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1930

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CASES REPORTED IN THIS VOLUME

	PAGE
Alcantara (Owners) *v.* Tovarisch (Owners) [H.L.]	559
Askew, *Re*, Marjoribanks *v.* Askew [Ch.D.]	174
Attorney-General *v.* Manchester Corporation [Ch.D.]	653
Attorney-General *v.* Price's Tailors (1928), Ltd. [C.A.]	660
Attorney-General *v.* Sharp [C.A.]	741
Barratt *v.* Richardson and Cresswell [K.B.D.]	748
Birmingham Corporation *v.* Inland Revenue Commissioners [H.L.]	699
Blay *v.* Pollard and Morris [C.A.]	609
Blücher, Prince, *Re*, *Ex parte* Debtor [C.A.]	562
Bolton, *Re*, *Ex parte* North British Artificial Silk, Ltd. [Ch.D.]	628
Bomze *v.* Bomze [Ch.D.]	479
Bower, *Re*, Bower *v.* Mercer [Ch.D.]	348
Bowie (or Ramsay) *v.* Liverpool Royal Infirmary [H.L.]	127
Brotex Cellulose Fibres, Ltd. *v.* Inland Revenue Commissioners [K.B.D.]	595
Buller & Co., Ltd. *v.* T. J. Brooks, Ltd. [K.B.D.]	534
Bundy *v.* Motor Cab Owner Drivers' Association [K.B.D. Divl. Ct.]	351
Bush, *Re*, B. Lipton *v.* Mackintosh [Ch.D.]	605
Buxton, *Re*, Buxton *v.* Buxton [Ch.D.]	396
Cardiff Revenue Officer *v.* Cardiff Assessment Committee and Western Mail, Ltd. [K.B.D. Divl. Ct.]	30
Cardiff Revenue Officer *v.* Cardiff Assessment Committee and David Duncan & Sons, Ltd. [K.B.D. Divl. Ct.]	30
Carpenter *v.* Haymarket Hotel, Ltd. [K.B.D. Divl. Ct.]	525
Carroll, *Re* [C.A.]	189
Carroll (No. 2), *Re* [C.A.]	192
Cayley and Evans' Contract, *Re* [Ch.D.]	645
Chatsworth Estates Co. *v.* Fewell [Ch.D.]	142
Chowood, Ltd. *v.* Lyall [C.A.]	402
City Equitable Fire Insurance Co., Ltd. (2), *Re* [C.A.]	315
Clayton *v.* Clayton [Ch.D.]	735
Clayton, Herbert, and Jack Waller, Ltd. *v.* Oliver [H.L.]	414
Coliseum (Barrow), Ltd., *Re* [Ch.D.]	221
Collier, *Re* [Ch.D.]	447
Colville Estate, Ltd. *v.* Inland Revenue Commissioners [K.B.D.]	770
Cotton *v.* Heyl [Ch.D.]	375
Dale, *Re*, Mayer *v.* Wood [Ch.D.]	10
Daniels *v.* Pinks [K.B.D. Divl. Ct.]	639
Debtor A, *Re* (No. 247 of 1930). *Ex parte* Debtor *v.* Petitioning Creditor [C.A.]	444
Drabble Bros., *Re* [C.A.]	450
Elder *v.* Northcott [Ch.D.]	398
Ellerman Lines, Ltd. *v.* Murray [H.L.]	503
Ellis *v.* Noakes [C.A.]	382
Excelsior Wire Rope Co., Ltd. *v.* Callan [H.L.]	1
Executors of Dowager Lady Michelham *v.* Inland Revenue Commissioners [C.A.]	681
Fairclough, T. M. & Sons, Ltd. *v.* Berliner and another [Ch.D.]	170
Fenton (No. 1), *Re*, *Ex parte* Fenton Textile Association, Ltd. [C.A.]	15
Fenton (No. 2), *Re*, *Ex parte* Fenton Textile Association, Ltd. [Ch.D.]	27
Fisher *v.* Oldham Corporation [K.B.D.]	96
Flexman *v.* Corbett [Ch.D.]	420
Fowler *v.* Commercial Timber Co., Ltd. [C.A.]	224
Frankenburg *v.* Famous Lasky Film Service, Ltd. [C.A.]	364
Fry *v.* Burma Corporation [H.L.]	800
Fry *v.* Salisbury House Estate, Ltd. [H.L.]	538
Garrett, *Re*, Official Receiver and Trustee *v.* The Bankrupt [Ch.D.]	139
Gimson *v.* Inland Revenue Comrs. [K.B.D.]	766
Grant and Others *v.* Edmondson and Others [C.A.]	48
Guy-Pell *v.* Foster [C.A.]	790
Hagger, *Re*, Freeman *v.* Arscott [Ch.D.]	620
Halliwell *v.* Venables [C.A.]	284
Harris, *Re* [Ch.D.]	472
Haskins *v.* Lewis [C.A.]	227
Hastings, Lord *v.* Walsingham (Revenue Officer) [K.B.D. Divl. Ct.]	517
Hill, R. A. *v.* Permanent Trustee Co. of New South Wales [P.C.]	87
Hole *v.* Garnsey [H.L.]	568
Holmes *v.* Payne [K.B.D.]	322
Hood, *Re*, Public Trustee *v.* Hood [C.A.]	215
Humphreys *v.* Dreamland (Margate), Ltd. [H.L.]	327
Inland Revenue Commissioners *v.* Dalgety & Co., Ltd. [H.L.]	779
Inland Revenue Commissioners *v.* Miller [H.L.]	713
Jacques Settled Estates, *Re* [Ch.D.]	407
Jones, *Re*, Jones *v.* Cusack-Smith [Ch.D.]	515
Jones *v.* Leeming [H.L.]	584
Jonesco *v.* Beard [H.L.]	483
Kitano Maru (Owners) *v.* Otranto (Owners), The Otranto [H.L.]	665
Laidlaw, *Re*, Wilkinson *v.* Lyde [Ch.D.]	252
Lawrence *v.* Cassel [C.A.]	733
Legh *v.* Legh [K.B.D.]	565
Leitch, William & Co., Ltd. *v.* Leydon [H.L.]	754
Littlewood, *Re*, Clark *v.* Littlewood [Ch.D.]	151
Lock *v.* Bell [Ch.D.]	635
London Playing Fields Society *v.* South-West Essex Assessment Committee [K.B.D. Divl. Ct.]	104
Long Acre Press, Ltd. *v.* Odhams Press, Ltd. and Another [Ch.D.]	237
Lopes, *Re*, Bence Jones *v.* Zoological Society of London [Ch.D]	45
Louch, *Re* [Ch.D]	711
Luipaard's Vlei Estate and Gold Mining Co., Ltd. *v.* Inland Revenue Commissioners [C.A.]	688
Martin (otherwise Crawley) *v.* Martin [Div.]	603
Melvill *v.* Melvill and Woodward [C.A.]	79
Michelham's Trustees *v.* Inland Revenue Commissioners [C.A.]	681
Mills, *Re*, Mills *v.* Lawrence [C.A.]	355
Minter *v.* Priest [H.L.]	431
Moon (Lambeth Revenue Officer) *v.* London County Council [H.L.]	63
Mourton *v.* Poulter [K.B.D. Divl. Ct.]	6
Munro, Robert A. & Co., Ltd. *v.* Meyer [K.B.D.]	241
Nachimson *v.* Nachimson [C.A.]	114
Newman, *Re*, Slater *v.* Newman [Ch.D.]	617
Nixon *v.* Attorney-General [H.L.]	487
Oakley *v.* Lyster [C.A.]	234
Osborn *v.* Thomas Boulter & Son [C.A.]	154

PAGE
Peech *v.* Best [C.A.] 268
Phillips, *Re*, Lawrence *v.* Huxtable [Ch.D.] 165
Pilkington *v.* United Railways of the Havana and Regla Warehouses, Ltd. [Ch.D.] 649
Potteries Electric Traction Co., Ltd. *v.* Bailey (Stoke-on-Trent Revenue Officer) [H.L.] 63
Price *v.* Gould [K.B.D.] 389
R. *v.* Divine. *Ex parte* Walton [K.B.D. Divl. Ct.] 302
R. *v.* Lapworth [C.C.A.] 340
R. *v.* Southern [C.C.A.] 160
Ralston *v.* Ralston [K.B.D.] 336
Ramsay (or Bowie) *v.* Liverpool Royal Infirmary [H.L.] 127
Restall *v.* Restall [C.A.] 372
Robinson, *Re*, Lamb *v.* Robinson [Ch.D.] .. 658
Sagar *v.* H. Ridehalgh & Son, Ltd. [C.A.] 288
Shawdon Estates Settlement, *Re* [C.A.] .. 474
Shearn *v.* Shearn [Div.] 310
Shell Co. of Australia, Ltd. *v.* Federal Commissioner of Taxation [P.C.] .. 671
Simms, *Re*, *Ex parte* Trustee [Ch.D.] .. 528
Simons *v.* Associated Furnishers, Ltd. [Ch.D.] 427
Sittingbourne Urban District Council *v.* Lipton, Ltd. [K.B.D. Divl. Ct.] 491
Siviour *v.* Napolitano [K.B.D. Divl. Ct.] 626
Slingsby *v.* Westminster Bank, Ltd. [K.B.D.] 184

PAGE
South London Greyhound Racecourses, Ltd. *v.* Wake [Ch.D.] 496
Spivack *v.* Spivack [Div.] 133
Spyer *v.* Phillipson [C.A.] 457
Stratton, *Re*, Knapman *v.* Attorney-General [C.A.] 255
Sturley *v.* Powell [K.B.D. Divl. Ct.] .. 631
Swadling *v.* Cooper [H.L.] 257
Taylor *v.* Lock [C.A.] 279
Taylor *v.* Twinberrow [K.B.D. Divl. Ct.] 342
Terroni and Another *v.* Corsini [Ch.D.] .. 370
Tong, *Re*, Hilton *v.* Bradbury [C.A.] .. 262
United Fruit Co., Ltd. *v.* Frederick Leyland & Co., Ltd. [C.A.] 331
Vander Byl, *Re*, Fladgate *v.* Gore [Ch.D.] 696
Walker, *Re*, Walker *v.* Walker [C.A.] .. 392
Walton Harvey, Ltd. *v.* Walker and Homfrays, Ltd. [C.A.] 465
Westminster Revenue Officer *v.* Daily Mirror Newspapers, Ltd. [K.B.D. Divl. Ct.] 30
White Star Line of Royal and United States Mail Steamers Oceanic Steam Navigation Co., Ltd. *v.* Comerford [H.L.] 503
Williams, *Re*, Richards *v.* Williams [Ch.D.] 642
Windermere District Gas and Water Co. *v.* Whitehead [Ch.D.] 725
Winter *v.* Woolfe [K.B.D. Divl. Ct.] .. 623
Wright, H. S., and Webb *v.* Annandale [C.A.] 409

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EXCELSIOR WIRE ROPE CO., LTD. *v.* CALLAN

[HOUSE OF LORDS (Lord Buckmaster, Lord Dunedin, Lord Warrington, Lord Atkin and Lord Thankerton), February 6, 1930]

[Reported [1930] A.C. 404; 99 L.J.K.B. 380; 142 L.T. 531; 94 J.P. 174; 35 Com. Cas. 300; 28 L.G.R. 543]

Child—Negligence—Dangerous machine—Presence of children near machine known to owners—Machine set in motion without warning.

To the knowledge of the appellants children constantly played round a post and pulley whereby the appellants, by means of an endless wire rope attached to the pulley, as and when required moved railway trucks along a siding. The servants of the appellants set the rope in motion without, at that moment, seeing whether there were any children in such a position near the post as to be exposed to danger. In fact the infant plaintiff, a child of five years old, was then swinging on the rope close to the post, and she was injured.

Held: in the circumstances the appellants owed a duty to the children to take reasonable precautions to see that they were not injured by the occasional use to which the appellants put a dangerous machine, and, therefore, they were liable to the plaintiff for negligence.

Notes. As to the distinctions between the duties owed by an occupier to invitees, licensees, and trespassers referred to in the opinions (infra), see now the Occupiers' Liability Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 832), which substitutes the rules laid down in the Act for those of the common law.

Followed: *Mourton* v. *Poulter*, post, p. 6. Considered: *Sycamore* v. *Ley*, [1932] All E.R.Rep. 97. Referred to: *Liddle* v. *North Riding of Yorkshire County Council*, [1934] All E.R.Rep. 222; *Culkin* v. *McFie & Sons, Ltd.*, [1939] 3 All E.R. 613; *Glasgow Corpn.* v. *Muir*, [1943] 2 All E.R. 44; *Walder* v. *Hammersmith Borough Council*, [1944] 1 All E.R. 490; *Adams* v. *Naylor*, [1944] K.B. 750; *Buckland* v. *Guildford Gas, Light and Coke Co.*, [1948] 2 All E.R. 1086.

As to the increased degree of care required in relation to children, see 23 HALSBURY'S LAWS (2nd Edn.) 584–586; and for cases see 36 DIGEST (Repl.) 114 et seq.

Case referred to:

(1) *R. Addie & Sons (Collieries), Ltd.* v. *Dumbreck*, [1929] A.C. 358; 98 L.J.P.C. 119; 140 L.T. 650; 45 T.L.R. 267; 34 Com. Cas. 214; 1929 S.C.(H.L.) 51, H.L.; 36 Digest (Repl.) 120, *604*.

Appeal from an order of the Court of Appeal (Scrutton, Lawrence and Sankey, L.JJ.), affirming a judgment of Shearman, J.

Under a conveyance dated Oct. 15, 1925, by the Marquess of Bute, the appellants were the owners of land upon which they constructed the Excelsior Wire Rope Works, situate near Mynachdy, in the city of Cardiff. The Taff Vale section of the Great Western Railway passed near the appellants' works, to the west of which the Marquess of Bute had caused to be constructed on land belonging to him a railway siding connecting with the railway. To enable the appellants to run railway trucks from a siding in their own works on to the Great Western Railway they obtained leave from the Marquess of Bute to construct about 200 yards of railway siding on his land so as to link up their own siding with the siding belonging to him. For the purpose of hauling railway trucks from their own siding to the siding belonging to the Marquess of Bute the appellants erected at the end of the siding in their own works a winch worked by a dynamo and at the other end, with the permission of the Marquess of Bute, they erected a pulley block attached to a post, such erection being known as a sheave. Trucks were hauled along the two sidings by an endless wire rope, so that it was possible to haul a truck in either direction. The further part of the siding adjoined some fields which had been let by the marquess to the Cardiff Corporation on a monthly tenancy and were used as a playing ground. The boundary fence separating those fields from the siding had practically disappeared, with the result that children were enabled to pass across and use the sheave as a centre of their games. It was the practice of the appellants' servants before moving a truck to walk down to the sheave to adjust the rope in case it had been interfered with, and of driving away any children who might be there. On Aug. 5, 1927, two of the appellants' servants, preparatory to moving a truck, proceeded from the appellants' works along the siding to the sheave, and told some children whom they found there to go away. After the appellants had retraced their footsteps and their backs were turned the respondent, Eileen Callan, a child of five, came from somewhere unknown and started to swing on the wire rope close to the sheave. The movement of the rope caused her hands to be caught in the pulley block and they were badly crushed and injured. The respondent, Leslie Daniel Callan, Eileen's brother, aged seven, went to her assistance, and his left hand was also drawn into the sheave and mutilated. Actions were accordingly instituted by the respondent, John Patrick Callan, as father and next friend of the infant respondents, claiming damages against the appellants for personal injuries sustained by the infant respondents owing to the alleged negligence of the appellants. The appellants used their siding and rope only about two or three times a week. Evidence was given that the respondent, Eileen Callan, was on the day in question seen swinging on the wire rope near the sheave, that the wire rope was set in motion without any warning being given to her and that no servant of the appellants had been near the sheave for at least twenty minutes before the wire rope was set in motion. The Court of Appeal held, affirming the decision of Shearman, J., though on other grounds, that, on the assumption that the children were trespassers, the injuries to them were caused by an act done by the appellants' servants, with reckless disregard of the presence of children whom they had every reason to think might be injured. The company appealed.

R. P. Croom-Johnson, K.C., and *H. J. Astell Burt* for the appellants.

A. T. James, K.C., and *Vyrnwy Lewis*, for the respondents, were not called upon.

LORD BUCKMASTER.—The appellants in this case are a firm of wire rope manufacturers, who have their works near Cardiff. The actual site of their factory is a triangular piece of ground, which is bounded on the south by the Glamorganshire Canal, on the west by certain playing fields, to which I will refer more particularly in a moment, and on the east by other business premises. The lease of the works was granted to the appellants in 1902. On one side of the land so granted to them there was a line of rails which ran up to and effected a junction with the Great Western Railway. In 1904 the appellants obtained permission to put what was called a block upon a piece of land belonging to the Marquess of Bute, which was intended to be used in connection with a line that they had built, or were preparing to build, to enable trucks to be taken from their works and pass over the junction between that line, which was then in contemplation, and the line already there, and by this means to enable access to be obtained for their goods to and from the Great Western Railway. The block was necessarily some few yards, perhaps about 25 yards or so, beyond the actual point of junction of the two lines—the exact distance does not matter. The appellants obtained no estate or interest in the land on which the block was built; they merely obtained a licence to place it there, and there were no measured dimensions of the spot of land they were to occupy, but in accordance with their licence they placed, first of all a stone slab, and on that a post about 3 ft. high. To this post there was attached a large pulley round which ran a wire rope running down to their works, and whenever they wanted to move a truck they fastened the wire rope on at each end of the truck, put the wire rope in action by some motive power they had at their works, and by this means ran the truck backwards and forwards in the way I have described. This machinery was not in constant use; it is said that it was used about three times a week, and the period of its operation would be about three minutes.

It appears that in 1924 the Cardiff Corporation obtained from the Marquess of Bute the tenancy of a very large block of land lying to the immediate west of the factory, called the Lock Fields. There was originally a fence of some kind that ran between the actual boundary of this land and the place where the block and the post had been put up, but that fence has completely disappeared, all that is now left of it being the stone slab which formed the footstep for the stile by which the fence was crossed. As matters are now, the post standing on the block, the sheave or pulley, and the wire rope round it, stand actually adjoining these Lock Fields, separated only by a road or pathway which is not in the possession of the Cardiff Corporation, and is in no way fenced or protected so as to prevent its common use in connection with the fields. The Cardiff Corporation acquired these fields for the express purpose of turning them into playing fields, and they are so used. The evidence is that they are so used among others by children, who, the policeman says, swarm there. There can be no doubt, either, that just round the spot where the block and the pulley stand is a very attractive place for children, because close to it are a number of bushes which do not appear to be found elsewhere on the land, and just behind these bushes runs a little stream, which has been providentially provided with a sufficient number of small fish to enable the children to spend their time in the hope of catching some. The evidence is quite clear, and, to my mind, is in accordance with the probabilities of the case, that the children actually use the post to which this pulley is attached for the purpose of their games. They play a sort of hide-and-seek in and out of the bushes, and a game which is something like prisoner's base, in which the stone slab on which the post stands is called "Home." These facts were obvious to the employees of the Excelsior Wire Rope Works, and it appears to me to be an undoubted inference from the facts that they knew the children swarmed round there, and that they certainly knew they played with the wire. I have not any doubt myself that the only reasonable inference one can draw is that the appellants, through their workmen, understood that the children did what children necessarily would do, that is, use that post and the adjoining bushes for the purpose of their games. There is some evidence to show that the children were mischievous, and have broken lamps by the side of the path; but that appears to me to be totally irrelevant. It really is a ridiculous thing to imagine that you can expect the same gravity and decorum from children as that which is sometimes associated with advanced years, and for the purpose of this case it is important to remember that the duty which we are about to examine is a duty to these children.

What happened was this. On Aug. 5, 1927, the Excelsior Wire Rope Works were going to use this line for one of their trucks. There is evidence that just before it was in fact so used a little child was seen swinging on the wire. What actually happened is a matter about which there is no direct testimony at all. There were two men whose business it was to superintend the operations, one named Williams and the other named Osborne, and they both came up to the sheave for the purpose no doubt of seeing that the wire was properly put round the pulley, and also for the purpose of driving the children away. They knew the children would be there, and because of that knowledge, before putting the wire in motion, they used to go and send them away. The question put and the answer given by the witness Osborne is quite clear upon the point: "(Q.) In order to see whether there are children about there, is it necessary for you to go down to the sheave? (A.) We cannot start the thing without going down there." He accepts the position that the children swarmed about the place, and he is asked again: "(Q.) Do you say before you start moving the trucks you always go down so far as the sheave and warn any children that there may be there? (A.) Yes. (Q.) You do that because you know children are in the habit of playing round the sheave, I suppose? (A.) No, not on purpose for that, because we would always go there before starting to move a truck." There is no doubt that these people do what is obviously their duty to do in the circumstances—that is, go and adjust the wire, and when doing that see if there are any children before they start the work. They did that on this occasion, but they went back and started the machinery without being clear that the wire was free from children, and one little child who was either sitting on it or playing with it—what she was actually doing no one knows—got her hands entangled in the machinery, and her little brother, who came to help her, got his hand injured, too. It is in respect of those injuries that these proceedings have arisen, and it is argued that in the circumstances there was no duty whatever on the part of the Excelsior Wire Rope Co. to these children, and, consequently, the action must fail.

If I have adequately explained the facts as they present themselves to my mind, they answer the whole proposition. To the knowledge of the Excelsior Wire Rope Co. these children played uninterruptedly round this post. There was nothing to prevent them doing it, and I cannot find that there is any evidence to show that, except at the moment when this machine was going to be set in action, they were ever driven away. It was, therefore, well known to the appellants that when this machine was going to start it was extremely likely that children, with the wire in motion, would be exposed to grave danger. I do not think it necessary in the least to define that it is because the children were licensees in relation to the machine or trespassers in relation to the machine that the obligation cast upon the appellants here exists. Having a machine which to their knowledge is constantly being played with by children who are not prevented from playing with it, or warned away except just before it is started, the duty owed by such people, when they set the machinery in motion, is to see that no child is there, and no injury results. For these reasons I think this appeal should be dismissed.

LORD DUNEDIN.—I agree, and I should be content to express my agreement with the judgment, either as put by the learned judge of first instance or by the lords justices of the Court of Appeal, and I take it that what my Lord on the Woolsack has said does not throw any doubt on what I thought it necessary to lay great stress upon in *Addie's Case* (1), namely, the necessity, in order to find the criterion of duty, to fix within which of the three classes of invitees, licensees, or trespassers a person falls; but really the negligence here was such that, inasmuch as the greater always includes the less, it does not matter in which class you find them in this case. I would only say one other word about that, which is that, with deference to LAWRENCE, L.J., who says the children were not there as licensees of the appellants, the word "licensee" in the cases that have to do with this subject, though, probably, not a perfectly accurate word, is certainly intended to include another class, if you so call it, which I may coin a word to represent, namely, a permittee, and though the ground on which the post stood did not belong to the

A appellants, yet the post was in their charge, and it was they who permitted the children to use the post as they did.

LORD WARRINGTON.—I entirely agree, and I only desire to add a very few words. The question whether the children were invitees, licensees or trespassers for the purpose of a case in which the defendant has a dangerous machine on his B own land is not a question which need engage our attention in this case. There is ample evidence that, to the knowledge of the servants of the appellants, children were in the habit, not only of playing around this sheave and using it for purposes connected with their games, but were actually in the habit of playing with the machine, and the ropes and so forth attached to it, so that it was found necessary, when they were about to use the machine, to see that it had not been put out of C gear by the children. In those circumstances, it seems to me quite plain that there was a duty upon the present appellants, by their servants, when they were about to put this machine in motion, so that it would become a danger to any children who might be in the neighbourhood, to see whether or not at that moment there were children in such a position as to be exposed to danger. That duty was plainly neglected, and in the circumstances I think the appellants have rightly been held D liable.

LORD ATKIN.—I agree with the reasons which have been put before your Lordships by the noble Lord on the Woolsack. In cases of a similar kind questions have arisen in respect to the duty owed by owners of property or occupiers of property in relation to dangers which exist upon that property, whether they are E dangers inherent to the nature of the soil, or whether they are the result of an interference with it by the owner or occupier, either by placing machinery upon it or otherwise. There has arisen in respect to the duties of owners and occupiers of land an elaborate series of decisions which have involved the consideration of the precise difference between invitees of the occupiers, licensees of the occupiers, or trespassers upon the land. In my view, in this case none of those questions is F relevant, and that particular branch of the law which deals with the obligations of occupiers of land towards those persons who come upon the land is not in issue at all. The appellants were not occupiers of the land in question. They had had a right from the Marquess of Bute, who in fact owned the land, and as far as I can see on the evidence was the occupier of the land, to place a line of rails upon it, and there was specially reserved, if reservation is the right phrase, but, at any rate, G it was expressly made clear in the lease that the Marquess of Bute retained the right to make what use he pleased of the land upon which the siding was placed, subject to there being no unreasonable interference with the use of the siding. A similar position existed in reference to the erection of this particular hauling machinery that was placed upon this siding.

In those circumstances, my Lords, the only question that appears to me to arise H is: What was the obligation on the owners of this hauling machinery to persons who might be endangered by its use? When once the facts which have been stated by my noble and learned friend on the Woolsack have been ascertained, the question of the duty is indisputable. There was a swarm of children frequenting the spot where this machine was used, and frequenting it to the knowledge of the owners of the machine, and it appears to me that they owed a duty to these children to take I reasonable precautions to see that the children were not injured by the occasional use to which the owners put that dangerous machine. It follows from that that the judgment appealed from was right. I myself would feel a difficulty in putting the case precisely upon the ground on which it was put by the learned trial judge, because I think he has been rather led to consider the case from the point of view of the liability of the occupiers of the land, which these defendants were not. On the facts as they now emerge it appears to me quite plain that the appellants committed a breach of their duty to these children, and that the judgment against them was right.

LORD THANKERTON.—I agree. The normal class of case which has arisen and which is illustrated by the recent case in your Lordship's House, of *R. Addie & Sons (Collieries) Ltd.* v. *Dumbreck* (1), is where the main question at issue concerns the capacity in which the person injured got access to the property in question, and thereby to the dangerous machine, or whatever did the injury. In the present case it seems to me that there can be no issue as regards that point. As has been pointed out by your Lordships already, the appellants here were mere licensees, and in fact, as has also been pointed out, the children not only had constant and free access to the machine itself, but clearly to the knowledge of the appellants they were in the habit of interfering and playing with both the post and the wire rope, and it was only when the occasion of putting the machine into operation arose that there was any question of keeping the children away from that spot. That last fact itself appears to me to recognise a necessity and a duty to see that the children were away from this dangerous machine. As regards the necessary conclusions from that, I agree entirely with what your Lordships have said.

Appeal dismissed.

Solicitors: *Wedlake, Letts & Birds*; *Bell, Brodrick & Gray*, for *A. Frank Hill & Co.*, Cardiff.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

MOURTON *v.* POULTER

[KING'S BENCH DIVISION (Scrutton and Lawrence, L.JJ., sitting as additional judges), February 26, 27, 1930]

[Reported [1930] 2 K.B. 183; 99 L.J.K.B. 289; 143 L.T. 20; 35 Com. Cas. 308; 94 J.P. 190; 46 T.L.R. 256; 74 Sol. Jo. 170]

Negligence—Dangerous work—Need to give warning—Felling of tree.

A person who undertakes a dangerous work which alters the condition of the land on which it is done owes a duty to give warning before commencing the work to a person who is on the land, even though that person be a trespasser, if he is visible to the person undertaking the work from the place where the work is commenced.

Excelsior Wire Rope Co., Ltd. v. *Callan* (1), ante, p. 1, applied.

R. Addie & Sons (Collieries), Ltd. v. *Dumbreck* (2), [1929] A.C. 358, distinguished.

Notes. See note to *Excelsior Wire Rope Co., Ltd.* v. *Callan* (1) (ante, p. 1).

Distinguished: *Hillen* v. *I.C.I. (Alkali), Ltd.*, [1934] 1 K.B. 455. Considered: *Buckland* v. *Guildford Gas, Light and Coke Co.*, [1948] 2 All E.R. 1086. Referred to: *Liddle* v. *North Riding of Yorkshire County Council*, [1934] All E.R.Rep. 222; *Adams* v. *Naylor*, [1944] 2 All E.R. 21; *Longhurst* v. *Metropolitan Water Board*, [1948] 2 All E.R. 834; *Davis* v. *St. Mary's Demolition and Excavation Co., Ltd.*, [1954] 1 All E.R. 578.

As to the duty of an occupier of premises to visitors, see Occupiers' Liability Act, 1957 (37 HALSBURY'S STATUTES (2nd Edn.) 832. For cases see 36 DIGEST (Repl.) 45 et seq.

Cases referred to:

(1) *Excelsior Wire Rope Co., Ltd.* v. *Callan* (1928), unreported, C.A.; affirmed, ante, p. 1; [1930] A.C. 404; 99 L.J.K.B. 380; 142 L.T. 531; 94 J.P. 174; 35 Com. Cas. 300; 28 L.G.R. 543, H.L.; 36 Digest (Repl.) 118, *592*.

(2) *R. Addie & Sons* (*Collieries*), *Ltd.* v. *Dumbreck*, 1928 S.C. 547; reversed, [1929] A.C. 358; 98 L.J.P.C. 119; 140 L.T. 650; 45 T.L.R. 267; 34 Com. Cas. 214, H.L.; 36 Digest (Repl.) 120, *604*.

(3) *Barnes* v. *Ward* (1850), 9 C.B. 392; 19 L.J.C.P. 195; 14 Jur. 334; 137 E.R. 945; 36 Digest (Repl.) 209, *1100*.

(4) *Latham* v. *R. Johnson and Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 29 T.L.R. 124; 57 Sol. Jo. 127, C.A.; 36 Digest (Repl.) 49, *262*.

Appeal from Brentford County Court.

The plaintiffs, Herbert Mourton, an infant, suing by his father, Walter Mourton, as next friend, and his father, claimed damages for personal injuries and loss and expense occasioned by the negligence of the defendant. The defendant had been employed as an independent contractor by the owner of an unfenced piece of land at Acton, which was being developed for building purposes, to fell a large elm tree, and the infant plaintiff, who was playing with other children near the tree, was injured by its fall. The county court judge found that the infant plaintiff was a trespasser, but that the defendant was negligent in not warning the children, whom he had seen in the vicinity just before he cut away the last root, that the tree was about to fall, and that the injury suffered by the infant plaintiff was due to that negligent omission. He held, however, that, inasmuch as the infant plaintiff was a trespasser, he was bound by the decision in *R. Addie & Sons* (*Collieries*), *Ltd.* v. *Dumbreck* (2) to enter judgment for the defendant. The plaintiffs appealed.

F. G. Paterson (*C. T. Williams* with him), for the plaintiffs, referred to *Barnes* v. *Ward* (3) and *Latham* v. *R. Johnson and Nephew, Ltd.* (4).

J. Macmillan for the defendant.

SCRUTTON, L.J.—This is an appeal from a decision of a county court judge who has held that a person who felled a tree was not liable for injuries to a child who was hurt by the falling tree. The case is rendered a little troublesome by the difficulty that is to be found in ascertaining exactly on what grounds two decisions of the House of Lords, in somewhat similar cases, have been given in opposite directions.

A landowner had an estate which was being developed for building, and on part of the land which was about to be built on was a large elm tree, 50 or 60 ft. high. The landowner required an independent contractor of experience to fell that tree. The land itself was adjacent to a high road, and, therefore, it was almost inevitable that it was left in a derelict condition, and was not fenced off, as building operations were going to take place. Not unnaturally, the children of the neighbourhood used the place as a playground, the attractiveness of which was on that day increased by the excitement of a big tree being about to be felled, and I dare say there was a large attendance of children. The person engaged to fell the tree had made a vigorous assault upon the children about midday, and had temporarily driven them off. The nearer the time for the fall of the tree approached, the greater became the excitement, and although between three and four o'clock in the afternoon the feller of the tree made another attack upon the children and drove them away, they soon came back. Between four and five the situation was such that the feller knew that the tree, which was then being held up by one spread eagle, would soon fall—within two minutes or so—and one of the workmen or the contractor himself cut the last root at a time when he knew the tree would fall within two minutes, and without giving any further warning to the children standing in the vicinity. Everyone must know that one cannot be certain exactly how far the spreading branches of a high tree will reach when the tree falls, and people standing on the edge of safety cannot be sure, but the person who is engaged in felling the tree knows much more about it than children who are standing round. Three children were caught by the fall of the tree; two of them were not injured, but one boy was injured and crushed to a small extent.

The learned judge's note is a little puzzling. He says:

> "I hold that the defendant was negligent in not warning the children that the tree was then about to fall, and that the injury suffered by the plaintiff is due to that negligent omission."

Negligence involves a duty, and the judge must, therefore, have found that there was a duty owing by the defendant to the children to warn them that the tree was about to fall. He has found that the injury to the infant plaintiff was due to the failure of the defendant to fulfil the duty which he owed to the children. In spite of that fact, which one would think was enough to carry judgment for the plaintiff, he adds:

> "I give judgment for the defendant in law with costs. I hold that the plaintiff has not proved that the owner of the land had either invited him or licensed him to be on the land."

That means, presumably, that the plaintiff was a trespasser, but, in spite of that, the judge has found that there was a duty owed by the feller of the tree to trespassers—the duty to warn them that the tree was about to fall—and that neglect of that duty caused the injury. Counsel for the defendant has urged that the ground of the county court judge's judgment was that the only duty owed to a trespasser is not to do him malicious injury, and that what the judge found in this case was less than malicious injury—a failure to use due care or a negligent omission falling short of the intentional doing of damage. I do not find any trace of that in the judge's note. The judge, having found that there was clearly a breach of the duty owed to the children, appears, after having read *Addie's Case* (2), to have thought that there could not be such a duty if the child were a trespasser, and, consequently, by finding that the child was a trespasser, to have negatived his previous finding.

While the appeal in *Addie's Case* (2) was coming to the House of Lords from the Scottish court, the Court of Appeal had a case of its own to decide: *Excelsior Wire Rope Co., Ltd.* v. *Callan* (1). The facts in that case were, that a strip of land belonging to the Marquis of Bute was next to a recreation ground, let to the Cardiff Corporation. The boundary fence had been broken down by children at play. On the Marquis of Bute's land was an endless wire rope running by means of a wheel operated by the licensees of the marquis, who had no interest in the land itself and agreed to run the rope only two or three times a week, it being necessary for the haulage of their trucks that they should work it. Children played about round a sheave erected by the licensees on the marquis's land during the times when the rope was not running, and swung on the rope. The licensees who worked the rope knew that this was so, and before working the rope they sent people up to see that it was clear of the sheave and to chase the children away. When this was done one man walked about 20 yards from the sheave to give the signal, and the other man went down the hill to start the engine. The man who had gone about 20 yards from the sheave could see it, but apparently he did not look, and an unfortunate child aged five years got her fingers caught in it and her brother who came up to help her had his fingers crushed. SHEARMAN, J., who tried the case, held that the children were licensees. The Court of Appeal assumed that they were trespassers, but took the view that anybody who started the rope and sheave in a place where he knew children might be, and from a place from which, if he had looked, he could have seen the children, was guilty of negligence because he changed the condition of things on the land. Without the Court of Appeal knowing it, there was an appeal from the Scottish court to the House of Lords in *Addie's Case* (2), the only difference between that case and *Callan's Case* (1) being that the people who started the wire rope in *Addie's Case* (2), started it from a place from which they could not see the children, though they might have done so if they had walked up the hill. In *Addie's Case* (2) the House of Lords held that, as the children were trespassers, the person who started the rope owed no duty to them. The Court of Appeal had, about a month before, decided *Callan's Case* (1) the other way, and, encouraged by the decision of the House of Lords in *Addie's Case* (2), the unsuccessful appellant in *Callan's Case* (1) came to the Court of Appeal and got a stay of execution. The case went to the House of Lords, but the appellant did not get the advantage he had hoped for, because the House of Lords approved our decision [see p. 1, ante]. I, myself, can see only this difference between the two cases—that in *Addie's Case* (2) the people who started the wire rope at the bottom of the hill could not see the children, though they could have done so if they had walked up a little way, while in *Callan's Case* (1) the man who started the sheave could have seen the child if he had looked round, without moving from his position. Whether that really is the difference the House of Lords may have to say in some subsequent case, but we must accept their decision in *Callan's Case* (1), which was that the decision of the Court of Appeal was right.

It is, apparently, not sufficient to prove that the person who started the dangerous appliance knew that children were likely to be about—a feature common to both cases. What are the facts of the present case? A man who was experienced in felling trees knew well the approximate time when the tree would fall and the approximate distance it would cover; in cutting away the last root he did an act which he knew would bring the tree down in two minutes. Though children were standing round and might well be in the area of danger he gave no warning, and it has been found by the county court judge that that negligence caused the injury to the plaintiff. May I compare it with a similar case? Suppose blasting is going on in a quarry when a number of trespassers are standing round, and suppose the man who fires the blast fires it without warning. It seems to me that he would be clearly guilty of breach of duty to them, because he has done an act which might injure them, and has done it without warning. In such a case, and in the present one, he is under a duty, when he is about to do a dangerous act, to warn even trespassers who are in the neighbourhood. The liability of an owner of land to trespassers does not extend to a case where there is on the land a continuing trap, as—to cite an American case—an innocent looking pond which really contains poisonous matter. There the land remains in a continuing state, and the trespasser must take it as he finds it, and the owner is not bound to warn him. That, however, is quite a different case from the case of a man who does something which makes a change in the condition of the land—starts a sheave, fells a tree, or fires a blast—when he knows that persons are standing near. In each of these cases a duty is owed even to trespassers—the duty to give warning. From that point of view it appears that the county court judge, probably and quite excusably led away by *Addie's Case* (2), came to a wrong conclusion. His finding that there had been a negligent omission of the duty owed to the child should have resulted in his giving judgment for the plaintiffs. The appeal must be allowed, and judgment must be entered for the plaintiffs for £25, with costs here and below.

LAWRENCE, L.J.—I agree. The county court judge has found as a fact that the defendant was negligent in not warning the children who, to his knowledge, were in a dangerous position at a time when, to his knowledge, the tree was about to fall. The judge has further found that the injuries caused to the infant plaintiff were caused by that act of negligence, but he has held, as a matter of law, that the defendant was not liable, because the child was a trespasser. In my opinion, that decision is wrong. I share the difficulty of my Lord in seeing how the judge could have found negligence without that finding involving a finding that there was a duty towards the child. Be that as it may, I think that this case is, on its facts, indistinguishable from *Callan's Case* (1), and that it is covered by the decision in that case. I, therefore, agree with my Lord that this appeal should be allowed.

Appeal allowed.

Solicitors: *Darracott, Seymour & Co.*; *Monson & Withers.*

[*Reported by* T. R. Fitzwalter Butler, Esq., *Barrister-at-Law.*]

Re DALE. MAYER *v.* WOOD

[Chancery Division (Luxmoore, J.), November 28, December 19, 1930]

[Reported [1931] 1 Ch. 357; 100 L.J.Ch. 237; 145 L.T. 632]

Will—Donees—Gift to be divided equally between the children of A and B—General rule—Gift in equal shares to B and children of A—Contrary decision in view of context and circumstances.

By his will the testator gave all his residue to trustees on trust to pay the income to his wife for life, and then on trusts to sell and to divide the corpus proceeds of sale between W.J.D., a son, absolutely and M.A.W., a daughter, to be settled on her for life, and then for her children. By a codicil he devised a freehold house to the trustees on trust for his wife for life and then to be let and pay the net rent to E.B. until marriage or death, and then to sell and "divide the proceeds equally between the children of W.J.D. and my daughter, M.A.W." He died in 1877, the wife in 1890, and E.B., a spinster, in 1929. W.J.D. married in 1861 and had a son, W.A.D., who died in 1907, and M.A.W. had six children. She died in 1905. On a summons taken out by the trustees asking who was entitled to the proceeds of sale of the house and in what shares,

Held: in the absence of any context or surrounding circumstances leading to a contrary conclusion a gift "to the children of A and B in equal shares" or "to be equally divided between the children of A and B" should be construed as a gift in equal shares to the individual B and the children of A, but these phrases may be ambiguous and the ambiguity is to be solved by the context and the circumstances; in the present case the testator, in his will, treated his son and his daughter on a footing of equality, the codicil did not affect the main provisions of the will, and it was difficult to understand why the testator should, while making an absolute gift to the children of his son, make a similar gift to his daughter, but individually and not to her children; and, therefore, there was sufficient in the context afforded by the will and by the surrounding circumstances to compel the conclusion that the testator meant all his grandchildren by his son and his daughter to take and did not intend to exclude his grandchildren by his daughter or to benefit her to the exclusion of her children.

Notes. Applied: *Re Birkett*, [1950] 1 All E.R. 316. Considered: *Re Cossentine, Philp* v. *Wesleyan Methodist Local Preachers' Mutual Aid Association*, [1932] All E.R.Rep. 785. Referred to: *Re Hall, Parker* v. *Knight*, [1948] Ch. 437; *Re Jeffrey, Welch* v. *Jeffrey*, [1948] 2 All E.R. 131.

As to the ascertainment of donees under will generally, see 34 Halsbury's Laws (2nd Edn.) 265 et seq.; and for cases see 44 Digest 758 et seq.

Cases referred to:

(1) *Re Walbran, Milner* v. *Walbran*, [1906] 1 Ch. 64; 93 L.T. 745; 54 W.R. 167; 44 Digest 845, *6984*.

(2) *Re Prosser, Prosser* v. *Griffith* (1929), 167 L.T.Jo. 307; 67 L.Jo. 346; [1929] W.N. 85; Digest Supp.

(3) *Re Harper, Plowman* v. *Harper*, [1914] 1 Ch. 70; 83 L.J.Ch. 157; 109 L.T. 925; 58 Sol. Jo. 120; 44 Digest 845, *6985*.

(4) *Lugar* v. *Harman* (1786), 1 Cox, Eq. Cas. 250; 29 E.R. 1151; 44 Digest 846, *6994*.

(5) *Peacock* v. *Stockford* (1853), 3 De G.M. & G. 73; 43 E.R. 30, L.C.; 44 Digest 598, *4239*.

(6) *Hawes* v. *Hawes* (1880), 14 Ch.D. 614; 43 L.T. 280; Digest Supp.

(7) *Mason* v. *Baker* (1856), 2 K. & J. 567; 69 E.R. 908; 44 Digest 845, *6986*.

(8) *Re Featherstone's Trusts* (1882), 22 Ch.D. 111; 52 L.J.Ch. 75; 47 L.T. 538; 31 W.R. 89; 44 Digest 845, *6989*.

Adjourned Summons.

By his will, dated Aug. 1, 1867, the testator devised and bequeathed the residue of his estate to trustees to pay the income to his wife for life and then on trusts for sale and to divide the proceeds into two equal portions, one to be paid to his son, Walter James Dale, and the other half to hold in trust for his daughter, Matilda Ann Wood, for life and then for her children as she should appoint. By a codicil, dated Aug. 3, 1875, the testator gave his house at Teddington to the trustees to permit his wife to live there for life, and then to let the same and pay the net rent to Emily Bridger until marriage or death, and then to sell the same and "divide the proceeds thereof equally between the children of my son, Walter James Dale, and my daughter, Matilda Ann Wood." The testator died on May 7, 1877. His widow died on Oct. 11, 1890. Walter James Dale married and had one son, Walter Arthur Dale, who died Oct. 21, 1907, leaving a will of which Robert William Low and another were executors. Probate was granted to Low alone; he died intestate on Jan. 26, 1909, and letters of administration de bonis non were granted to the defendant, J. B. H. Low, with the will of W. A. Dale annexed. Matilda Ann Wood married once and had six children—Walter James and the defendants, Alice Matilda, Edward, Harold, Kate Harloch, and Sydney Wood. Matilda Ann died on Jan. 29, 1905, having by her will appointed the defendant, George Lionel Wood—husband of Alice—and Walter James Wood executors. Walter James died on Feb. 13, 1930, having by his will appointed the defendant, R. W. Wood, executor. Emily Bridger died on Oct. 19, 1929, and the house of which she received the rent was sold. This summons was then taken out by the trustees of the testator's will asking whether on the true construction of the codicil and in the events which had happened (a) the funds and property, the net proceeds of sale of the house, were with the income thereof since the death of Emily Bridger divisible into seven shares, one for each of the defendants, Alice, Edward, Harold, Kate Harloch, and Sydney Wood, one to the defendant Ronald Walter Wood, as representative of Walter James Wood, and one to J. B. H. Low, as representative of Walter Arthur Dale, or (b) who was entitled and in what shares and proportions thereto.

G. G. Solomon for the plaintiffs.

Galbraith, K.C., and *Parson* for the defendants, George L. Wood and J. B. H. Low.—A gift in equal shares to the children of A and B is a gift to B and the children of A. Neither the words "of" or "to" was to be found in the gift before the name of B. [They referred to *Re Walbran, Milner* v. *Walbran* (1), *Re Prosser, Prosser* v. *Griffith* (2), *Re Harper, Plowman* v. *Harper* (3), *Lugar* v. *Harman* (4), *Peacock* v. *Stockford* (5), *Hawes* v. *Hawes* (6), *Mason* v. *Baker* (7), *Re Featherstone's Trusts* (8), Theobald on Wills (8th Edn.), p. 329, and Jarman (7th Edn.), cap. xlii, pp. 1687, 1693.]

Morton, K.C., and *Beebee* for the other defendants.—The whole will and the circumstances must be looked at. All the grandchildren were intended to take.

Cur. adv. vult.

Dec. 19. **LUXMOORE, J.**, read a judgment in which he stated the facts and continued: At the date of the codicil the testator's son, Walter James Dale, was married and had one child; the testator's daughter, Matilda Ann Wood, was also married, her husband was living, and they had six children. There are three possible constructions. First, that the gift is, in the events that have happened, to the one child of Walter James Dale and to Matilda Ann Wood in equal shares. The second construction is that the gift is, in the events that have happened, divisible into seven shares, one to each of the six children of Matilda Ann Wood or their legal personal representatives, and the remaining seventh to the legal personal representative of the child of Walter James Dale; while the third construction is that one half-share goes to the legal personal representative of the child of Walter James Dale and the other half-share goes equally between the six children of Matilda Ann Wood or their legal personal representatives.

I reserved judgment to examine the decided cases carefully, because it was said by counsel on behalf of the last two defendants—George Lionel Wood and J. B. H. Low, who are, respectively, the surviving legal personal representatives of the testator's daughter, Matilda Ann Wood and testator's son, Walter James Dale—that those decided cases laid down a principle of construction which required the court to hold that a direction to divide a fund equally between the children of A and B means a division per capita between the individual B and the respective persons who answer the description "the children of A." Counsel admits that in the case of a gift to the children of A and B there is in any event ambiguity because on a strict grammatical construction of the phrase it is necessary to supply some word. He says, strictly you must supply before the name B either the preposition "of" or the preposition "to," and that that case differs entirely from the present where there is no gift apart from the direction to divide. In such a case he says there is no need to supply any word because the phrase, if read literally, is strictly and grammatically complete. A B C

I was referred to a number of cases beginning with *Lugar* v. *Harman* (4). In that case the gift in question was of a residue to be divided equally among

> "all and every the child and children of my late cousin, Edward Lugar, and my cousin, Philip Fearis, and their lawful representatives." D

The Master of the Rolls decided that the residue belonged to the plaintiffs, the four children of Edward Lugar, and to Philip Fearis himself in equal shares. He said that the construction could not be to give the residue to the children of Edward Lugar and to the children of Philip Fearis

> "for in that case you must at least understand the word 'of' (namely, the children of my late cousin, Edward Lugar, and of my cousin, Philip Fearis), whereas the words as they stand have a plain grammatical sense, namely, to the children of Edward Lugar and to Philip Fearis himself." E

It is to be observed that Edward Lugar and Philip Fearis each bore the same relationship to the testator, and that Edward Lugar was dead, while Philip Fearis was alive. MR. VAUGHAN HAWKINS, in his book on WILLS—I quote from the original edition (1863, pp. 113, 114)—says this: F

> "According to *Lugar* v. *Harman* (4) and a dictum in *Peacock* v. *Stockford* (5), a gift to or in trust for the 'children of A and B' must be read as a gift to B and not to his children on account of the non-repetition of the word 'of' before the word B. But although it may be more idiomatic to speak of 'the children of A and of B,' it may, perhaps, be doubted whether usage requires the repetition of the particle." G

In *Mason* v. *Baker* (7) SIR W. PAGE WOOD, V.-C., dealt with *Lugar* v. *Harman* (4), and pointed out that the circumstance that Edward Lugar was dead at the date of the will made the construction arrived at by the Master of the Rolls a reasonable one, and, dealing with the particular gift before him—which was the gift of the residue to H

> "all the children of my brother Richard Baker and my sister Mary Mason, to be equally divided among them, share and share alike"

—goes on to say:

> "There is nothing on the face of this will which makes it probable that the testatrix meant to treat her sister Mary differently from her brother Richard in this bequest; and unless the genius of our language is opposed to it, I should think the construction was that this was a gift to the children of Mary to share equally with the children of Richard. I can scarcely say that it is idiomatic English to use the expression: 'I give to the children of A and B in equal shares,' meaning to give to the children of one and of the other of them; but, on the other hand, the other construction seems to me equally to require the introduction of the word 'to' and on the whole, seeing that this brother and I

> sister of the testatrix are placed in exactly the same position in other parts of the will, I see no reason for preferring the parent in one case and not in the other, and I must therefore hold that the children of Richard and Mary take this residue equally."

The Vice-Chancellor seems to me to take the view that there is ambiguity in the gift, whether it is to be found in the direction to divide between the children of A and B or in the form of a gift to the children of A and B.

In *Re Featherstone's Trusts* (8), KAY, J., had to determine the meaning of a gift of residue "unto and equally amongst all the children of my said brother-in-law Dr. John Dowson and the said Robert Abbey of Coatham." Robert Abbey was one of the four children of Thomas Abbey, who was described by the testator as "his late relative." Robert Abbey himself in fact predeceased the testator, leaving eleven children living at the testator's death. The learned judge in the course of his judgment says this:

> "On the proper grammatical construction of the words used it would be necessary in order to enable the children of Robert Abbey to take to insert the word 'of,' so that it should read the children of Dr. Dowson and 'of the said Robert Abbey.' In *Lugar* v. *Harman* (4), where the gift was to the children of E.L. and 'my cousin P.F. and their lawful representatives,' it was held that the gift was not to the children of P.F. but to P.F. himself, and the children of E.L., all taking equal shares."

It will be observed that he treated the gift in *Lugar* v. *Harman* (4) as if it was a gift "to the children of E.L. and P.F.," and made no distinction between this kind of gift and a gift contained in a direction to divide the subject-matter between the children of E.L. and P.F.

In *Re Walbran*, *Milner* v. *Walbran* (1), the gift to be construed was a gift of proceeds of sale "to be equally divided between the children of Francis M. Walbran . . . and James C. Walbran . . . or their heirs." Francis M. Walbran and James C. Walbran were nephews of the deceased husband of the testatrix. Francis Walbran had six children living at the death of the testatrix; James Walbran had two living at the death of the testatrix. JOYCE, J., held that the gift must be construed as a gift to James Walbran and the children of Francis Walbran, and that the division was in moieties, one going to James and the other to the six children of Francis. JOYCE, J., said in the course of his judgment:

> ". . . notwithstanding anything that may have been or may be said to the contrary, I do not doubt that the proper grammatical meaning of the expression 'the children of A and B'—the preposition 'of' not being repeated before B, and A and B not having or being capable of having children together—is the children of A and the individual B—not his or her children. But the expression 'the children of A and B' may mean the children of A and the children of B; and in a will must have that meaning if B, to the knowledge of the testator, be dead, leaving children still alive. In the present case A and B are both alive. Each is a nephew of the testatrix. But A—that is Francis—had deserted, or at all events was living away from his family. On the other hand, no reason has been suggested why the testatrix should have passed over B—that is James—in favour of his children. I hold, therefore, that the division must be between James—not his children—and the children of Francis."

It is plain from this that JOYCE, J., drew no distinction between a gift to the children of A and B and a gift to be divided between the children of A and B. He pointed out on the strict grammatical construction that a gift to the children of A and B is the children of A and the individual B. But he pointed out that the expression is frequently of ambiguous meaning. It seems to me that the decisive factor in the case before him was the fact that Francis Walbran had ceased to reside with his children whom he had apparently abandoned, whilst no such conduct could be attributed to James Walbran.

In *Re Harper, Plowman* v. *Harper* (3), Sargant, J., had to construe a gift "to be divided equally between the unmarried daughters of my brother-in-law, Dr. I. Harper, and Dr. A. S. Grant." In the headnote it is stated that the learned judge followed *Re Walbran* (1) on this point. I do not think this is correct. Sargant, J., said that he could not see that the construction of a gift to the children of A and B as a gift to the children of A and of B or as a gift to the children of A and to B was more grammatical or idiomatic in the one case than the other, and he expressed the view that either construction was equally permissible. He in fact decided that the gift before him must be construed as a gift to the three unmarried daughters of Dr. I. Harper and to Dr. A. S. Grant personally, each taking a fourth. The decision turned entirely on the particular facts of the case, the decisive factors being that Dr. Grant was not related in any way to the testatrix and had in fact only one daughter, an infant about four years of age, when the will was made, while Dr. Harper was his brother-in-law with five daughters, three of whom were unmarried at the date of the will and death of tenant for life.

The last case referred to was *Re Prosser, Prosser* v. *Griffith* (2). It is only reported in the Weekly Notes, but the report there is in all respects a complete report. Clauson, J., had to determine the meaning of a gift to be equally divided between "the children of my brother Frederick and John Prosser." Clauson, J., followed *Re Walbran* (1) because he found the words were precisely the same.

In my judgment, the result of the authorities seems to be that, in the absence of any context or surrounding circumstances, a gift to the children of A and B in equal shares or to be equally divided between the children of A and B should be construed as a gift in equal shares to the individual B and the children of A. But it is worthy of note that even in the cases where the strict rule of construction has been recognised, it has been adopted in particular circumstances which themselves admit of no doubt but that the strict construction was in complete accordance with the context and the intention of the testator. I think it is fair to say that the phrase may be ambiguous, and that the ambiguity which necessarily arises from the context or surrounding circumstances is to be solved by that context or those circumstances. As Joyce, J., said in *Re Walbran* (1), in order to understand what the testator meant by the words in question in that case it is necessary to know something about the persons mentioned. In the present case before me the testator had one son, Walter James Dale, and one daughter, Matilda Ann Wood. Each was married. Walter James Dale had one child and Matilda Ann Wood had six children. By his will, after giving to his son and his daughter certain specific gifts, he gave the residue to trustees upon the usual trusts for sale, conversion, and investment. He then directed his trustees to pay the income to his wife for life, and after her death to pay £1,000 to Emily Bridger, his sister-in-law, and then to divide the residue into two equal parts, whereof one should be paid to his son, Walter James Dale, absolutely and the other should be held in trust for his daughter, Matilda Ann Wood, for her separate use during her life without power of anticipation, and after her death upon trust for all or such one or more of her children as she should appoint and, in default of appointment, upon trust for all or any of her children who, being sons or a son, should attain the age of twenty-one years or, being daughters or a daughter, should attain that age or marry under it, if more than one in equal shares. From this it is plain that the testator, while treating his son and daughter on a footing of equality, provided that his daughter's share should be settled. He did this for obvious reasons having regard to the law then in force relating to married women and their property. The codicil does not affect the main provisions of the will. All it does is to deal with a dwelling-house the testator had purchased since the date of the will. He directs the rents to be paid to his wife for life and after her death to his sister-in-law, Emily Bridger, for her life or until she should marry, and after her death or marriage the trustees are directed to sell the house and divide the proceeds thereof equally between the children of his son, Walter James Dale, and his daughter, Matilda Ann Wood. Having regard to the dispositions of his residuary estate and the existing law it is

A difficult to understand why the testator should—while making an absolute gift to the children of his son—make a similar gift to his daughter individually and not to her children. In my view, there is sufficient in the context afforded by the will and by the surrounding circumstances of this case to compel me to the conclusion that by the direction to divide "equally between the children of my son, Walter James Dale, and my daughter, Matilda Ann Wood," the testator meant all his B grandchildren by his son and by his daughter, and that he did not intend to exclude his grandchildren by his daughter or to benefit his said daughter to the exclusion of these grandchildren.

I, consequently, hold that on the true construction of the will and codicil the proceeds of sale of the house are divisible into sevenths. The costs of all parties to be paid between solicitor and client out of the proceeds of sale.

C

Solicitors: *Lindo & Co.*; *G. G. Scott, Son & Pryce.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

D

Re FENTON (No. 1). Ex parte FENTON TEXTILE ASSOCIATION, LTD.

E

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), May 2, 5, 6, 30, 1930]

[Reported [1931] 1 Ch. 85; 99 L.J.Ch. 358; 143 L.T. 273; 46 T.L.R. 478; 74 Sol. Jo. 387; [1929] B & C.R. 189]

F *Bankruptcy—Set-off—Mutual dealings—Bankrupt surety—Claim to set off liability under guarantee against debt due to principal debtor—No payment made to principal creditor—Bankruptcy Act*, 1914 (4 *& 5 Geo. 5, c.* 59), *s.* 31.

Section 31 of the Bankruptcy Act, 1914, does not enable the trustee of the estate of a bankrupt surety (in whose bankruptcy a proof has been lodged by the principal creditor) to set off the liability of the surety under his guarantee G against a debt presently due from him to the trustee of the estate of the bankrupt principal debtor, when nothing has been paid to the principal creditor either by the surety or by his trustee.

In June, 1919, F. formed a group of firms and companies interested in the textile trade into an association, and, as surety, guaranteed the overdraft of the association at certain banks. On June 12, 1921, an order was made for H the compulsory winding-up of the association. In September, 1921, F. committed an act of bankruptcy. The association did not pay off the overdraft, nor did either F. or his trustee in bankruptcy pay anything under F.'s guarantee. At the date of the winding-up order F. owed the association £436,192, a proof for which was lodged by the association in his bankruptcy. F.'s trustee in bankruptcy claimed the right to set-off against that debt the sum of £177,000 I odd, the amount owing by the association in respect of its overdraft at the banks. The banks lodged a proof in F.'s bankruptcy for the £177,000 under his liability as surety, and a proof in the winding-up of the association in respect of the overdraft.

Held: (i) the time for ascertaining what mutual credits, debts, and dealings within s. 31 existed between F. and the association was the date of the winding-up order; the words of s. 31 connoted accounts capable of ascertainment on either side, if not immediately, yet based on authority or liability definitely undertaken, and so the section did not apply to a case where the debt sought to be set off was a contingent liability to a third party; (ii) if the trustee of F.'s estate were allowed to set off the debt due to the bank which F. had guaranteed he would exercise that right in respect of the same debt as that in respect of which the bank had put in a proof in the winding-up of the association, and that offended against the rule forbidding two proofs in respect of one debt; and, therefore, the proof of the £436,192 would be admitted without any reduction by set-off.

Notes. Considered: *Re Fenton (No. 2), Ex parte Fenton Textile Association, Ltd.*, post, p. 27; *Re A Debtor (No. 66 of 1955), Ex parte The Debtor* v. *The Trustee of the Property of Waite*, [1956] 2 All E.R. 94.

As to debts provable in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 464–480; and as to set-off, see ibid. 480–485. For cases see 4 DIGEST 250 et seq., 389 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

(1) *Re Sass, Ex parte National Provincial Bank of England*, [1896] 2 Q.B. 12; 65 L.J.Q.B. 481; 74 L.T. 383; 44 W.R. 588; 12 T.L.R. 333; 40 Sol. Jo. 686; 3 Mans. 125; 26 Digest 90, *628*.

(2) *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; 53 L.J.Q.B. 497; 51 L.T. 637; 32 W.R. 989, H.L.; 10 Digest (Repl.) 990, *6813*.

(3) *Re Daintrey, Ex parte Mant*, [1900] 1 Q.B. 546; 69 L.J.Q.B. 207; 82 L.T. 239; 7 Mans. 107, D.C.; affirmed, [1900] 1 Q.B. 571; 69 L.J.Q.B. 220; 82 L.T. 246; 7 Mans. 129, C.A.; 4 Digest 389, *3562*.

(4) *Eberle's Hotels and Restaurant Co.* v. *Jonas* (1887), 18 Q.B.D. 459; 56 L.J.Q.B. 278; 35 W.R. 467; 3 T.L.R. 421, C.A.; 10 Digest (Repl.) 990, *6815*.

(5) *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.*, [1909] 2 Ch. 401; 78 L.J.Ch. 697; 101 L.T. 519; 16 Mans. 318; 26 Digest 127, *902*.

(6) *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514; 62 L.J.Ch. 773; 68 L.T. 753; 9 T.L.R. 437; 3 R. 610; 26 Digest 146, *1099*.

(7) *Re Parker, Morgan* v. *Hill*, [1894] 3 Ch. 400; 64 L.J.Ch. 6; 71 L.T. 557; 43 W.R. 1; 38 Sol. Jo. 694; 7 R. 590, C.A.; 26 Digest 113, *788*.

(8) *Re Paine, Ex parte Read*, [1897] 1 Q.B. 122; 66 L.J.Q.B. 71; 75 L.T. 316; 45 W.R. 190; 13 T.L.R. 13; 41 Sol. Jo. 30; 3 Mans. 309; 5 Digest 856, *7181*.

(9) *Re Blackpool Motor Car Co., Ltd., Hamilton* v. *Blackpool Motor Car Co., Ltd.*, [1901] 1 Ch. 77; 70 L.J.Ch. 61; 49 W.R. 124; 45 Sol. Jo. 60; 8 Mans. 193; 10 Digest (Repl.) 1032, *7137*.

(10) *Re Parrott, Ex parte Whittaker* (1891), 63 L.T. 777; 39 W.R. 400; 7 T.L.R. 218; 8 Morr. 49, D.C.; 4 Digest 271, *2546*.

(11) *Re Herepath and Delmar, Ex parte Delmar* (1890), 38 W.R. 752; 6 T.L.R. 280; 7 Morr. 129; 4 Digest 271, *2545*.

(12) *Re Moseley Green Coal and Coke Co., Ltd., Barrett's Case (No. 2)* (1865), 4 De G. J. & Sm. 756; 5 New Rep. 496; 34 L.J.Bcy. 41; 12 L.T. 193; 13 W.R. 559; 46 E.R. 1116, L.C.; 10 Digest (Repl.) 985, *6785*.

(13) *Gibson* v. *Bell* (1835), 1 Bing.N.C. 743; 1 Hodg. 136; 1 Scott, 712; 131 E.R. 1303; 4 Digest 406, *3689*.

(14) *Re City Life Assurance Co., Ltd.*, [1926] Ch. 191; 95 L.J.Ch. 65; 134 L.T. 207; 42 T.L.R. 45; 70 Sol. Jo. 108; [1925] B. & C.R. 233, C.A.; Digest Supp.

(15) *Sampson* v. *Burton* (1820), 2 Brod. & Bing. 89; 4 Moore, C.P. 515; 129 E.R. 891; 4 Digest 401, *3656*.

(16) *Palmer* v. *Day & Sons*, [1895] 2 Q.B. 618; 64 L.J.Q.B. 807; 44 W.R. 14; 11 T.L.R. 565; 39 Sol. Jo. 708; 2 Mans. 386; 15 R. 523; 4 Digest 410, *3714*.

(17) *Re Oriental Commercial Bank, Ex parte European Bank* (1871), 7 Ch. App. 99; 41 L.J.Ch. 217; 25 L.T. 648; 20 W.R. 82, L.JJ.; 10 Digest (Repl.) 982, *6764*.

(18) *Re Asphaltic Wood Pavement Co., Lee and Chapman's Case* (1885), 30 Ch.D. 216; 54 L.J.Ch. 460; 53 L.T. 65; 33 W.R. 513, C.A.; 10 Digest (Repl.) 990, *6814*.

(19) *Re Taylor, Ex parte Norvell*, [1910] 1 K.B. 562; 79 L.J.K.B. 610; 102 L.T. 84; 17 Mans. 145; sub nom. *Re Taylor, Ex parte Sutcliffe*, 26 T.L.R. 270; 54 Sol. Jo. 271, C.A.; 40 Digest (Repl.) 441, *295*.

(20) *Re Mitchell, Freelove* v. *Mitchell*, [1913] 1 Ch. 201; 82 L.J.Ch. 121; 108 L.T. 34; sub nom. *Re Mitchell, Truelove* v. *Mitchell*, 57 Sol. Jo. 213; 26 Digest 128, *915*.

Appeal by the liquidator of the Fenton Textile Association, Ltd., from an order of LUXMOORE, J.

The facts are stated shortly in the headnote, and more fully in the judgment of the Master of the Rolls. LUXMOORE, J., held, that as Fenton was entitled to be repaid by the association any sum which he, as surety, paid to the bank on behalf of the association, his trustee in bankruptcy could set off the amount for which proof against his estate had been lodged by the bank against the proof lodged by the liquidator of the association against his estate on the principle of mutual dealings and set-off allowed by s. 31 of the Bankruptcy Act, 1914. The liquidator appealed on the grounds that (a) there was, in fact, no mutual dealing; that the claim of the association was a direct claim to be repaid sums due as debts from Fenton to the association, and that the contra claim was not one for a debt due to Fenton, but only a contingent liability involving a right of protection against a liability incurred by Fenton towards the bank, a liability which he had not turned into a debt by paying off the bank; (b) the bank had a right of proof against the estate of the association in liquidation, and so, if Fenton's right against the association was allowed by a set-off, it was in effect a second or double proof against the estate of the association, but by a well-known rule in bankruptcy a double proof for the same debt was not permissible. The trustee alleged that all claims provable in bankruptcy, provided there was mutuality, were the subject of set-off.

W. N. Stable and *Harold L. Murphy* for the liquidator.

F. P. M. Schiller, K.C., and *J. W. Morris* for the trustee.

Cur. adv. vult.

May 30. The following judgments were read.

LORD HANWORTH, M.R.—This is an appeal from a judgment of LUXMOORE, J., given on Feb. 20, 1930, by which he determined that the proof of the Fenton Textile Association, Ltd., under a deed of arrangement, executed by Henry Fenton for the benefit of his creditors, on Sept. 19, 1921, and a supplemental deed dated Oct. 10 of that year, was to be reduced by a set-off under s. 31 of the Bankruptcy Act, 1914.

Fenton had been interested in a number of firms and companies engaged in the textile trade, and in June, 1919, formed them as a group into the above-named company—which I will call for short "the association." It is now in liquidation, an order to wind it up compulsorily having been made on June 12, 1921, and it is insolvent. No assets are available for its unsecured creditors. The figures are not in dispute. The claim of the association is to prove against Fenton's estate for £436,192. That sum has been reached after certain items have been set off against the claims of the association, items as to which it is not disputed that Fenton had a right to set off. The question to be determined arises as to a sum of £176,795 which is the total for which Fenton is liable to three banks as surety to them for the association.

Fenton had given four guarantees to the banks—three by himself alone and one with others—in respect of overdrafts made by the banks for which the association is, in the events that have happened, the principal debtor. In each of these guarantees the surety guarantees the whole amount, but his liability is limited to the amounts stated therein respectively, and in each provision is made that the surety is not to be entitled, as against the bank, their successors, or assigns, to any right of proof in the bankruptcy or insolvency of the principal debtor, or other right of a surety discharging his liability in respect of the principal debt, unless and until the whole of such principal money and interest shall have been discharged and satisfied. The result is that the banks' right of proof against the association remains unimpaired. They have a right to prove for their whole debt against their principal debtors: see *Re Sass, Ex parte National Provincial Bank of England, Ltd.* (1). The bank which has the largest claim, of £150,000, has put in a proof in the winding-up of the association. The other two banks have not lodged proofs, presumably because there is nothing for the unsecured creditors to receive; but they have proved against Fenton's estate for the full amount of the several guarantees, and it seems that Fenton's estate will have to bear, as far as is possible, the indebtedness of the association; in other words, his estate will be depleted by a quota paid to the banks out of his estate. LUXMOORE, J., has held that as Fenton, the surety, is entitled to be repaid by the association any sum which he, as surety, pays to the banks on behalf of the association, his trustees may set off the amount for which proof against his estate has been made by the banks against the proof lodged by the liquidator of the association against his estate, on the principle of mutual dealings embodied in s. 31 of the Bankruptcy Act, 1914. The liquidator of the association appeals on the ground (a) that there was no mutual dealing; that the claim of the association is a direct claim to be repaid sums due as debts from Fenton to the association, and that the contra claim is not one for a debt due to Fenton, but only a contingent liability involving a right of protection against a liability incurred by Fenton towards the banks which he has not turned into a debt by paying off the banks; and (b) that the banks have a right of proof against the estate of the association in liquidation, and so, if Fenton's right against the association is allowed by a set-off, it is in effect a second or double proof against the estate of the association, and, by a well-known rule in bankruptcy, a double proof for the same debt is not permissible.

With regard to the first point taken before LUXMOORE, J.—that Fenton must have received most of the money in respect of which the guarantees were given, and that, consequently, it would not be right to allow him the equitable relief of indemnity in respect of the guarantees—it is sufficient to say that I agree with the learned judge in rejecting that objection. Whether the money received by the association from the banks passed into the hands of Fenton or not makes no difference. The debt incurred to the banks was the debt of the association. The association was liable as principal debtor. Fenton was surety—not a debtor directly liable to the banks.

The question of set-off by the trustee of the estate of Fenton, the surety, is more difficult. Neither Fenton nor his trustee has yet paid anything to the banks on behalf of the association. Can the trustee claim, before payment, that a right of set-off under s. 31 has arisen? It must be remembered that set-off under s. 31 is not optional. As LORD SELBORNE said in *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (2) (9 App. Cas. at p. 438):

> "It is a positive absolute rule for the purpose of proof in bankruptcy and nothing can be proved according to that rule in such cases except the balance of the account."

As pointed out by WRIGHT, J., in *Re Daintrey, Ex parte Mant* (3) ([1900] 1 Q.B. at p. 553), LORD SELBORNE cannot have intended to refer to proof only, but to what is to be claimed or paid on either side. With that qualification LORD SELBORNE'S observation as to set-off being a rule in bankruptcy and not merely a right which can be invoked at the will of the trustee, remains, and the question that is to be determined is whether that rule applies to the facts of the present case.

It is clear that a surety has a right to be protected against the liability that may fall upon him by the failure of the principal debtor to liquidate his debt; but this right, it is said, has its own distinctive character. It stands wholly apart from a liability for debts on the one side or the other, incurred by persons mutually dealing

A with each other in the course of business, and cannot be set off against them. It has been decided that a claim in detinue for the return of goods in specie cannot be set off against a money claim for a liquidated amount. The two things are incommensurable: see per BOWEN, L.J., in *Eberle's Hotels and Restaurant Co.* v. *Jonas* (4) (18 Q.B.D. at p. 468). The right of a surety to be protected from the liability that will fall upon him in case of default by the principal debtor is clear, B and is not confined to cases in which he has paid the creditor. As soon as any definite sum of money has become payable to the creditor, the surety has a right to have it paid by the principal and his own liability in respect of it brought to an end: see the cases collected in ROWLATT ON PRINCIPAL AND SURETY (2nd Edn.), p. 185, and the judgment of SWINFEN EADY, J., in *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.* (5) and that of WRIGHT, J., in *Wolmershausen* v. *Gullick* (6). C The right, however, as pointed out in the latter case, is for protection and does not enure to the surety so as to justify an order to pay him the sum for which he stands in peril, for the surety who has not paid the principal creditor cannot give a discharge as against the principal creditor. Money so paid to the surety might be employed by him for his own purposes and not paid over to discharge the debt due to the creditor. If the principal creditor had been a party to that action of D *Wolmershausen* v. *Gullick* (6) it seems that WRIGHT, J., would have made an order that the co-surety—the defendant—should pay direct to the principal creditor, but not to the surety himself. This being the right of the surety it also seems clear that the time for ascertaining what mutual debts, credits and dealings were existing between the debtor and other persons is the date of the receiving order: see *Re Daintrey* (3) and the judgment of LINDLEY, L.J. ([1900] 1 Q.B. at p. 572), and the E terms of the section hereinafter referred to.

What then were these mutual dealings when the equivalent of a receiving order was made—that is when the order for winding-up the association compulsorily was made on June 21, 1921? At that time there was a debt due to the association from Fenton, and Fenton had the right to be protected against any claim made by the banks against him. In *Re Parker, Morgan* v. *Hill* (7) it was decided that when F one of two sureties had paid the creditor the whole of the debt, and taken an assignment of the securities, he was entitled under s. 5 of the Mercantile Law Amendment Act, 1856, to bring an action against his co-surety, or to prove against his estate as the assignee of the creditor for the full amount of the debt, although he can only actually recover the proportion which as between the sureties, the co-surety is liable to pay. That decision is clear enough upon its facts. The G bearing of it upon the present question is that DAVEY, L.J., said ([1894] 3 Ch. at p. 407):

> "What would have been the effect if the creditors had not proved their claim—and if the two sureties had brought in their claim in their own right against their co-surety for contribution—I do not say."

H He leaves it an open question.

In *Re Paine, Ex parte Read* (8) it was held that a surety who has a right of proof in respect of his contingent liability as surety is a creditor under the Bankruptcy Act—in that case it was under s. 37 of the Bankruptcy Act, 1883—and a payment, therefore, to, or for, his benefit, before he has been actually called upon to pay as surety, may be a fraudulent preference. That decision was followed by BUCKLEY, I J., in *Re Blackpool Motor Car Co., Ltd., Hamilton* v. *Blackpool Motor Car Co., Ltd.* (9) ([1901] 1 Ch. at p. 87). Those decisions were as to who could be a creditor and be fraudulently preferred under s. 48 of the Act of 1883. They do not necessarily conclude the point that we have to determine, which is not determined by any definite authority and has, in several cases, expressly been left open for subsequent decision. Thus in *Re Parrott, Ex parte Whittaker* (10) two judges of great experience in bankruptcy law held that a surety who was under a contingent liability only, had no right to vote at a meeting of creditors and decided this "even if the liability of a surety can be the subject of a proof before payment"—a point which CAVE, J., says was not settled by *Re Herepath and Delmar, Ex parte Delmar* (11) though at first sight that case, decided by CAVE, J., would appear to have involved the point. In *Re Moseley Green Coal and Coke Co., Ltd., Barrett's Case (No. 2)* (12), LORD WESTBURY, L.C., decided that where a surety, who was such before the winding-up, paid off the debt of his principal debtor after the winding-up and received the securities held by the creditor, he was entitled to be treated as being in the same position as if he had paid off the debt before the winding-up and to set off his payments so made, because he had fulfilled his contract made before the winding-up and his right arose not by reason of dealings after, but before the winding-up order. The Lord Chancellor clearly laid stress on the fact that the liability was not only outstanding at the date of the winding-up, but had in fact been fulfilled by payment which turned the surety into an actual creditor, and he was, therefore, no longer merely under a contingent liability. Thus, so far as the cases go, it has been decided that a surety is entitled to a right to prove if (a) his liability arose under a guarantee given before the date of the receiving order or winding-up order, and (b) he has in fact paid to the creditors the sum that he seeks to set off. No case has decided that he can set off his contingent liability before he has changed that, by payment to the creditor, into an actual debt due to himself. Several cases have indicated a doubt whether there could be a right to prove before such a payment.

The mutual dealings section—s. 31—of the Bankruptcy Act, 1914, follows the principle long since recognised and embodied in the successive statutes relating to bankruptcy from 4 & 5 Anne, c. 17, s. 11, onwards. They are collected in the judgment of TINDAL, C.J., in *Gibson* v. *Bell* (13). The principle has been steadily enlarged as I pointed out in *Re City Life Assurance Co., Ltd.* (14) ([1926] 1 Ch. at p. 201). It should be mentioned, however, that it was decided in 1820 that mutual credit does not cover a case of loss incurred by a contingency after the bankruptcy: see *Sampson* v. *Burton* (15). BURROUGH, J., says (2 Brod. & Bing. at p. 96):

> "We think this shows that the legislature meant such credits only as must in their nature terminate in debt; as where a debt is due from one party and credit given by him on the other for a sum of money payable at a future day, and which will then become a debt; or where there is a debt on one side and a delivery of property with directions to turn it into money, on the other. These two cases taken together explain the intention of the statute. The intention was to confine mutual credit to pecuniary demands, or to those subjects which at some subsequent time might become of a pecuniary nature."

To the words in previous Bankruptcy Acts, the Bankruptcy Act, 1869, added mutual dealings to the section, and we have to consider its exact terms to see whether a set-off can be allowed on such facts as are now present to the court. If the contra right were one which was effective before the receiving order, though its quantum was measured afterwards, the system of set-off would apply: see *Re Daintrey* (3) and *Barrett's Case* (12), and *Palmer* v. *Day & Sons* (16), where an authority given before the receiving order resulted in a money claim after the receiving order.

The terms of the present s. 31 follow the decision of *Re Daintrey* (3), above quoted—

> "Where there have been mutual credits, mutual debts or other mutual dealings, between a debtor against whom a receiving order shall be made . . . and any other person proving or claiming to prove a debt under the receiving order . . .",

and indicate that the debts or dealings contemplated must have been previous to the receiving order. Then s. 31 directs that an

> "account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be

> set off against any sum due from the other party, and the balance of the account and no more shall be claimed or paid on either side . . ."

In *Re Daintrey* (3), when the datum line was fixed by the receiving order being made, it was clear, as Lindley, M.R., said, that very considerable sums would become payable under the agreement entered into between the parties before the date of the receiving order—that is, if the agreement was carried into effect according to the intention of the parties. It is true that there was no express obligation by Mant to carry on the business, but if he fulfilled his agreement, he would do so and thus provide a sum payable to the bankrupt. At the date of the judgment he had carried out his agreement and there was a sum of £300 due to the bankrupt. In the present case, as I have pointed out, the liability of Fenton at the date of the receiving order was uncertain, though he might have made his position certain by payment. The words of the section seem clearly to connote an account capable of ascertainment on either side if not immediately, yet based upon authority or liability definitely undertaken. I find it difficult to construe those words or adapt that system to dealings in which there was a debt on one side due to the other, and per contra there was not a debt or a certain liability but one in respect of which there was a right of protection and no more—a liability which would not be turned into a direct contra money claim unless and until the debt had been paid by the surety, who then, and not till then, would become entitled to give a discharge for the sum paid to him. This he had not done at the date of the liquidation when his rights became determined.

Another difficulty remains to be considered. It will be observed that the latter part of the section provides that a right of set-off shall not accrue to a person when he had at the time of giving credit to the debtor notice of an act of bankruptcy committed by the debtor and available against him. The right of set-off is thus fitted into the scheme of bankruptcy and made subject to an important rule and limitation which preserves the rights of the creditors inter se.

There is another rule which is well founded in bankruptcy, the rule against a double proof. The substance of it is expressed by Mellish, L.J., in *Re Oriental Commercial Bank, Ex parte European Bank* (17) (L.R. 7 Ch. at p. 103):

> "The true principle is that there is only to be one dividend in respect of what is in substance the same debt although there may be two separate contracts."

Now the debt in respect of which the set-off is claimed is the debt in respect of which the banks have a right of proof against the association. They have a right under s. 65 and the rules, to come in and tender a proof at any time before a dividend is declared and to be admitted to prove, subject to certain limits imposed by the rules. If two of the banks have not yet exercised their full rights of proof, that is because there appears to be nothing for the unsecured creditors to receive, but their right of proof exists. If the trustee of Fenton's estate were allowed to set off the debt due to the banks which Fenton guaranteed, he would exercise that right in respect of the same debt which the largest creditor bank has already, and the other two can prove for. It would in effect be a double proof. But it would be more—it would be an allowance to Fenton's estate in full of a debt due to another which Fenton has not paid himself, with the result that Fenton's general creditors would benefit to the extent of the debt which is primarily due from the association to the banks. The rule, therefore, against double proof also prevents Fenton's trustees from setting off this liability of Fenton's to the banks which has not crystallised into a debt due to Fenton.

I desire to add that this judgment is not intended to determine that Fenton's trustee may not in some events have a provable debt within s. 30 (3) and (8), in the liquidation of the association. It may be that he will; but when and at what value are questions that we have not to decide. Our judgment is that at the present time Fenton's trustee has not a right to set off his contingent liability under s. 31, which provides and requires a particular machinery for the set-off of mutual debts, and

does not conclude all the rights and questions that may arise. The appeal will be A
allowed and the proof of £436,192 will be admitted without reduction by set-off.

LAWRENCE, L.J.—On the first point taken by the liquidator that Fenton had no right to be indemnified by the association in respect of his suretyship because he misappropriated the money advanced by the banks, I agree with the decision of LUXMOORE, J., and have nothing to add to the reasons which he has given for B
arriving at his conclusion. On the main point, however, which raises a difficult question, I have come to the conclusion that the appeal ought to succeed.

The effect of allowing a set-off in the circumstances is that the estate of the insolvent surety will obtain from the estate of the insolvent principal debtor 20s. in the pound on the guaranteed debts, although neither the surety nor his trustee has paid anything to the principal creditors under the guarantees, and although the C
estate of the principal debtor, after such set-off, will still remain liable for the full amount of the guaranteed debts. That cannot be right. The result would be still more extraordinary if (as might well have happened) there had been several other directors of the association in the same position as Fenton. In that case, if the estate of each director could successfully have asserted the right of set-off now claimed on behalf of Fenton's estate, the effect would have been that the estate of D
the association would have had to pay the amount of the banks' debts several times over in full and yet have remained liable to the banks for those debts.

It is common ground that, as regards the question to be determined on the present appeal, the bankruptcy law and rules are applicable to the administration of the estates of both Fenton and the association in the same manner as if Fenton and the association had been debtors against whom receiving orders had been made. E
The claim on behalf of Fenton's estate to the right of set-off is made under s. 31 of the Bankruptcy Act, 1914, and the question is whether that section enables the trustee of the estate of a bankruptcy surety (in whose bankruptcy a proof has been lodged by the principal creditor) to set off the liability of the surety under his guarantee against a debt presently due from him to the trustee of the estate of the bankrupt principal debtor, although nothing has been paid to the principal creditor F
either by the surety or by his trustee. The difficulty in the present case is entirely due to the fact that both the surety and the principal debtor are bankrupt; if either or both had been solvent different considerations would have arisen. It so happens that the estate of the principal debtor is insufficient to pay any dividend to his unsecured creditors and that the estate of the surety is expected to yield a dividend of about 1s. in the pound, but that fact does not, in my opinion, affect the question G
which we have to determine. The principle which has to be applied is the same whatever may be the degree of the insolvency of the two estates.

Although many cases have been decided under s. 31 and under the corresponding sections in the earlier Acts of 1869 and 1883, counsel have not been able to find a single case in which the court has considered a claim to set-off in circumstances similar to those prevailing in the present case. The contention of the trustee may H
be summed up as follows: that all claims provable in bankruptcy, provided there is mutuality, are the subject of set-off because the expression "mutual dealings" includes every case where there are provable claims on both sides; that the liability of a surety is a provable claim in the bankruptcy of the principal debtor although the surety may not have paid anything; and that, therefore, such a claim can properly be set off against a provable debt due from the surety to the principal I
debtor. The propositions so stated appear primâ facie to accord with the authorities which have been cited and with the wide interpretation placed by the courts on the expression "mutual debts, mutual credits or other mutual dealings."

It is unnecessary to examine the many cases in which in varying circumstances it has been decided what may and what may not be the subject of set-off under the section; it is enough for the purpose of this judgment to state generally (without attempting any exhaustive or precise enumeration) that it has been established that the claims must be commensurate (e.g., there can be no set-off of goods as against money); that the claims must be in the same right (e.g., a trustee cannot set off a debt due to him personally against a claim in respect of a fund in which he has no beneficial interest); that the claims must be between the same parties (e.g., a joint debt cannot be set off against a separate debt); and that claims provable in bankruptcy in respect of damages liquidated or unliquidated arising out of contract may be the subject of set-off. It has also been decided that, although the date for ascertaining the existence of any mutual debts, credits or dealings which may be made the subject of set-off under the section is the date of the receiving order, yet it is sufficient if the account prescribed by the section can be taken when the set-off arises: see *Re Daintrey, Ex parte Mant* (3), where the Court of Appeal allowed a set-off in respect of a debt the existence and amount of which were alike unascertained at the date of the receiving order. Further, it is not disputed by the liquidator in the present case that a claim for indemnity by a surety, either against a co-surety or against the principal debtor, comes within the definition of a provable debt contained in s. 30, and that under s. 28 a bankrupt will be released from such a claim by the order of discharge. Moreover, there is ample authority for the general proposition that all provable debts resulting from mutual dealings are within s. 31: see per Brett, M.R., in *Re Asphaltic Wood Pavement Co., Lee and Chapman's Case* (18), 30 Ch.D. at p. 222; per Buckley, L.J., in *Re Taylor, Ex parte Norvell* (19), [1910] 1 K.B. at p. 580; and per Warrington, L.J., in *Re City Life Assurance Co., Ltd.* (14), [1926] 1 Ch. at p. 210. It has to be remembered, however, that the account which has to be taken under s. 31 is an account of what is due from the one party to the other in respect of the mutual dealings, and that only sums which are due from the one party are to be set off against sums due from the other party.

The question, therefore, is whether (assuming that there were mutual dealings within the meaning of the section and assuming that there were provable debts on both sides resulting from such dealings) there was any sum due from the estate of the principal debtor to the estate of the surety at the time when the right to set-off was claimed by the trustee of the surety, regard being had to the fact that at that time nothing had been paid by or on behalf of the surety to the principal creditors, and the estate of the principal debtor was still liable for the whole amount of their debts. The law as to the right of a surety to indemnity where the principal debtor is solvent is not in doubt. Until the surety is called upon to pay, and does pay, something under his guarantee, there is no debt or right at law at all; until then a surety's right is confined to a right to come into equity in order to get an indemnity against his liability to the principal creditor: see per Parker, J., in *Re Mitchell, Freelove* v. *Mitchell* (20) ([1913] 1 Ch. at p. 206). The form which the order takes in such a case (as shown by *Wolmershausen* v. *Gullick* (6)) is a declaration of liability, followed by an order upon the principal debtor to pay or secure the debt. Even a solvent surety is not entitled to an order for payment to himself of the amount of the debt, as such a payment would not discharge the principal debtor from his liability to the principal creditor; much less is the trustee of a bankrupt surety entitled to any such payment, as the money paid to him by the principal debtor would be distributable among the general creditors of the surety, leaving the principal debtor liable to pay the debt due to the principal creditor. When, however, as in the present case, the principal debtor is bankrupt, the case assumes a different aspect. In such a case the claim of a surety who has been called upon to pay but has not yet paid anything to the principal creditor, is in effect a claim for damages for the breach by the principal debtor of his obligation to indemnify his surety on the ground that his bankruptcy has rendered it impossible for him to perform his obligation, and has made it possible to estimate the amount which the surety can properly claim by way of damages. The reason why, in my opinion, such a claim (although it apparently has the requisite attributes for a set-off under the section, and although it is one from which the principal debtor would be released by the order of discharge) cannot be set off is because so long as the estate of the principal debtor remains liable to the principal creditor the surety will not be permitted to prove against the estate of the principal debtor as such a proof would be a double proof for the same debt, and would, therefore, be inadmissible as being contrary to the established rule in bankruptcy.

In the present case the surety has guaranteed the whole of the debts of the principal creditors, although he has limited his liability under each guarantee to a fixed amount. The effect of this is that the principal creditors have the right to prove against the estate of the principal debtor for the whole of their debts, and until they have received 20s. in the pound on those debts the surety cannot prove against the estate of the principal debtor, even although he may have paid the full amount for which he is liable under his guarantees: *Re Sass, Ex parte National Provincial Bank of England, Ltd.* (1). Even where the principal creditor has been paid in full partly by a dividend from the estate of the insolvent surety and partly by a dividend from the estate of the insolvent principal debtor, the trustee of the insolvent surety will not be allowed to prove against the estate of the principal debtor for the amount which the estate of the surety has contributed towards the payment of the debt, as it is only when the surety has paid the full amount of the debt that he will be subrogated to the rights of the principal creditor: see *Oriental Commercial Bank, Ltd., Ex parte European Bank* (17) (L.R. 7 Ch. at p. 102). In the present case the largest in amount of the three principal creditors has lodged a proof in the winding-up of the principal debtor, and, although the other two principal creditors have not lodged proofs, they have been scheduled as creditors in the statement of affairs of the association. Under s. 65 proofs may be lodged at any time before the estate is finally wound-up, and arrears of dividends, if any, may be recovered out of any moneys in hand when the proofs are lodged, with the result that no claim by or on behalf of the surety would be admitted to proof even although two of the principal creditors have not in fact yet lodged any proofs in respect of their debts. To allow a set-off in respect of a claim which under the rules against double proof would not be admitted to proof would, in my opinion, be contrary to the principle upon which estates are administered in bankruptcy.

In these circumstances, I am of opinion that, although the claim to indemnity by the trustee of Fenton's estate is a provable debt arising out of a mutual dealing between the association and Fenton, it cannot be set off against the debt due from Fenton's estate to the liquidator of the association under s. 31 because the mutual dealing at the time when the account under s. 31 has to be taken, has not by reason of the rule against double proof resulted in any sum becoming due from the association to the trustee of Fenton's estate which could properly be entered on the debit side of the account. I agree, therefore, that the appeal succeeds and should be allowed.

ROMER, L.J.—In order to solve the problem presented to us by this appeal it is essential in the first place to ascertain what would have been the respective rights of Henry Fenton and Fenton Textile Association, Ltd., had both of them remained solvent. As to this the authorities leave no room for doubt. The association had, of course, a right of action against Fenton for the £436,000 odd. If Fenton had paid the banks the sum due to them he would have had a right of action against the association for the money so paid, and if the association had then sued him for the £436,000 odd he would have been entitled to set off £166,795. If, however, Fenton had not paid the banks, he would have had no right to set-off. The most he could have done would have been to counter-claim for an order upon the association to pay or secure the amount due from them to the bank so as to indemnify him from his liability as guarantor, with liberty to apply in the event of non-payment: see *Wolmershausen* v. *Gullick* (6) and *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.* (5). He could not have set off the amount of his liability to the banks, for that would have been equivalent to ordering payment to him of that amount by the association, and, as pointed out by Wright, J., in the earlier of the two cases I have referred to, no such order could have been made against the

A association, inasmuch as such a payment would not have given the association a discharge as against the banks.

Let me now consider the case upon the supposition that Fenton became bankrupt, but the association remained solvent. The association would then have had to prove for the £436,000 in the bankruptcy. But could Fenton's trustee have set off his liability to the banks against such proof? In my opinion, he could not. That B there were mutual dealings between the association and Fenton resulting in the debt due to the association, on the one hand, and the liability of the association to indemnify Fenton against his liability to the banks, on the other, may be conceded. But there was nothing "due" from the association to Fenton which could have been placed to Fenton's credit in the account that would have had to be taken under s. 31 of the Bankruptcy Act. A set-off would have been equivalent to a payment C by the association to Fenton's trustee for the general benefit of his creditors, leaving the association still liable to the banks. The trustee's right against the association could have been no greater than Fenton's before his bankruptcy. He could only have obtained an order upon the association to discharge their indebtedness to the banks. That would have been the only way in which he could have compelled the association to discharge their contingent liability to Fenton's estate.

D But now it is necessary to consider how the position is affected by the fact that the association is in liquidation and is insolvent. In that winding-up the rules of bankruptcy as to debts provable are applicable: s. 207 of the Companies (Consolidation) Act, 1908, replaced by s. 262 of the Companies Act, 1929, [and now replaced by s. 317 of the Companies Act, 1948], including the rules as to set-off: *Mersey Steel and Iron Co., Ltd.* v. *Naylor, Benzon & Co.* (2). This, no doubt, E creates a difficulty. For contingent liabilities are in general debts provable in bankruptcy, and it is well settled that, provided that there be mutuality of dealings, claims provable may be set off.

The first question to be determined on this appeal, and one which, if answered in the negative, is, in my opinion, conclusive, is this. Is a claim by a surety, who has not paid off the principal creditor, in respect of the contingent liability to the F surety of the principal debtor, one that can be proved by the surety in the principal debtor's bankruptcy? In connection with this question our attention was called to *Re Paine, Ex parte Reed* (8) and *Re Blackpool Motor Car Co., Ltd.* (9). In both those cases the court in effect had to consider whether a payment by the principal debtor to a surety who had not paid anything to the principal creditor could be avoided as a fraudulent preference in the subsequent bankruptcy of the G principal debtor. That depended upon the meaning of the word "creditor" in s. 48 of the Bankruptcy Act, 1883, [now s. 44 of Bankruptcy Act, 1914]. As to this, VAUGHAN WILLIAMS, J., in the earlier case, said ([1897] 1 Q.B. at p. 124):

> "I think, therefore, that the word 'creditor' means any person who, at the date of the payment to him, would have had to come in and prove and rank with the other creditors in the bankruptcy. A surety would be such a person."

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He, further, said that the surety had a right to share in the distribution of the bankrupt's assets, and he held that the surety was, therefore, a creditor and that the payment to him was a fraudulent preference. In the later case, BUCKLEY, J., followed this decision. He said that the sureties in the case before him were persons who were under a contingent liability which could be the subject of proof. I I do not doubt that these cases were rightly decided. When a principal debtor makes a payment to a surety who has not yet paid anything to the principal creditor in anticipation of and to provide against his subsequently being called upon to pay something to the principal creditor, I see no difficulty in treating the surety as a creditor for the purposes of the rule against fraudulent preference. For the word "creditor" may include a contingent creditor without doing any great violence to the language of the section, and a payment to him is obviously within the mischief of the statute. Should the surety subsequently pay off the principal creditor before the latter has lodged a proof, he would undoubtedly be able to prove in the

bankruptcy, and if he paid the principal creditor off after the latter had lodged a A
proof, the dividends in respect of such proof would be made available for the surety. But I cannot agree that a surety who has not paid off the principal creditor can prove in the bankruptcy of the principal debtor so as to share in the distribution of his assets unless the principal creditor has renounced in some way his right to lodge a proof himself while preserving, of course, his rights against the surety. To allow such a sharing in the assets would be to subject the assets to two claims in respect B
of the same debt, and this is contrary to the well-established rule in bankruptcy against double proof.

In *Re Herepath and Delmar, Ex parte Delmar* (11), CAVE, J., did in fact allow a surety who had not paid the principal creditor to prove in the bankruptcy of the principal debtor. The point does not, however, appear to have been argued, it having been practically conceded in argument. Moreover, the same learned judge, C
in the later case of *Re Parrott, Ex parte Whittaker* (10), expressly stated that *Re Herepath* (11) was not an authority in favour of the general right of a surety to prove in such circumstances. There is indeed a direct authority against such a proof being allowed. In *Re Oriental Commercial Bank, Ex parte European Bank* (17) the holder of certain bills of exchange had proved for the amount due upon them in the liquidation of company A that had accepted the bills and in that of D
company B upon whose request the bills had been accepted, and who, as between themselves and company A, were primarily liable for the amount. The holder of the bills received a dividend on each proof and in this way was paid in full. Company A then claimed to be entitled to receive a dividend out of the estate of company B in respect of the sum that the holder of the bills had received out of the estate of company A. It was held that the claim was not well founded, on the E
ground that to accede to it would be to subject the estate of company B to a double dividend in respect of one and the same debt. In the present case, if Fenton, not having paid the banks anything under his guarantee, were entitled to prove in the winding-up of the association, or if, having paid them less than the amount due to them, he were to prove for the amount so paid, and the banks were also to prove in the winding-up of the association for the full sum due to them, as they would F
be entitled to do, the estate of the association would be subjected to more than one proof in respect of the same debt, and this is not permissible. The claim of Fenton against the association in either case would be a claim in respect of the same debt as that claimed by the banks. In both cases the claim of Fenton would come within the definition of debts provable in bankruptcy contained in s. 30 of the Bankruptcy Act, 1914. But so does the claim of the banks, and the only reason G
why Fenton is prevented from proving his claim is that his claim is in respect of the same debt as is that of the banks, and as between him and the banks the latter have the prior right of proof.

I am, accordingly, of opinion that the claim of Fenton's trustee cannot be proved in the liquidation of the association, there being no evidence that the banks have in any way renounced their right to prove. We are, indeed, told that in the case H
of the bank with the largest claim a proof has actually been lodged. The claim of Fenton's trustee not being in the circumstances provable in the winding-up of the association, it follows that it cannot be set off against the claim of the association in respect of the £436,000. There is only one other matter that I need mention. Where a principal debtor becomes bankrupt and the dividend received from his estate and what is recovered by the principal creditor from the surety are together I
insufficient to pay the principal creditor in full, it is quite clear that the effect of the discharge of the principal debtor is to release him from all further liability to the surety in respect of what the surety has paid or is liable to pay. If that be so, it is said, the claim of the surety must be provable in bankruptcy. But the fallacy in this argument consists in forgetting that the claim of the surety and the claim of the principal creditor are in respect of the same debt. The discharge of the principal debtor releases him from the debt, because it is a debt which is provable in his bankruptcy, but one which is in fact proved by the principal creditor. This

is no doubt a hardship upon the surety. But it is one that he has brought upon himself by becoming surety for the debts of a person who is unable to pay them as they fall due. For the reasons I have given this appeal must, in my judgment, be allowed. With regard to the other point taken before LUXMOORE, J., based upon the misappropriation by Fenton of the moneys advanced by the banks to the association, I entirely concur with the decision of the learned judge.

Appeal allowed.

Solicitors: *Stephenson, Harwood & Tatham*; *Blundell, Baker & Co.*, for *Mumfords & Gordons*, Bradford.

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re FENTON (No. 2), Ex parte FENTON TEXTILE ASSOCIATION, LTD.

[CHANCERY DIVISION (Luxmoore, J.), June 15, 22, 24, July 29, 1931]

[Reported [1932] 1 Ch. 178; 146 L.T. 229; [1931] B. & C.R. 59; 101 L.J.Ch. 1]

Bankruptcy—Set-off—Mutual dealings—Bankrupt surety—Dividend paid to principal creditor under guarantee—Trustee's right to retain dividend on bankrupt's debt due to principal debtor.

The trustee in F.'s bankruptcy (see *Re Fenton* (*No. 1*), ante, p. 15) having declared an interim dividend of 1s. in the pound, the banks were paid a sum representing that dividend on the amount of their proofs.

Held: the trustee was not entitled to retain out of the dividend payable to the association a sum equal to the dividend on the amount due to the banks under the guarantee, since, as the banks were entitled to prove against the association in respect of the whole sum guaranteed, that would, in effect, result in an allowance against the association of two dividends in respect of what was for all practical purposes the same debt and so the rule against double proof would be infringed.

Cases referred to:

(1) *Re Leeds and Hanley Theatre of Varieties, Ltd.*, [1904] 2 Ch. 45; sub nom. *Re Leeds and Hanley Theatres of Varieties, Ex parte Consolidated Exploration and Finance Co.*, 73 L.J.Ch. 553; 52 W.R. 506; 12 Mans. 191; 10 Digest (Repl.) 989, *6812*.

(2) *Re Mayne, Ex parte Official Receiver*, [1907] 2 K.B. 899; 76 L.J.K.B. 1086; 97 L.T. 644; 23 T.L.R. 758; 51 Sol. Jo. 704; 14 Mans. 261; 4 Digest 495, *4453*.

(3) *Re Rhodesia Goldfields, Ltd.*, *Partridge* v. *Rhodesia Goldfields, Ltd.*, [1910] 1 Ch. 239; 79 L.J.Ch. 133; 102 L.T. 126; 54 Sol. Jo. 135; 17 Mans. 23; 10 Digest (Repl.) 796, *5170*.

(4) *Re Peruvian Railway Construction Co., Ltd.*, [1915] 2 Ch. 442; 85 L.J.Ch. 129; 113 L.T. 1176; 32 T.L.R. 46; 60 Sol. Jo. 25, C.A.; 10 Digest (Repl.) 1075, *7434*.

(5) *Re Akerman*, *Akerman* v. *Akerman*, [1891] 3 Ch. 212; 61 L.J.Ch. 34; 65 L.T. 194; 40 W.R. 12; 23 Digest (Repl.) 448, *5163*.

(6) *Re National and Provincial Live Stock Insurance Co., Ltd.*, *Re National General Insurance Co., Ltd.*, [1917] 1 Ch. 628; 86 L.J.Ch. 391; 116 L.T. 466; [1917] H.B.R. 119; 10 Digest (Repl.) 987, *6804*.

(7) *Re Melton, Milk* v. *Towers*, [1918] 1 Ch. 37; 87 L.J.Ch. 18; 117 L.T. 679; 34 T.L.R. 20, C.A.; 23 Digest (Repl.) 447, *5153*. A

(8) *Re Goy & Co., Ltd., Farmer* v. *Goy & Co., Ltd.*, [1900] 2 Ch. 149; 69 L.J.Ch. 481; 83 L.T. 309; 48 W.R. 425; 16 T.L.R. 310; 8 Mans. 221; 10 Digest (Repl.) 795, *5164*.

(9) *Cherry* v. *Boultbee* (1839), 2 Keen, 319; 4 My. & Cr. 442; 9 L.J.Ch. 118; 3 Jur. 1116; 41 E.R. 171, L.C.; 4 Digest 418, *3769*. B

(10) *Re Hilton, Ex parte March* (1892), 67 L.T. 594; 9 Morr. 286; 5 Digest 987, *8081*.

(11) *Re Sass, Ex parte National Provincial Bank of England*, [1896] 2 Q.B. 12; 65 L.J.Q.B. 481; 74 L.T. 383; 44 W.R. 588; 12 T.L.R. 333; 40 Sol. Jo. 686; 3 Mans. 125; 26 Digest 90, *628*.

(12) *Ex parte Rushforth* (1805), 10 Ves. 409; 32 E.R. 903; 26 Digest 88, *620*. C

(13) *Stammers* v. *Elliott* (1868), 3 Ch. App. 195; 37 L.J.Ch. 353; 18 L.T. 1; 16 W.R. 489, L.C.; 40 Digest (Repl.) 431, *230*.

(14) *Re Fenton (No. 1), Ex parte Fenton Textile Association, Ltd.*, ante, p. 15, [1931] 1 Ch. 85; 99 L.J.Ch. 358; 143 L.T. 273; 46 T.L.R. 478; 74 Sol. Jo. 387; [1929] B. & C.R. 189, C.A.; Digest Supp.

(15) *Re Brown and Gregory, Ltd., Shepheard* v. *Brown and Gregory, Ltd., Andrews* v. *Brown and Gregory, Ltd.*, [1904] 1 Ch. 627; 73 L.J.Ch. 430; 52 W.R. 412; 11 Mans. 218; 10 Digest (Repl.) 796, *5169*. D

Motion by the trustee in bankruptcy asking whether in view of the interim dividend of 1s. in the pound which he had declared since the decision in the Court of Appeal (ante, p. 15), he should pay to the association any, and if so what, dividend in respect of their proof directed by the order of the Court of Appeal to be admitted against the estate of the debtor. The banks had been paid in respect of their proofs the interim dividend amounting to £8,839 15s. E

Tindale Davis, for the trustee, cited *Re Leeds and Hanley Theatre of Varieties* (1); *Re Mayne, Ex parte Official Receiver* (2); *Re Rhodesia Goldfields, Ltd., Partridge* v. *Rhodesia Goldfields, Ltd.* (3); *Re Peruvian Railway Construction Co., Ltd.* (4); *Re Akerman, Akerman* v. *Akerman* (5); *Re National Live Stock Insurance Co., Ltd., Re National General Insurance Co., Ltd.* (6); *Re Melton, Milk* v. *Towers* (7); and *Re Goy & Co., Ltd., Farmer* v. *Goy & Co., Ltd.* (8). F

Stable, for the association, referred to *Cherry* v. *Boultbee* (9); *Re Hilton, Ex parte March* (10); *Re Sass, Ex parte National Provincial Bank of England* (11); and *Ex parte Rushforth* (12).

Davis, in reply, cited *Stammers* v. *Elliott* (13) and *Re Brown and Gregory, Ltd.* (15). G

Cur. adv. vult.

July 29. **LUXMOORE, J.**, read a judgment in which he said: Counsel for the trustee has argued that the position is governed by a series of decisions of which the well-known case of *Cherry* v. *Boultbee* (9) is the leading example, and he claims that so long as the association is indebted, whether presently or contingently, to Harry Fenton's estate, no dividend can be received by the association. On the other hand, counsel for the liquidator of the association claims that the decision of the Court of Appeal on an earlier motion by the association against the trustee under the deeds of arrangement has settled the question in his favour, and that, notwithstanding the alterations in the circumstances by reason of the payment to the banks under the several guarantees of £8,839 15s., the association is still entitled to receive the full dividend on its own proof in precisely the same manner as if no payment had in fact been made under the guarantees. H I

There is nothing in any of the judgments of the learned lord justices in *Re Fenton (No. 1)* (14) to suggest that they considered what would be the legal position as between the association and the other creditors of Henry Fenton if he or the trustee of the deeds of arrangement had in fact made any payment to the banks in part discharge of Fenton's liability as surety. I think it is plain that the court never intended to do anything more than determine the question whether there was a right of set-off or not. In my judgment, the contention of counsel for the association, that the question which is raised by this motion has already been decided by the Court of Appeal and is res judicata, cannot be supported.

It is, therefore, necessary for me to consider and determine whether the principle enunciated in *Cherry* v. *Boultbee* (9), and developed in the later cases, namely, *Re Leeds and Hanley Theatre of Varieties, Ltd.* (1), *Re Akerman* (5), *Re Rhodesia Goldfields, Ltd.* (3), and *Re Peruvian Railway Construction Co., Ltd.* (4), applies to the present case. The principle is clearly stated by SARGANT, J., in the last-mentioned case as follows:

> "Where a person entitled to participate in a fund is also bound to make a contribution in aid of that fund, he cannot be allowed to participate unless and until he has fulfilled his duty to contribute."

This principle obviously applies where the person to make the contribution is solvent, but if he happens to be insolvent then the position must be considered in the light of the law governing insolvent persons. It appears to me to have been decided in *Cherry* v. *Boultbee* (9) that if the person to make the contribution is insolvent at the time when the contribution is to be made, the persons entitled to receive the contribution cannot be entitled to receive more than the dividend appropriate to the amount to be contributed. LORD COTTENHAM said in that case:

> "In the present case the bankruptcy of the debtor having taken place in the lifetime of the testatrix, her executors never were entitled to receive from the assignee more than the dividends upon the debt; and although the bankrupt had not obtained his certificate, and the liability incident to that state remained upon him, yet he, for the same reason, was never entitled to receive the legacy; and, consequently, there never was a time at which the same person was entitled to receive the legacy and liable to pay the entire debt; the right, therefore, of retaining a sufficient sum out of the legacy to pay the debt can never have been vested in anyone. The assignees who claim the legacy would, indeed, have been liable to the payment of any dividend upon the debt, had it been proved; and the Master of the Rolls proposed to the executors to make provision for deducting the amount of such dividend from the amount of the legacy."

As SARGANT, J., pointed out in *Re Peruvian Railway Construction Co., Ltd.* (4), that part of the decision in *Cherry* v. *Boultbee* (9) has never been questioned or dissented from in any way and has been frequently followed. He further pointed out that this special feature, namely, the insolvency of the contributor, if I may so style the person liable to make the contribution, was entirely absent in *Re Akerman* (5), *Re Goy & Co., Ltd.* (8), *Re Rhodesia Goldfields, Ltd.* (3), and *Re Brown and Gregory, Ltd.* (15), all of which cases were cited to me and relied on by counsel for the trustee in the present case.

In my judgment, apart from any question arising out of the relationship of principal creditor, principal debtor, and surety existing between the banks, the association, and Henry Fenton respectively, the fact that the association was in liquidation before any payment was made by or out of the surety's estate would have limited the trustee's right of retainer or quasi set-off—to use the nomenclature adopted by SARGANT, J., in *Re Peruvian Railway Construction Co., Ltd.* (4)—to a sum equal to the appropriate dividend in the liquidation of the association in respect of the amount which the association would have been bound to contribute if solvent. But the position is further complicated by the fact that the banks have already proved, or are entitled to prove, against the assets of the association in respect of the whole of the sum guaranteed, and, consequently, if the trustee of the deeds of arrangement should retain out of the dividend payable to the association a sum equal to the dividend on the total amount due to the banks under the guarantee, there would in effect be an allowance against the association of two dividends in respect of what is for all practical purposes the same debt, and so the rule against double proof would be infringed. It is true that the right of retainer under the principle I have referred to is not correctly described as a set-off, and has repeatedly been stated to be a higher right and to rest on quite different principles, and that the decision of the Court of Appeal does not in terms cover the present case, yet I am satisfied that the same ground—namely, the rule against double proof—as was held by the Court of Appeal to preclude the right of set-off in the present case, also affords an answer to the claim of the trustee to retain the dividends on the admitted proof of the association or any part of such dividends at any rate so long as any part of the debt due to the banks remains unsatisfied. It follows from what I have said, that, in my judgment, the claim of the trustee of the deeds of arrangement to withhold any part of the dividends payable in respect of the association's proof fails. The motion will be dismissed, and I will order the trustee to pay the association's costs.

Solicitors: *Blundell, Baker, & Co.*, for *Mumfords & Gordons*, Bradford; *Stephenson, Harwood, & Tatham.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

CARDIFF REVENUE OFFICER *v.* CARDIFF ASSESSMENT COMMITTEE AND WESTERN MAIL, LTD.

CARDIFF REVENUE OFFICER *v.* CARDIFF ASSESSMENT COMMITTEE AND DAVID DUNCAN & SONS, LTD.

WESTMINSTER REVENUE OFFICER *v.* DAILY MIRROR NEWSPAPERS, LTD.

[KING'S BENCH DIVISION (Avory, Talbot and Finlay, JJ.), May 23, 1930]

[Reported [1931] 1 K.B. 47; 99 L.J.K.B. 672; 143 L.T. 500; 94 J.P. 146; 46 T.L.R. 499; 74 Sol. Jo. 466; 28 L.G.R. 372; [1926–31] 2 B.R.A. 542.

Rates—De-rating—Industrial hereditament—Newspaper office—Apportionment—Exclusion of managerial, editorial, accounts and advertisement offices—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 149 (1) (*c*) (*i*) (*iii*), (4) —*Rating and Valuation Act*, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3 (1), *s.* 4 (1).

A hereditament consisted of a shop, managerial, editorial, advertising and accounts offices, and composing, engraving and printing departments, and in it newspapers were produced which were supplied to wholesale newsagents.

Held: the fact that the primary purpose of the production of a newspaper was the publication of news and the expression of opinion and not the mere manufacture of printed sheets of paper did not prevent the hereditament being "premises wherein manual labour was exercised for purposes of gain in the making of an article or the adapting of an article for sale" within s. 149 (1) (c) (i) and (iii) of the Factory and Workshop Act, 1901, and, therefore, it was primarily used as a factory and was an industrial hereditament within s. 3 of the Rating and Valuation (Apportionment) Act, 1928; but the net annual value must be apportioned, under s. 4 of the Act, between those parts of the hereditament which were used for factory purposes and those which were used for other purposes, e.g., advertising and (which was admitted) accounts, editorial and managerial offices.

Per **Curiam:** We get into exceedingly difficult and dangerous ground if, in determining what is a factory, we depart from the ordinary conception of mechanical operations conducted in a manufacturing industry and try to include other operations which are of an entirely different nature: observations of LORD SANDS in *George Outram & Co., Ltd.* v. *Inland Revenue* (1), 1930 S.L.T. 303, approved.

Notes. The Factory and Workshop Act, 1901, s. 149, has been replaced by the Factories Act, 1937, s. 151.

Applied: *London Co-operative Society, Ltd.* v. *Southern Essex Assessment Committee*, [1941] 3 All E.R. 252. Considered: *Thomas* v. *British Thomson-Houston Co., Ltd.*, [1953] 1 All E.R. 29.

As to the de-rating of industrial hereditaments, see 27 HALSBURY'S LAWS (2nd Edn.) 435 et seq.; and for cases see DIGEST Supps., title Rates and Rating, case No. 226a et seq. For Rating and Valuation (Apportionment) Act, 1928, see 20 HALSBURY'S STATUTES (2nd Edn.) 173; and for the Factories Act, 1937, s. 151, see ibid., vol. 9, p. 1113.

Cases referred to:

(1) *George Outram & Co.* v. *Inland Revenue*, 1930 S.C. 351; 1930 S.L.T. 303; Digest Supp.

(2) *Inland Revenue* v. *Gunn, Collie and Topping*, 1930 S.C. 389; 1930 S.L.T. 296; Digest Supp.

(3) *Bailey* (*Stoke-on-Trent Revenue Officer*) v. *Potteries Electric Traction Co., Ltd.*, 1930, 99 L.J.K.B. 428; 143 L.T. 485; 46 T.L.R. 434, D.C.; affirmed, [1931] K.B. 385; 46 T.L.R. 601; 100 L.J.K.B. 1; 143 L.T. 650, C.A.; reversed sub nom. *Potteries Electric Traction Co., Ltd.* v. *Bailey* (*Stoke-on-Trent Revenue Officer*), [1931] A.C. 151; 100 L.J.K.B. 153; 144 L.T. 410; 95 J.P. 64; 47 T.L.R. 154; 29 L.G.R. 131; (1926–31) 2 B.R.A. 573, H.L.; Digest Supp.

(4) *Moon* (*Lambeth Revenue Officer*) v. *L.C.C.*, 1930, unreported in Divisional Court; reversed, [1931] 1 K.B. 385; 100 L.J.K.B. 1; 143 L.T. 650; 46 T.L.R. 601, C.A.; affirmed, post, p. 63, [1931] A.C. 151; 100 L.J.K.B. 153; 144 L.T. 410; 95 J.P. 64; 47 T.L.R. 154; 29 L.G.R. 131; (1926–31), 2 B.R.A. 573, H.L.; Digest Supp.

(5) *Lewis* v. *Gilbertson & Co., Ltd.* (1904), 91 L.T. 377; 68 J.P. 323; 20 Cox, C.C. 677, D.C.; 24 Digest (Repl.) 1022, *10*.

(6) *Taylor* v. *Hickes* (1862), 12 C.B.N.S. 152; 31 L.J.M.C. 242; 6 L.T. 784; 9 Jur.N.S. 21; 142 E.R. 1100; 24 Digest (Repl.) 1029, *54*.

(7) *Hardcastle* v. *Jones* (1862), 3 B. & S. 153; 1 New Rep. 54; 32 L.J.M.C. 49; 7 L.T. 322; 27 J.P. 166; 9 Jur.N.S. 19; 11 W.R. 36; 122 E.R. 59; 24 Digest (Repl.) 1027, *42*.

(8) *Vines* v. *Inglis*, 1915 S.C.(J.) 18; 7 Adam, 561; 52 S.L.R. 43; 1914 2 S.L.T. 303; 24 Digest (Repl.) 1031, **26*.

CARDIFF REVENUE OFFICER *v.* CARDIFF ASSESSMENT COMMITTEE AND WESTERN MAIL, LTD.

Case Stated by Recorder of Cardiff.

The Western Mail, Ltd., were the occupiers of a hereditament described in the valuation list for the parish of Cardiff as "shop, offices, printing-works, and appurtenances at 69, St. Mary Street, Cardiff." The hereditament was included in the special list as an industrial hereditament at a net annual value of £1,700, which was apportioned by the Cardiff Area Assessment Committee as follows:

Net annual value for industrial purposes	£990
Net annual value for non-industrial purposes	£710
Rateable value	£957

The revenue officer lodged an appeal, to which the assessment committee and the Western Mail, Ltd., were respondents, against the decision to include the hereditament in the special list. The Western Mail, Ltd., lodged an appeal, to which the assessment committee and the revenue officer were respondents, against the decision to apportion the assessment of the hereditament. At Cardiff Quarter Sessions on Oct. 16, 1929, the appeal of the revenue officer against the decision to include the hereditament in the special list and the appeal of the Western Mail, Ltd., against the apportionment came on for hearing before the Recorder of Cardiff, when the following facts were admitted or proved:

The hereditament consisted of one self-contained building, which had a small frontage to St. Mary Street and about 132 ft. to Great Western Lane. It had a basement and four floors over. Those, except such parts as were separately sublet, were included in one assessment. The Western Mail, Ltd., occupied the whole of the premises for the purposes of printing and publishing the "Western Mail" (a morning daily newspaper), the "Evening Express" (a daily evening paper), and the "Cardiff Times" and the "Weekly Mail" (two weekly papers). There was a stationery counter on the ground floor, and, excepting what was sold thereat, nothing but the aforesaid newspapers was sold or distributed from any part of the premises. The hereditament was registered under the Factory and Workshop Acts, and during his visits the factory inspector was not restricted by the occupiers to any one part of the hereditament. The basement had a floor area of 8,759 sq. ft., of which 7,148 sq. ft. were occupied and used for printing and stereo-casting, while 1,611 sq. ft. were used as a "returns" stores. Very heavy machinery was installed in the basement, and, for the prevention of excessive vibration and the steadying of the machines themselves, the floor had had to be specially strengthened. Among the machinery so installed were rotary printing presses, stereo-casting, and steam boilers. The ground floor had a total area of 8,612 sq. ft., divided as follows:

	Sq. ft.
For the purposes of publishing and circulating	2,000
For advertising purposes	3,157
Stationery counter	674
Contents bills, composing room	664
Accounts department	2,117

The first floor had a total area of 7,338 sq. ft., divided as follows:

	Sq. ft.
Used by reporters, sub-editors, and others	3,152
Used as Creed room	247
Used for process engraving	2,267
Board room, managers' office, &c.	1,672

The second floor had a total area of 6,104 sq. ft., divided and used as follows:

	Sq. ft.
For Linotype machines	5,308
Readers' rooms	526
Canteen	270

To carry the weight of those Linotype machines it had been necessary to specially strengthen the floor. The third floor had an area of 3,861 sq. ft., and was used as a paper reel stores. The fourth floor consisted of caretaker's rooms, with a total floor space of 439 sq. ft. The total floor space of the whole building was 35,113 sq. ft., and that was given in percentages as follows:

	per cent.
Printing, engraving, &c.	57·8
Publishing, circulating, &c.	19·2
Editorial	9·0
Management, accounts, &c.	10·8
Stationery counter and caretaker's rooms	3·2
	100·0

The bulk of the news came by post, and the telegraph wires, telephones, tapes and various other mechanical contrivances from news agencies such as Reuter and the Press Association poured into the Creed room from these outside agencies. The news from the area of South Wales was received in the same way, but the news from the city of Cardiff was collected by reporters who brought it to the editorial department of the hereditament. The greater part of this was transcribed before it reached the office. Most reviews were written outside by experts, but the leading articles were written on the premises. Local advertisements as well as those from other parts of the country were received from agencies, by post, and by telegram, and some at the advertisement counters on the ground floor. All "copy" when ready for printing was sent to the Linotype department which had a battery of over thirty Linotype machines. By these it was set up and cast in lines. Pages were then made up in formes on metal and an impression of these formes taken under great pressure in a large mangle. At this stage the photographic blocks produced in the process-engraving rooms were inserted in the formes. The matrices or cardboard impressions were sent to the stereo-casting department where the stereos were cast and put on the rotary printing presses. The newspaper was then printed, folded and cut by machinery. It was afterwards transferred from the basement printing works to the publishing department and the ground floor by means of mechanical conveyors and from there loaded into vans and lorries for the railway stations and to other customers. The newspapers were supplied to wholesalers who supplied retail agents and also to retail agents direct. A small percentage of the newspapers thus supplied were returned. Of these a large proportion was cut up and overprinted as "contents bills," and the remainder tied in bundles and shipped abroad. The part of the building into which these "returns" were brought was also used to store oils, metals, blankets, and other things used in the factory.

By far the greater intrinsic value of the premises and contents was on the side of mechanical printing and engraving processes, printing machines being the great bulk. The other operations did not take up very much in the way of expense or space. The wages and salaries paid in the mechanical departments, including machine, composing, stereo foundry, photo-block, "readers," publishing, Creed, maintenance, and store department amounted to 62·77 per cent. of the whole; and those in the non-mechanical departments, including manager's, secretary's, accountant's, advertisement, editorial, cleaners', printing office and shop departments, amounted to 37·23 per cent.

For the revenue officer it was contended that the hereditament was not an industrial hereditament within the meaning of s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, and/or that it was not such a hereditament in that it was primarily occupied and used for (i) the purposes of offices, and/or for purposes in respect of the general direction and management of newspapers, and/or for editorial or other purposes, and for the purposes of the collection and dissemination of news and advertisements and for purposes not being the purposes of a factory or workshop; (ii) the purposes of a retail shop; or (iii) the purposes of distributive wholesale business. For the Western Mail, Ltd., it was contended that the hereditament was an industrial hereditament within s. 3 (1) of the Act of 1928, and that the decision of the assessment committee to include it as such in the special list was right; that the onus of showing that the hereditament was primarily occupied and used for any of the purposes enumerated in the proviso to s. 3 (1), above cited, or for any combination of such purposes was on the appellant revenue officer and that the evidence failed to discharge that onus of proof; and that, as the appellant had not pleaded in his statement of case that the hereditament was occupied and used primarily for the purpose of distributive wholesale business, he was not entitled to do so at the hearing of the appeal. For the assessment committee it was contended that the hereditament was an industrial hereditament within the meaning of the Act.

The recorder decided in favour of the contentions of the occupiers and the assessment committee that the hereditament was an industrial hereditament and was not primarily occupied and used for the purposes of distributive wholesale business nor for any of the other purposes referred to in s. 3 (1) (f) of the Act, and that the assessment committee's decision to include it in the special list was correct.

On the appeal of the Western Mail, Ltd., it was contended that the hereditament, being an industrial hereditament within the meaning of s. 3 (1) of the Act of 1928, should have been regarded and treated as wholly industrial in the special list, and not subject to any apportionment under s. 4 of that Act; that the evidence in regard to the nature, occupation, and uses of the said hereditament with the exception of the stationery counter and the caretaker's apartments supported this contention; and that these two exceptions, taken together, formed less than 10 per cent. of the net annual value of the remainder of the hereditament within the provisions of s. 4 (2) of the Act of 1928; that on a true construction of the Factory Acts, 1901–20, the premises as a whole comprised a factory; and that it was contrary to law to divide the hereditaments into portions which were occupied and used for purely manufacturing and productive purposes as distinct from such portions as were ancillary to such occupation and user of those parts; but that for the purposes of the Act of 1928 the premises must be regarded as one entire whole. For the revenue officer it was contended that the hereditament was not an industrial hereditament within the meaning of s. 3 (1) of the Act of 1928, and/or that it was not such an industrial hereditament in that it was primarily occupied and used for one of the following purposes or for the combination of such purposes, that is to say: (i) the purposes of offices, and/or for purposes in respect of the general direction and management of newspapers, and/or for editorial or other purposes, and for the purposes of the collection and dissemination of news and advertisements, such purposes not being the purposes of a factory or workshop; (ii) the purposes of a retail shop; (iii) the purposes of distributive wholesale business. If (contrary to the revenue officer's contention that the decision of the assessment committee that the said hereditament was an industrial hereditament was wrong) the hereditament should be held to be an industrial hereditament within the meaning of the aforesaid Act, the revenue officer contended that the said apportionment was correct and fair, and in accordance with the provisions of the said Act. On behalf of the assessment committee, it was contended that the decision of the assessment committee as to apportionment was correct and fair, and in accordance with the provisions of the said Act.

The recorder decided in favour of the occupiers' contentions, and gave judgment in their favour against the revenue officer. Having held in the first appeal that the hereditament was an industrial hereditament, the recorder decided in the second appeal that the hereditament was wholly industrial, and that, by reason of the fact that the only portions of the premises occupied and used for purposes other than industrial purposes within the meaning of the Act were the stationery counter and caretaker's premises, and that those portions occupied less than 10 per cent. of the remainder of the hereditament, the assessment of the hereditament ought not to be apportioned and did not come within s. 4 of the Act for that purpose.

The questions upon which the opinion of the court was desired were: Whether on a true construction of sub-s. (1) of s. 3 of the Act of 1928, and on the facts proved and admitted at the hearing of the appeals, the recorder was entitled to hold as he did, namely: On the first appeal: That the hereditament referred to was an industrial hereditament and had been properly included as such in the special list; and on the second appeal: That in such list the said hereditament should be regarded and treated as wholly industrial, and that no apportionment under s. 4 of the Act of 1928 should be made.

The Rating and Valuation (Apportionment) Act, 1928, s. 3, provides (as amended by s. 69 of the Local Government Act, 1929):

> (1) "In this Act the expression 'industrial hereditament' means a hereditament (not being a freight-transport hereditament) occupied and used as a mine or mineral railway or, subject as hereinafter provided, as a factory or work-

shop: Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say: (a) The purposes of a dwelling-house; (b) The purposes of a retail shop; (c) The purposes of distributive wholesale business; (d) Purposes of storage; (e) The purposes of a public supply undertaking; (f) Any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop. (2) For the purposes of this Act (a) a hereditament shall not be deemed not to be occupied and used as a factory or workshop by reason only of the fact that the owner or occupier of the hereditament is the only person working therein or that no other person working therein is in his employment; and (b) any place used by the occupier for the housing or maintenance of his road vehicles or as stables shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory or workshop and used in connection therewith, be deemed not to form part of the factory or workshop, but save as aforesaid, the expressions 'factory' and 'workshop' have respectively the same meanings as in the Factory and Workshop Acts, 1901 to 1920."

By s. 4:

(1) "In every valuation list every industrial hereditament occupied and used wholly for industrial purposes shall be shown as being so occupied and used, and as respects every such hereditament occupied and used partly for industrial purposes, the net annual value thereof shall be shown, in the prescribed manner, as being apportioned between the occupation and user of the hereditament for industrial purposes, and the occupation and user thereof for other purposes. (2) For the purpose of determining in what proportions an industrial hereditament is occupied and used for industrial purposes, and for other purposes respectively, the following provisions shall have effect: (a) The hereditament shall be deemed to be occupied and used for industrial purposes except in so far as any part thereof is, under this Act or under the enactments relating to the regulation of mines, factories, and workshops, to be deemed neither to be, nor to form part of, a mine, factory, or workshop. (b) Where the net annual value of a hereditament does not exceed fifty pounds, or where the part of the net annual value of a hereditament attributable to purposes other than industrial purposes does not exceed 10 per cent. of the part thereof attributable to industrial purposes, the hereditament shall be treated as if it was occupied and used wholly for industrial purposes; and where the part of the net annual value attributable to such other purposes exceeds 10 per cent. of the part thereof attributable to industrial purposes, the part attributable to such other purposes shall not be treated as being attributable to those other purposes except in so far as it exceeds 10 per cent. of the part attributable to industrial purposes. . . ."

By the Factory and Workshop Act, 1901, s. 149:

(1) "Subject to the provisions of this section, the following expressions have in this Act the meanings hereby assigned to them—that is to say: . . . The expression 'non-textile factory' means:—(a) any works, warehouse, furnaces, mills, foundries or places named in Part I of Sched. 6 to this Act; and (b) any premises or places named in Part II of the said schedule wherein or within the close or curtilage or precincts of which steam, water or other mechanical power is used in aid of the manufacturing process carried on there; and (c) any premises wherein or within the close or curtilage or precincts of which any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, namely: (i) the making of any article or of part of any article; or (ii) the altering, repairing, ornamenting or finishing of any article; or (iii) the adapting for sale of any article, and wherein or within the close or curtilage or precincts of which steam, water or other

mechanical power is used in aid of the manufacturing process carried on there. The expression 'factory' means textile factory and non-textile factory or either of those descriptions of factories . . . (2) A part of a factory or workshop may, with the approval in writing of the chief inspector, be taken for the purposes of the Act to be a separate factory or workshop. (3) A room solely used for the purpose of sleeping therein shall not be deemed to form part of the factory or workshop for the purposes of this Act. (4) Where a place situate within the close, curtilage or precincts forming a factory or workshop is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop that place shall not be deemed to form part of the factory or workshop for the purposes of this Act, but shall, if otherwise it would be a factory or workshop, be deemed to be a separate factory or workshop and be regulated accordingly. . . ."

By Sched.: "List of Factories and Workshops.—Part I.—Non-Textile Factories—(17) 'Letterpress printing works,' that is to say, 'any premises in which the process of letterpress printing is carried on."

The Attorney-General (*Sir William Jowitt, K.C.*) and *Wilfrid Lewis*, for the revenue officer, referred to *Inland Revenue* v. *Gunn, Collie and Topping* (2); *Bailey* (*Stoke-on-Trent Revenue Officer*) v. *Potteries Electric Traction Co., Ltd.* (3); *George Outram & Co., Ltd.* v. *Inland Revenue* (1); the judgment of LORD ALVERSTONE, C.J., in *Lewis* v. *Gilbertson & Co., Ltd.* (5), (1904) 91 L.T. at p. 379; *Taylor* v. *Hickes* (6); *Hardcastle* v. *Jones* (7); and *Vines* v. *Inglis* (8).

Comyns Carr, K.C., and *William C. Howe* for the Western Mail, Ltd.

CARDIFF REVENUE OFFICER *v.* CARDIFF ASSESSMENT COMMITTEE AND DAVID DUNCAN & SONS, LTD.

This case raised the same issues as those in *Cardiff Revenue Officer* v. *Cardiff Assessment Committee and Western Mail, Ltd.* The same counsel appeared for the revenue officer and the assessment committee, and those who appeared in the preceding case for Western Mail, Ltd., appeared for David Duncan & Sons, Ltd.

WESTMINSTER REVENUE OFFICER *v.* DAILY MIRROR NEWSPAPERS, LTD.

This case also raised the first point taken in the above-mentioned cases as to whether premises for the production of a newspaper constituted an "industrial hereditament"; but there was no appeal against the apportionment.

The Attorney-General (*Sir William Jowitt, K.C.*) and *Wilfrid Lewis* for the appellant.

Henry O'Hagan for the Daily Mirror Newspapers, Ltd.

AVORY, J.—The first of these cases that was argued before us is an appeal by the Cardiff Revenue Officer against the Cardiff Assessment Committee and Western Mail, Ltd., and a cross-appeal by the Western Mail, Ltd., against Cardiff Assessment Committee and the Revenue Officer. The premises which were in question are described as "Shop, offices, printing works, and appurtenances, 69 St. Mary Street, Cardiff." Of those premises the Western Mail, Ltd., are the occupiers. That hereditament was included in the special list as an industrial hereditament, and an apportionment was made by the Cardiff Area Assessment Committee as follows: "Net annual value for industrial purposes, £990. Net annual value for non-industrial purposes, £710." The revenue officer lodged an appeal to quarter sessions against that decision to include the hereditament in the special list, and the Western Mail, Ltd., lodged an appeal to quarter sessions against the decision to apportion the assessment of the hereditament in the manner described. As the result of the appeal to quarter sessions the learned recorder held that the hereditament is an industrial hereditament within the meaning of s. 3 (1) of the Act of 1928; he also held that the hereditament was wholly industrial and that there ought not to be apportionment. The questions which are submitted to the court are whether, on a true construction of sub-s. (1) of s. 3 of the Rating and Valuation (Apportionment) Act, 1928, and on the facts proved and admitted, the learned recorder was entitled to hold that the hereditament was an industrial hereditament, and whether, if so, it should be regarded and treated as wholly industrial so that no apportionment under s. 4 of the Act should be made.

The learned Attorney-General, in arguing this case on behalf of the revenue officer, has invited the court to say that this hereditament is not an industrial hereditament within the meaning of the Act of 1928 on the ground that it is primarily occupied for a purpose which is not a factory purpose, in other words, that it comes within the proviso to s. 3 of the Act of 1928 as being primarily occupied and used for some other purpose which is not that of a factory or workshop under sub-para. (f) of that proviso; and he has invited the court to say that the primary purpose for which these premises are occupied is for the dissemination of news—in other words, that the object is to provide food for the intellectual faculties of the readers of the newspaper. The idea is picturesque, but, in my opinion, absolutely irreconcilable with what I know and what I believe to be common knowledge of the purposes for which the modern newspaper is printed and published.

In order to determine whether the hereditament is primarily occupied for purposes which are not those of a factory or workshop we have to turn to the provisions of the Factory and Workshop Act, 1901. These premises are, in fact, registered as a factory; they are expressly included in Part I of Sched. 6 to the Factory and Workshop Act, 1901, as premises in which the process of letterpress printing is carried on. Quite apart from the general provisions of the Factory Acts, they are ipso facto a factory. The Case states that the whole of the premises are registered as a factory. That is not conclusive, as has been shown by previous decisions of this court. The mere fact that the premises are specifically within the schedule to the Factory and Workshop Act, 1901, is not of itself sufficient to show that they are primarily occupied for a factory purpose: they may be primarily occupied for some other purpose than a factory purpose although they are specifically within the Act. Looking at the general provisions of the Factory and Workshop Act, 1901, in s. 149 we find that the expression "non-textile factory" means (inter alia)

> "any premises wherein or within the close, or curtilage, or precincts of which any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes—namely, (i) the making of any article, or of part of any article; or (ii) the altering, repairing, ornamenting or finishing of any article; or (iii) the adapting for sale of any article, and wherein or within the close or curtilage or precincts of which steam, water or other mechanical power is used in aid of the manufacturing process carried on there."

I cannot bring myself to doubt that the composing, printing, and publishing of a newspaper such as the one in question here comes within the precise words which I have read from s. 149. I think it is impossible to say that the composing, printing, and publishing of a newspaper are not the making of an article and the adapting for sale of an article. That that is done by way of trade or for purposes of gain I think is equally incontrovertible. For those reasons I have come to the conclusion that in this case the primary purposes for which this hereditament was occupied and used by the Western Mail, Ltd., was a factory purpose within the meaning of the Act, and that the learned recorder rightly held that it was an industrial hereditament which properly should be put in what is called the special list.

The same considerations apply in the second case that was argued before us of the *Cardiff Revenue Officer* v. *Cardiff Assessment Committee and David Duncan & Sons, Ltd.*, in which a similar conclusion was arrived at by the learned recorder on both points, namely, that the hereditament was an industrial hereditament and that there should be no apportionment. My judgment in that case is the same on that first point. As to the third case which was argued before us, *Westminster Revenue Officer* v. *Daily Mirror Newspapers, Ltd.*, in my opinion the same result follows upon that first point, namely, that it has been properly held to be an industrial hereditament. In that case no question arises of any apportionment.

Upon the second point which is raised in the cross-appeal, in the first two cases A I think, with all respect to the learned recorder, that he was wrong in holding that there should be no apportionment. I think in both of those cases there should be an apportionment under s. 4 of the Act of 1928 of those parts which are occupied and used for industrial purposes as distinguished from those which are occupied and used for other purposes. I am unable to find any better rule or principle for determining the distinction between the portions which are used for industrial B purposes and those which are used for other purposes than is to be found in the decision in the Scottish courts in *George Outram & Co., Ltd.* v. *Inland Revenue* (1). That was a case which related to newspaper offices in which the court was saved the difficulty of distinguishing the details of the portions of the premises which were to be included as industrial from those which were not, because in that case only certain portions of the premises were registered under the Factory and Workshop C Acts, and the court held that only those portions which were registered under the Factory and Workshop Acts had been properly included as being used for industrial purposes as distinct from the other portions. But it is useful to observe that those portions which were excluded in that case were devoted to the accommodation of the managerial, editorial and clerical staff, and, on the facts stated, were not used in connection with the manufacturing process carried on in the D premises in question. LORD SANDS, in his judgment, said:

> "It appears to me that what is done in the editorial part of these premises exactly answers that description,"

namely, that of a place within a factory which is used solely for some purpose other than the manufacturing process or handicraft carried on in the factory within E s. 149 (4) of the Factory and Workshop Act, 1901, and he proceeds:

> "I think that we get into exceedingly difficult and dangerous ground if, in determining what is a factory, we depart from the ordinary conception of mechanical operations conducted in a manufacturing industry and try to include other operations which are of an entirely different nature."

The difficulty of determining which portions of the premises should be deemed F to be occupied and used for industrial purposes as distinguished from the other portions arises from the provision of s. 4 (2) (a) of the Act of 1928, which provides that

> "the hereditament shall be deemed to be occupied and used for industrial purposes except in so far as any part thereof is, under this Act or under the enactments relating to the regulation of mines, factories and workshops, to be G deemed neither to be, nor to form part of, a mine, factory or workshop."

No question arises here whether under this Act any part is excluded, because it only refers to stables and garages of the Act of 1928 in s. 3 (2) (b), so when we have to inquire whether some portion of these premises is to be deemed neither to be, nor to form part of, a factory or workshop, we are thrown back upon a H consideration of s. 149 (4) of the Act of 1901, which provides that:

> "Where a place situate within the close, curtilage or precincts forming a factory or workshop is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop, that place shall not be deemed to form part of the factory or workshop for the purposes of this Act, but shall, if otherwise it would be a factory or workshop, be deemed I to be a separate factory or workshop and be regulated accordingly."

I quite appreciate the difficulty which has been pointed out by counsel for the occupiers, that the effect of holding any portion of these premises not to form part of the factory may create difficulties and embarrassment in the exercise of the duties of the factory inspector when he finds that the whole premises are registered as a factory; but none the less it appears to me that we are bound to give effect to the provisions relating to apportionment in s. 4 of the Act of 1928. As I have said, the only general principle which I think is to be used as a guide is the principle which was laid down by the learned judges in *George Outram & Co., Ltd.* v. *Inland Revenue* (1).

In that view it is necessary that both these cases should be remitted to the learned recorder to determine upon those principles which portions of the premises as they are set out in the schedule to each of the Cases should be excluded as not being used for industrial purposes. My view is that in each of these Cases the items which are included under the head of "printing, composing, engraving, &c." are all clearly used for industrial purposes, with the exception in the *Western Mail Case* of the item of 270 sq. ft. which is described as a canteen, and in the *David Duncan Case* with the exception of the items which are described as messroom and cookhouse, and the electrical store. With regard to the area devoted to "publishing and circulating," primâ facie I think in the *Western Mail Case* the item of "return store" should be excluded. The next item of 2,000 sq. ft., which is used for publishing and circulating, primâ facie should be included subject to any exception that may be found as to any portion of that part of the premises which is called publishing and circulating department. The item of 3,157 sq. ft. which is described as "advertising" should be excluded, and the items relating to editorial work, accounts, and managerial work admittedly should be excluded. In the case of *David Duncan* I have already dealt with two items which I think primâ facie should be excluded, and the item of 3,963 sq. ft. under the head of publishing and circulating should be included subject, as I have said, to the exception that may be taken there. The result is that the three appeals of the revenue officer will be dismissed on the main point and the cross-appeals will be allowed on the question of apportionment in the first two cases.

TALBOT, J.—I am of the same opinion in the case of the *Western Mail, Ltd.* We are concerned here with one single rateable hereditament occupied by this company for printing and publishing three newspapers. The way in which the hereditament is arranged, or the way in which it is used, is set out in the Case. I might call attention in passing to part of para. 5 (b) of the Case as to the stationery counter, a small matter:

> "Excepting what was sold thereat nothing but the aforesaid newspapers is sold or distributed from any part of the premises."

Most of the news printed in these newspapers comes in ready-made from outside, either written out by the reporters who are responsible for it, or through one of the well-known agencies which circulate news.

There are two questions on this appeal: (i) Is this hereditament an industrial hereditament within the meaning of the Act of 1928? (ii) If so, is its annual value to be apportioned in the valuation list under s. 4 of the Act? I think there can be no doubt that primâ facie it is an industrial hereditament. It is used and occupied solely for the purpose of producing and selling certain articles—namely, newspapers. In the building the matter is prepared and arranged, and the printing, folding, cutting, and so on, are done. The result of those operations is complete articles—namely, newspapers ready for sale. When they have been sold the company have no more to do with them. It is quite immaterial to them what those who buy the papers do with them. Those circumstances appear to me to make the premises primâ facie premises occupied and used as a factory. That is having in view the enactment in s. 3 (2) of the Act of 1928, by which we are referred to s. 149 of the Factory and Workshop Act, 1901. There is a particular exception which that subsection of the Act of 1928 enacts, and another qualification has been introduced later. But subject to that the expression "factory" has the same meaning as in the Factory and Workshop Act. By s. 149 of the Act of 1901 a factory is said to mean a textile factory and a non-textile factory, or either of them. Non-textile factories are divided into three categories, the first of which includes any works, warehouses, furnaces, mills, foundries or places named in Part I of Sched. 6, one of which is letterpress printing works—that is to say, any premises in which the process of letterpress printing is carried on; and the second of which refers to

Part II of Sched. 6. Then there is a third category which deals with other premises **A** which are factories but are not specified in either the first or the second parts of the schedule. Although these particular premises come within Part I of the schedule it is essential to look at the wording of para. (c) of s. 149 in order to see what the statute defines as the essentials of a factory.

> "(c) Any premises wherein or within the close or curtilage or precincts of **B** which any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes—namely, (i) the making of any article or of part of any article; or (ii) the altering, repairing, ornamenting, or finishing of any article; or (iii) the adapting for sale of any article, and wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there." **C**

It is the first words which indicate what the class of thing is which those who are responsible for the statute say constitutes a factory.

It was argued here by the revenue officer that these premises are primarily occupied and used for purposes which are not those of a factory. As I have said, primâ facie they appear to correspond with the description of a factory. The **D** argument, as I understand it, is put somewhat in this way, that a newspaper, which is the article or commodity produced on these premises, is quite different from—I think it is put as high as that—any other manufactured article—at any rate, quite different from the great majority of manufactured articles, inasmuch as the essence of it is the matter conveyed in the newspaper and not the printed paper which conveys it, or, which is, perhaps, the same thing in other words, the business of a **E** newspaper owner is not primarily adapting sheets for sale by printing them—the mere production of the printed page—but the publication of news. It is argued that the cases recently decided in this court. *Bailey* (*Stoke-on-Trent Revenue Officer*) v. *Potteries Electric Traction Co., Ltd.* (3) and *Moon* (*Lambeth Revenue Officer*) v. *L.C.C.* (4), are analogous, and that, inasmuch as the purpose is the publication of news or the conveying of news, it is a purpose other than the purposes **F** of a factory or workshop, and, therefore, prevents this place from being an industrial hereditament.

I think that this argument really involves a confusion in this sense. The distinction made in those cases was between the way in which the premises were used and occupied, namely, as a factory, and the purpose for which the occupier intended to use articles made there, and which, therefore, constituted the purposes **G** for which the premises were so used and occupied by him. It will be noticed that all the purposes which are mentioned in the proviso to s. 3 (1) of the Act of 1928, which introduces the qualification relied on, are purposes for which the occupier himself wants and makes the thing manufactured. The specific purposes enumerated, (a), (b), (c), (d), and (e), all fall within that description. Then the proviso continues: **H**

> "(f) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop."

In order to come within the proviso it is not necessary that they should be similar purposes, but, in my opinion, they must be purposes for which the occupier desires to use the article which he makes.

In the present case, when the occupier has sold the newspaper, he has no more **I** to do with it. He does not use it at all. By the mere sale he has accomplished his object; at any rate he has done all that he can do to accomplish his object. The analogy would be, taking the example of the *Stoke-on-Trent Case* (3), if the company, instead of running omnibuses, had sold omnibuses. It could not then be disputed, and, indeed, it was admitted, that the factory which was in question in that case would have been entitled to the benefit of this Act. Of course the use to which he hopes the buyer will put the newspaper when he has bought it is, in one sense, the object of the newspaper proprietor's operation, but he has no control

A over that use; and, in my opinion, it is not the purpose for which he occupies or uses the hereditament within the meaning of the proviso in s. 3 of the Act of 1928. I think if that sort of consideration were admissible it would lead to inquiries which would be impossible, and to distinctions which would be unreasonable. You would have to inquire—and I think that illustrates the fallacy of the argument—into the motive with which newspaper proprietors carry on their business. No B doubt, there are newspaper proprietors whose principal object, the object with which they go into the business, is the promotion of a particular opinion, whether political or social or religious, or any other. Others merely wish to make money like any other manufacturer. They print and publish what they think will sell best, and without any regard to the effect on either the minds or the morals of their readers. Others, probably the majority, carry on their business for motives C which are compounded in varying proportions of those two. But it seems to me that that is a question of motive, which is a totally different question from the question of purpose, within the meaning of this statute. Once you get the premises used as a factory, and not used to produce things wanted by the occupier to be used for other than factory purposes, it is immaterial what the motive is with which the occupier carries on the factory, and immaterial to what use the buyer D puts the product of the factory, or why he buys it. Then it was said that the mere printing and so on, the mechanical manual part of the business, is only part of the manufacture, and that the other and vital part is the composition and arrangement of what is to be printed. Of course that is true, but the result is the manufactured article which the factory turns out and the customer buys. For my own part, I cannot see how that makes the premises any the less used as a factory. It merely E shows that this particular manufacture is conducted in a particular way; and it remains true that the result of it all is the production of an article for sale.

The question remains as to the apportionment. The learned recorder has held that this hereditament was occupied and used wholly for industrial purposes, subject to the margin of less than 10 per cent. for other purposes which is allowed by the Act. He has, consequently, not apportioned the value of the hereditament at F all. The legislation on this point is somewhat involved, and it obliges anyone who wishes to arrive at a conclusion as to its meaning to follow it out through several stages. You have, first of all, to see whether the place is an industrial hereditament that is used and occupied as a factory and not primarily used for purposes other than those of a factory. Then, when you are dealing with an apportionment, you have to look at the fourth section, which deals only with industrial heredita-G ments. Section 4 obviously contemplates that some of the industrial hereditaments will be wholly, and some only partially, occupied and used for industrial purposes. That is the new phrase introduced by this section—new, I mean, as far as our attention has been called to anything in the wording of the statute. The legislature proceeds to explain what is meant by these words: and it does that by sub-s. (2).

> "For the purpose of determining in what proportions an industrial heredita-
> H ment is occupied and used for industrial purposes and for other purposes respectively"

—of course that is confined to the hereditaments which are used partly for industrial purposes and partly for other purposes—

> "the following provisions shall have effect: (a) The hereditament shall be
> I deemed to be occupied and used for industrial purposes except in so far as any part thereof is, under this Act or under the enactments relating to the regulation of mines, factories, and workshops, to be deemed neither to be, nor to form part of, a mine, factory, or workshop . . ."

I do not know that the presumption is very important; but s. 4 (2) (a) means, I think, that, given that you have to assume that this is an industrial hereditament, primâ facie you have to assume that every part of it is of that character. Of course we are dealing with a case here where some parts are not, but I mean as to any single part you start with the assumption that it is occupied and used for industrial purposes, except in so far as any part thereof is, under the legislation, to be deemed not to be part of a factory. That refers, first of all, to s. 3 (2) (b) of the Act of 1928, which deals with garages and stables, with which we are not concerned here. Then it refers to sub-ss. (3) and (4)—possibly to others—but, at any rate, to sub-ss. (3) and (4) of s. 149 of the Factory and Workshop Act, 1901. We are here concerned with sub-s. 4. There is no doubt we are necessarily somewhat embarrassed in dealing with this matter (though, perhaps, in another way assisted) by the fact that the Factory and Workshop Act, 1901, is dealing with matters wholly different from those contemplated by the Act of 1928, or, at any rate, is dealing with them from a wholly different point of view from that from which the Act which we are construing here is dealing with them. The Factory Acts were, putting it shortly, passed in order to secure that the conditions of those who are employed in factories and workshops should be as favourable as possible for their health and comfort. Here, of course, we are dealing with a different matter. But none the less this question, whether any part of an industrial hereditament is or is not used for industrial purposes, is governed, under the Act of 1928, by whether under the Factory Acts the part is or is not to be deemed to be part of the factory. Section 149 (4) of the Act of 1901 provides:

> "Where a place situate within the close, curtilage or precincts forming a factory or workshop is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop, that place shall not be deemed to form part of the factory or workshop for the purposes of this Act . . ."

Then there is a provision about a separate factory which itself fulfils the description of a factory. The language there is special, and it is to be noted that it does not say "solely used for some purpose not connected with a factory," or "other than those of a factory," but it brings in those words "process or handicraft"—some purpose other than the manufacturing process or handicraft carried on in the factory. Something done in the factory is the test, and not connection with the general purposes; and it differentiates I think, according to the natural construction of the words, between the manufacturing process carried on in the factory and everything in the way of mental or clerical work. However essential that may be, it is no part of the actual mechanical manual process which has physically created the thing that is sold. That is what I think is meant by the words of LORD SANDS, which have been read, in *George Outram & Co., Ltd.* v. *Inland Revenue* (1):

> "I think that we get into exceedingly difficult and dangerous ground if in determining what is a factory we depart from the ordinary conception of mechanical operations conducted in a manufacturing industry and try to include other operations which are of an entirely different nature."

I think, as was said in argument, that, in construing this definition, one has to bear in mind that it must be given the same meaning as in the Factory Act itself, but in its application to the Act of 1928, one must consider the object with which the Factory Acts were enacted and in connection with which this definition was enacted. I think it is clear, when one considers that, that there is nothing unreasonable—on the contrary it is what one would expect—that one would not include in the Factory Acts cases in which they would be ordinarily speaking, broadly speaking, not wanted—cases in which the legislature might well consider that no legislation by law was needed for such things as ventilation, cubic space, hours, and so on. It is quite true, of course, that, if one excludes, for instance, the clerical work which is done at a factory, one may be subjecting those who work as clerks or typists to insanitary and uncomfortable conditions. But that equally applies to the people who are doing the same work in hundreds and thousands of places which the legislature has not thought fit to interfere with in this way. I think, looking at the object of the Factory Acts and limiting the definition in the way which appears to me to be the natural meaning of the words, it fits in with its policy. If it were not limited in some way of that kind, in the great majority of factories probably there would be no possibility of apportionment at all under the Act of 1928, because everything in the factory—at any rate, in a great number of cases—is connected with and exists for the purposes of the manufacture, especially if one takes into consideration the 10 per cent. margin. Forming the best opinion I can of the construction of this Act, I think that Parliament, in conferring this boon on industry, has limited it to the part of the premises used directly for the actual industrial process, and I think in coming to that conclusion we have the direct authority of the judgment of the court in Scotland in *Outram's Case* (1). I agree, therefore, that the appeal must be dismissed, as to the first point, and allowed as to this point.

I do not wish to add anything to what has been already said about the details of the apportionment, but I would add one thing, with the consent of AVORY, J. I may be wrong, but I think that what he said might not have been wholly unambiguous. I have his authority for saying this, and it is my own view. It is in regard to the messroom and cookhouse; I do not think he intended to say that this necessarily came out of the industrial part of the building. That may depend upon the persons for whose accommodation they are provided and used, according to whether they relate to part of the industrial area, the factory proper, if I may use the term, or to the clerical, editorial and similar part of the hereditament.

FINLAY, J.—I am of the same opinion. With regard to the first point, it was argued on the part of the Crown that that depends upon the proper construction of s. 3 of the Act of 1928 as applied to the facts of the case. This question is whether those premises are an industrial hereditament, and that in turn depends upon whether they come within the proviso that the expression "industrial hereditament" does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for certain specific purposes, among those being "any other purposes, whether or not similar to any of the foregoing, which are not purposes of a factory or workshop."

The question on that part of the case depends on whether this place is one where manual labour is exercised by way of trade or for purposes of gain, in or incidental to the purpose of the making of any article or part of any article. In regard to that it seems to me clear, in spite of the most able argument to the contrary, that this place is used for the purposes of sale of an article, namely, a newspaper. I cannot think that it makes any difference that intellectual effort, no doubt of very varying quality, goes to the making of that article; none the less an article is made, and is made there for sale. Still less does it seem to me that one can possibly attempt to go into questions of motive. One cannot consider what is the motive (no doubt, they are mixed motives) with which any person chooses to make and to sell a newspaper; nor can one consider why people buy newspapers or what they do with them; and for myself, I am unable to follow the argument by which it is sought to show that because the life of the newspaper as a newspaper was ephemeral, because it is bought for the purpose of looking at the news, it may be only for a very few hours, that, therefore, that shows that the newspaper could not be regarded as an article made, and made for sale. On that part of the case I do not think that there is any real difficulty, and I entirely concur in the view taken by my brothers.

No doubt more difficulty arises on the second part of the case, that relating to apportionment. The difficulty arises partly from the somewhat confused state of this legislation and partly from the difficulty of applying a scheme of legislation of this sort to the varying processes which go to make up a business such as that with which we have to deal. The question depends on s. 4 of the Act of 1928, and s. 4 makes perfectly clear what, apart from that section, might not have been very obvious—that one may have an industrial hereditament within the definition of s. 3 which, nevertheless, may, as to a large part of it, not be used for industrial purposes at all. That, of course, lies at the root of the scheme of the section. Where one finds an industrial hereditament, certain parts of which are used for purposes other than industrial purposes, then, subject to a provision with regard to 10 per cent., with which I need not deal, an apportionment becomes necessary. I think that the law is correctly laid down by the Scottish court in *George Outram & Co., Ltd.* v. *Inland Revenue* (1), which was a case very similar to the present one. It related to a well-known paper in Scotland, the "Glasgow Herald," as this case relates to a well-known paper in South Wales. The general processes pursued in the manufacture of papers of this sort must inevitably be very similar. In the Scottish case the court had an advantage which has been denied to us, because certain parts of the premises there had, as it was expressly found, been excluded from registration under the Factory and Workshop Acts. It is worth noting, because it may afford some guidance to those who have to consider these matters from a practical point of view, that one department in the "Glasgow Herald" office, called the despatch department, was not excluded from registration under the Factory and Workshop Acts, with the result that the Lords of Session accepted the view that the despatch department was a part of the industrial hereditament and was not excepted from it. That is a matter of detail, and I mention it only because it may possibly afford some assistance to those who have to grapple with this matter from the point of view of detail. The principle appears to be laid down in all the judgments, but, perhaps, most clearly in the passage in the judgment of Lord Sands from which my brother Avory quoted. Accepting, as we do, that decision, and desiring to follow it, it only remains to apply it to the facts of this case. With regard to the general principle, the general line to be drawn is clear enough. It is the line between the manufacturing process, on the one hand, and other things not part of the manufacturing processes, on the other. Some of the processes seem to be clear enough; the editorial department obviously falls outside the manufacturing process. With regard to the questions which are doubtful, I do not desire to add anything to what has been said. I concur exactly with the view that has been expressed by my brother Avory, amplified on one point as it was by my brother Talbot. I, therefore, concur entirely in their judgments.

Orders accordingly.

Solicitors: *Treasury Solicitor*; *Ingledew, Sons & Brown*, for *Ingledew & Sons*, Cardiff; *Theodore Goddard & Co.*; *Nicholson, Graham & Jones*.

[*Reported by* C. G. Moran, Esq., *Barrister-at-Law*.]

Re LOPES, BENCE, JONES *v.* ZOOLOGICAL SOCIETY OF LONDON

[CHANCERY DIVISION (Farwell, J.), July 17, 1930]

[Reported [1931] 2 Ch. 130; 100 L.J.Ch. 295; 146 L.T. 8; 46 T.L.R. 577; 74 Sol. Jo. 581]

Charity—Education—Zoology and animal physiology—Gift to Zoological Society for upkeep and improvement of gardens.

A testator bequeathed his residuary estate to the Zoological Society of London to be applied for the upkeep and improvement of the gardens and for the objects of the society. By the charter of the society its objects were "the advancement of zoology and animal physiology, and the introduction of new and curious subjects of the animal kingdom." At the Zoological Gardens the society catered for the refreshment of visitors, and received payment for riding by children on elephants and camels and for the sale of guides, and provided bands.

Held: taking a broad view of the objects of the society, they were charitable on the ground that they were for the advancement of education, and the gift for the upkeep and improvement of the gardens enabled the society effectively to carry out that charitable purpose; this conclusion was not affected by the fact that refreshment was provided for visitors and riding on animals provided for children who would thus be attracted to the gardens where their knowledge of animals would be widened, these things being done as part of the educational purpose of the society; and, therefore, the bequest was a good charitable bequest.

Notes. Referred to: *Royal College of Surgeons of England* v. *National Provincial Bank, Ltd.*, [1952] 1 All E.R. 984.

As to charitable purposes, see 4 HALSBURY'S LAWS (3rd Edn.) 213 et seq.; and for cases see 8 DIGEST (Repl.) 312 et seq.

Originating Summons issued by the trustees of the will of George de Arroyave Lopes for the decision (inter alia) whether a bequest to the Zoological Society of London was a good charitable bequest.

The testator, by his will dated June 14, 1915, directed that the income of his residuary estate should be paid to his wife for life, and that after her death his trustees should stand possessed of the capital and income of his residuary estate upon trust to pay and transfer the same to the Zoological Society of London. The testator then directed that such residue should be invested by the society, and be known as the "de Arroyave Fund," and that the income thereof should be applied for the upkeep and improvement of the Zoological Gardens, and for the objects of the society. He also directed that the society should hang in their board room the picture of his mother—which he had bequeathed to the society—and should keep in good repair the de Arroyave grave in Highgate Cemetery and the grave in which the testator should be buried, and that, if the society should cease so to hang the picture, or if either of the graves should be allowed to go out of repair, the residuary trust fund should be given to St. Bartholomew's Hospital, to be employed by them as a fund for medical and clinical research. The testator died on Sept. 1, 1929, his wife having predeceased him on Feb. 14, 1924, and the will was proved on Jan. 17, 1930. The residue amounted to about £79,000.

The Zoological Society of London was incorporated by Royal Charter on March 27, 1829, and its objects, as stated in the charter, were "the advancement of zoology and animal physiology, and the introduction of new and curious subjects of the animal kingdom." The society was, by the charter, empowered to make byelaws not repugnant to the charter or to the laws of the realm. Byelaws were duly made, and among them these:

Chapter 1, s. 12:

> "No dividend, gift, division or bonus shall be made by the society unto or between any of its members."

Chapter 14, s. 1:

> "An account of the business transacted at the meetings of the society for scientific purposes and the communications made to those meetings shall be published under the title: 'Proceedings of the Scientific Meetings of the Zoological Society of London.' "

The society opened, and had carried on, the Zoological Gardens in the Regent's Park and acquired an estate at Whipsnade, in Bedfordshire, which had been opened to the public, to keep animals under conditions more nearly approximating to the conditions in which they lived in a natural state.

For this purpose they obtained the Zoological Society of London Act, 1918. The preamble of this Act stated that the society was incorporated "for the advancement of zoology and animal physiology, and the introduction of new and curious subjects of the animal kingdom," and that the society had interpreted this as including the instruction of the public by the exhibition of animals under the best conditions at their disposal; that, the present Zoological Gardens being inadequate, they had purchased an estate to be developed and used as a zoological park under more favourable conditions for the breeding and exercise of animals, and as a sanctuary for British fauna and flora, and for other purposes of the society; that they intended to grant the public facilities for admission to the estate when developed and equipped; and that for the advancement of the society's objects it was expedient that the powers in the Act should be granted them. By s. 18 (1) the society were empowered (inter alia) to make provision for conveying members of the public to the estate, with a right to charge for their conveyance. By sub-s. (2) the society were empowered to arrange for the provision and sale of refreshments of all kinds at the Whipsnade estate and at the Regent's Park Gardens, or either of them, on Sundays as well as other days, and it was provided that in respect of the Regent's Park Gardens the society should be deemed always to have had the powers of sub-s. (2). The income of the society was derived from the subscriptions of Fellows, gifts and legacies, voluntary subscriptions and donations, and from the charges for admission of the public, rides on animals, and the sale of refreshments. The society maintained for the purpose of its scientific work a laboratory, where research work in anatomy and pathology was carried on under the direction of a full-time pathologist, and an anatomical Fellow, and research into aquatic life was carried on in the laboratory of the aquarium by an aquarium research Fellow. The society had also collected and maintained a library of scientific books and periodicals relating to zoology, which was reputed to be the most complete in the world, and they had published continuously annual volumes of their scientific proceedings.

The trustees of the will issued this summons to determine whether they ought to pay and transfer the residue to the society as a charitable bequest, and whether with or without the settlement of a scheme, or to whom they ought to pay and transfer the same, and whether the gift over in certain events to St. Bartholomew's Hospital was valid.

R. F. Roxburgh for the trustees.

Morton, K.C., and *A. Rose* for the next-of-kin.

Lionel Cohen, K.C., and *Droop* for the society.

J. A. Reid for St. Bartholomew's Hospital.

Stafford Crossman for the Attorney-General.

FARWELL, J. [after stating the facts, continued:] The next-of-kin says that the fund is given to the society for two objects, namely, (i) the upkeep and improvement of the gardens, and (ii) the objects of the society. He points out that the charter contains two objects, first: "The advancement of zoology and animal physiology," and secondly: "The introduction of new and curious subjects of the animal kingdom." He does not dispute that the first object may have a true educational benefit and so be charitable, but he rightly says that if the fund can lawfully be applied for a non-charitable purpose the whole gift is not charitable, and he says that the upkeep and improvement of the gardens is not a charitable purpose. He also says that the society is not limited to introducing new and curious animals for the purpose of public education, but may introduce them to provide amusement for which the society is paid, and that, on the whole, having regard to the facts that the society is keeping restaurants for visitors, keeping the gardens open on certain weekdays to a late hour and providing evening meals, providing animals for children to ride on, and doing non-charitable things of that kind, the gift is not charitable, because it might lawfully be expended on non-charitable objects.

I feel the force of those arguments, but I have first to consider what are the main objects of the society, which it is bound to carry out under the terms of the charter. Its first object is "the advancement of zoology and animal physiology." That is clearly educational—for the advancement of scientific knowledge—and, therefore, charitable. The second object is "the introduction of new and curious subjects of the animal kingdom." That object again, having regard to the form of the charter, is charitable. In the first place, although the copulative "and" is used, and, no doubt, imports two objects, nevertheless I think that the second object must be read in connection with the first, which may to some extent necessitate it. In the second place, I think that the introduction of non-indigenous animals, exhibited under proper conditions, is distinctly an educational object. It must widen the mind and outlook of everyone to see in the flesh animals, now becoming scarce in many parts of the world, which otherwise people might not see at all. Taking a broad view of the society's objects, I am satisfied that they are charitable, on the ground that they are for the advancement of education. If that be so, the gift for the upkeep and improvement of the gardens is to enable the society to carry out those charitable objects properly and effectively.

The second object clearly does not contemplate the introduction of new and curious animals to be let loose in this country. They must be kept in proper places and properly looked after. For that purpose there must be Zoological Gardens which must be properly kept up and improved. The gift for that purpose must, therefore, be read as a gift for the upkeep and improvement of the Zoological Gardens for the purpose of carrying out the objects stated in the society's charter. Those objects being charitable, the upkeep and improvement of Zoological Gardens necessary thereto must also be charitable. The next-of-kin, however, says that the society has built refreshment rooms, caters for the public, and provides amusement by way of riding on animals, and that that sort of thing is not charitable. But I must look at the real objects of the society, and see whether those objects are being carried out. The real object is educational, and, therefore, charitable, and none the less so because it is necessary to provide food for persons who attend (inter alia) for educational purposes, and this food must be paid for. It may also be necessary, in order to attract young people to be educated, that some form of amusement, such as riding on animals, should be provided. A ride on an elephant may be educational; at any rate, it brings the reality of the elephant and its uses to the child's mind in lieu of leaving him to mere book-learning. It widens his mind, and in that broad sense is educational. At any rate, it would be wrong to say that this society is not a charitable society merely because its money is applied to objects which in themselves may not be charitable, so long as these things are done, and can only be done, by the society as part of the whole educational purpose for which it exists. The whole fund must be expended for educational objects and what is necessary thereto. The next-of-kin suggested that the society could lawfully keep one very small portion of its gardens for a laboratory, and turn the rest into a circus. But that would not be educational or permissible within the terms of the charter. In these circumstances, looking at the question broadly, I am satisfied that the gift is a good charitable gift. I also think that the gift over to St. Bartholomew's Hospital is good.

[A scheme was agreed upon and accepted by the Attorney-General, whereby it was ordered that the trustees of the will should transfer the residuary fund to the Official Trustees of Charitable Funds on trust to pay the income to the society, who should undertake to apply it for the upkeep and improvement of the Zoological Gardens, and for the objects of the society, and to perform the conditions as to the picture and graves, and from time to time, but not more than twice a year, to admit persons authorised on behalf of St. Bartholomew's Hospital to the society's board room for the purpose of ascertaining that the picture remained hung there. Liberty was reserved for the governors of St. Bartholomew's Hospital to apply for a new scheme in the event of a wilful breach of the conditions as to the picture or graves.]

Solicitors: *Corbould, Rigby & Co.*; *Taylor & Humbert*; *Stow, Preston & Lyttelton*; *Wilde, Wigston & Sapte*; *Treasury Solicitor.*

[*Reported by* E. KNOWLES CORRIE, ESQ., *Barrister-at-Law.*]

GRANT AND OTHERS *v.* EDMONDSON AND OTHERS

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), July 4, 7, 8, 9, 29, 1930]

[Reported [1931] 1 Ch. 1; 100 L.J.Ch. 1; 143 L.T. 749]

Rentcharge—Covenant to pay—Covenant not running with rentcharge—Action on covenant by assignee of rentcharge—Real Property Act, 1845 (8 & 9 *Vict.*, c. 106), s. 5.

The benefit of a covenant by the grantor of a rentcharge for the payment of the rentcharge does not run with the rentcharge so as to enable assignees of the rentcharge to maintain an action on the covenant against the legal personal representatives of the grantor, but must be treated as a covenant in gross: observation of LORD HOLT, C.J., in *Brewster* v. *Kidgill* (*or Kitchin*) (1) (1697), 12 Mod. Rep. 166, criticised; *Milnes* v. *Branch* (2) (1816), 5 M. & S. 411, followed. This long-established rule was not affected by the provisions of s. 5 of the Real Property Act, 1845, which referred only to covenants which ran with the hereditament apart from the provisions of the section: *Forster* v. *Elvet Colliery Co., Ltd.* (3), [1909] A.C. 98, followed.

Notes. Section 5 of the Real Property Act, 1845, has been replaced by s. 56 of the Law of Property Act, 1925.

Considered: *Shayler* v. *Woolf*, [1946] 1 All E.R. 464. Referred to: *Strondale and Ball, Ltd.* v. *Burden*, [1952] 1 All E.R. 59.

As to an action on a covenant to pay a rentcharge, see 28 HALSBURY'S LAWS (2nd Edn.) 241–242; and for cases see 39 DIGEST 201–202. For Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427.

Cases referred to:

(1) *Brewster* v. *Kidgill* (*or Kitchin*) (1697), 1 Ld. Raym. 317; Carth. 438; Comb. 424, 466; 5 Mod. Rep. 368; 12 Mod. Rep. 166; 1 Salk. 198; 3 Salk. 340; 91 E.R. 1108; 38 Digest 201, *906*.

(2) *Milnes* v. *Branch* (1816), 5 M. & S. 411; 105 E.R. 1101; 31 Digest (Repl.) 240, *3745*.

(3) *Forster* v. *Elvet Colliery Co., Ltd.*, [1908] 1 K.B. 629; 77 L.J.K.B. 521; 98 L.T. 739; 24 T.L.R. 265, C.A.; affirmed sub nom. *Dyson* v. *Forster*, [1909]

A.C. 98; 78 L.J.K.B. 246; 99 L.T. 942; 25 T.L.R. 166; sub nom. *Forster* v. *Dyson*, 53 Sol. Jo. 149, H.L.; 34 Digest 686, *799*.

(4) *Austerberry* v. *Oldham Corpn.* (1885), 29 Ch.D. 750; 55 L.J.Ch. 633; 53 L.T. 543; 49 J.P. 532; 33 W.R. 807; 1 T.L.R. 473, C.A.; 40 Digest (Repl.) 331, *2717*.

(5) *Bally* v. *Wells* (1769), Wilm. 341; 3 Wils. 25; 97 E.R. 130; 31 Digest (Repl.) 154, *2919*.

(6) *Gwyn* v. *Neath Canal Co.* (1868), L.R. 3 Exch. 209; 37 L.J.Ex. 122; 18 L.T. 688; 16 W.R. 1209; 17 Digest (Repl.) 356, *1616*.

(7) *Martyn* v. *Williams* (1857), 1 H. & N. 817; 26 L.J.Ex. 117; 28 L.T.O.S. 321; 5 W.R. 351; 156 E.R. 1430; 31 Digest (Repl.) 340, *4732*.

(8) *Randall* v. *Rigby* (1838), 4 M. & W. 130; 6 Dowl. 650; 1 Horn & H. 231; 7 L.J.Ex. 240; 150 E.R. 1372; 39 Digest 201, *907*.

(9) *Thomas* v. *Sylvester* (1873), L.R. 8 Q.B. 368; 42 L.J.Q.B. 237; 29 L.T. 290; 21 W.R. 912; 39 Digest 205, *948*.

(10) *Butler* v. *Archer* (1860), 12 I.C.L.R. 104; 12 Ir. Jur. 276; 39 Digest 201, *906ii*.

(11) *Haywood* v. *Brunswick Building Society* (1881), 8 Q.B.D. 403; 51 L.J.Q.B. 73; 45 L.T. 699; 46 J.P. 356; 30 W.R. 299, C.A.; 40 Digest (Repl.) 331, *2714*.

(12) *Spencer's Case* (1583), 5 Co. Rep. 16a; 77 E.R. 72; 31 Digest (Repl.) 153, *2907*.

(13) *Canham* v. *Rust* (1818), 2 Moore, C.P. 164; 8 Taunt. 227; 129 E.R. 370; 31 Digest (Repl.) 151, *2897*.

(14) *Kennedy* v. *Stewart* (1836), 4 Ir.L.Rec.N.S. 160; 7 I.L.R. 421, n.; 39 Digest 201, *906i*.

(15) *Pakenham* v. *Prior of* —— (1368), Y.B. 42 Edw. 3, fo. 3. pl. 14; sub nom. *Pakenham's Case*, Co. Litt, 385a; 40 Digest (Repl.) 339, *2765*.

(16) *Bruce* v. *Lord Ponsonby* (1844), 7 I.L.R. 414; 21 Digest 263, *c*.

(17) *Earl of Egremont* v. *Keene* (1837), 2 Jo. Ex. Ir. 307; 33 Digest 530, 72*ii*.

(18) *Tulk* v. *Moxhay* (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143, L.C.; 40 Digest (Repl.) 342, *2774*.

(19) *Cooke* v. *Chilcott* (1876), 3 Ch.D. 694; 34 L.T. 207; 40 Digest (Repl.) 330, *2712*.

(20) *Kelsey* v. *Dodd* (1881), 52 L.J.Ch. 34; 40 Digest (Repl.) 357, *2866*.

Appeal from an order of CLAUSON, J.

On April 26, 1867, Thomas, second Earl of Wilton, being tenant for life of the Wilton estates, which included a plot of land at Crumpsal in the county of Lancaster, in exercise of certain powers vested in him under the Earl of Wilton's Estate Act, 1837, conveyed the said plot of land to John Beeby Edmondson in fee simple, and Edmondson by the same deed granted out of the plot to

> "the said earl and the person or persons who would for the time being have been entitled to the receipt of the rents and profits of the said plot if [the conveyance now in statement] had not been made"

yearly and for every year for ever thereafter, the rent of £142 7s. 3d. The conveyance contained powers of distress and entry in the usual form, and the following covenant:

> "And the said grantee doth hereby for himself his heirs executors administrators and assigns covenant with the said earl his heirs and assigns and other the person or persons who would for the time being have been entitled as aforesaid that he the grantee his heirs and assigns shall pay or cause to be paid the yearly rent hereby reserved to the person or persons entitled thereto under the reservation hereinbefore contained."

Thomas, second Earl of Wilton, died in 1882, and under and by virtue of various deaths and two successive disentailing deeds and resettlements, the Wilton estates

BIBL. LONDIN UNIV.

passed ultimately under the will of the sixth earl, who died in 1927, to the seventh earl of Wilton, the present tenant in tail who was born in the year 1921, and they are now vested in the plaintiffs in this action, as statutory owners, the plaintiffs being in fact representatives of the sixth earl under a probate of his will limited to the settled estates. John Beeby Edmondson died in or before 1887. The defendant, Thomas John Edmondson, was one of his executors, and it was admitted at the Bar that the three defendant trustees had part of the estate of John Beeby Edmondson in their hands. In 1920 the trustees of John Beeby Edmondson sold the plot in question to Arnold Williams, who became bankrupt in 1927, and by a vesting order of the court in bankruptcy the plot became vested in the plaintiffs in fee simple. The rentcharge was paid down to Dec. 25, 1927, but since that date the plaintiffs had not exercised their right of distress and entry. They, therefore, brought this action against the defendants for £231, being arrears of rentcharge from Dec. 25, 1927, to Aug. 8, 1929, namely, the date when the property became vested in the plaintiffs. The questions for determination were (i) whether the deed of April, 1867, effectually limited the rentcharge in perpetuity, and (ii) whether the plaintiffs as successors in title to the grantee of the rentcharge could sue the defendants on their testator's covenant; i.e., whether the benefit of the covenant ran with the rentcharge at law.

By the Law of Property Act, 1925, s. 56:

> "(1) A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument. (2) A deed between parties, to effect its objects, has the effect of an indenture though not indented or expressed to be an indenture."

Clauson, J., held that the rentcharge was well created in fee simple, but the benefit of a covenant to pay a rentcharge did not run with the rentcharge, and so the plaintiffs, as successors in title to the grantees of the rentcharge, could not sue the defendants on their testator's covenant to pay the rentcharge. Section 5 of the Real Property Act, 1845 (now replaced by s. 56 of the Law of Property Act, 1925) referred only to covenants which ran with, inter alia, the rentcharge, and so carried the matter no further. Accordingly, the action was dismissed with costs. The plaintiffs appealed.

Cleveland Stevens, K.C., and *Edgerley*, for the plaintiffs, referred to *Brewster* v. *Kidgill* (*or Kitchin*) (1), *Austerberry* v. *Oldham Corpn.* (4), *Bally* v. *Wells* (5), *Gwyn* v. *Neath Canal Co.* (6), *Forster* v. *Elvet Colliery Co., Ltd.* (3), *Dyson* v. *Forster* (3), *Martyn* v. *Williams* (7), and *Milnes* v. *Branch* (2).

Sir Thomas Hughes, K.C., and *Beebee*, for the defendants, referred to *Brewster* v. *Kidgill* (*or Kitchin*) (1), *Milnes* v. *Branch* (2), *Randall* v. *Rigby* (8), *Thomas* v. *Sylvester* (9), *Butler* v. *Archer* (10), *Haywood* v. *Brunswick Building Society* (11), *Austerberry* v. *Oldham Corpn.* (4), *Kelsey* v. *Dodd* (20), and *Forster* v. *Elvet Colliery Co., Ltd.* (3).

Cur. adv. vult.

July 29. The following judgments were read.

LORD HANWORTH, M.R.—This is an appeal from an order made by Clauson, J., dismissing the action, which was brought to recover the arrears of a perpetual yearly rentcharge of the amount of £142 7s. 3d. payable under an indenture, dated April 26, 1867, made between Thomas, second Earl of Wilton, and John Beeby Edmondson. The fee simple of the plot of land out of which the rentcharge issues became re-vested in the plaintiffs, who are the statutory owners of the Wilton settled estates including the above rentcharge. Their claim is to enforce payment of arrears of the rentcharge unpaid since Dec. 25, 1927. The plaintiffs had not exercised their right of distress and entry at the time when it was available to them, and, therefore, they have no practicable means of recovering these arrears unless

A they can succeed in recovering them from J. B. Edmondson's estate by virtue of his covenant in the deed of April 26, 1867, whereby John Beeby Edmondson covenanted for himself his executors administrators and assigns to pay the said rentcharge by half-yearly instalments on June 24 and Dec. 25 in each year. The defendant, Thomas John Edmondson, is the sole surviving executor, and he and the other defendants are the trustees of the will of the grantor of the rentcharge B John Beeby Edmondson, whose will was proved on May 4, 1887. It is admitted that the defendants have in their hands monies which still form part of the estate of the grantor. The defendants deny liability to the plaintiffs on the ground that the covenant relied upon was a covenant in gross with Thomas, Earl of Wilton personally and did not run with the rentcharge—an incorporeal hereditament—so as to be enforceable by the plaintiffs or other persons who subsequently to the death C of the second Earl of Wilton became entitled to the said rentcharge whether by assignment or otherwise. There was another point argued before CLAUSON, J., namely, whether the deed of April 26, 1867, effectually limited a perpetual rentcharge in fee simple. This point was not insisted upon before this court. It is sufficient to say that I agree with the conclusion upon it reached by CLAUSON, J.

I turn, therefore, to the main point relied upon by the plaintiffs, namely, that D the plaintiffs as successors in title to the grantee of the rentcharge can sue the defendants on their testator's covenant to pay. As pointed out by CLAUSON, J., in his judgment there is a concurrence of text writers that the benefit of a covenant for the payment of the rentcharge cannot run with a rentcharge at law, but must be treated as a covenant in gross. Incidentally, I may mention that the note that he refers to in WILLIAMS' SAUNDERS (5th Edn.), p. 241, and 6th Edn. at p. 241a, E has the authority of the joint editors of that edition, one of whom was PATTESON, J., and the other SIR EDWARD VAUGHAN WILLIAMS, who subsequently took his place upon the bench. The note points out that the statute 32 Henry 8, c. 34, as was decided in *Spencer's Case* (12) (1 Smith L.C. (10th Edn.) 52), only applies to covenants which run with the land and, of course, to the covenants which are expressly named in it whereby a lessee of, e.g., tithes, is enabled to enforce a F covenant to pay them. The note proceeds:

> "Therefore the assignee of a rentcharge is not within the statute; both because he has not the reversion, and because a covenant cannot run with a rent"

—for authority *Milnes* v. *Branch* (2) is cited. That case, decided by the Court of King's Bench in 1816, fully supports the statement above quoted. LORD ELLENBOROUGH says that putting aside a dictum of LORD HOLT, to which I will refer later: G

> "I do not find any authority to warrant the position that this covenant runs with the rent. I do not see how the analogy, as it regards covenants which run with the land, is to be applied, unless it be shown that this is land; it might as well be applied to any covenant respecting a matter merely personal."

BAYLEY, J., was of the same opinion on this point, and added that the covenant was H a covenant in gross; and ABBOTT, J., concurred. The covenant in that case sued upon was not only to pay the rentcharge, but also to erect buildings upon the land out of which the rentcharge issued so as to enhance the security for the rentcharge, and in that sense touched and concerned the land, yet it was held to be personal to the covenantee. In *Randall* v. *Rigby* (8), in which the decision turned upon whether debt or covenant was the right form of action to be brought by the I plaintiff, PARKE, B., expressly refers to *Milnes* v. *Branch* (2), and says that it is an authority which establishes that where a covenant is collateral or in gross, "it does not run with the land or rent": see also *Canham* v. *Rust* (13).

Coming to later decisions—in 1881 *Haywood* v. *Brunswick Permanent Benefit Building Society* (11) was decided by a Court of Appeal composed of BRETT, COTTON and LINDLEY, L.JJ. In that case the plaintiff was the assignee of one Charles Jackson to whom Edward Jackson had granted a rentcharge issuing out of land conveyed by Charles to Edward. Edward covenanted for himself his heirs executors administrators and assigns that he would pay to Charles this rentcharge, and also erect and keep in repair, and if necessary re-build, messuages upon the land of the value of double the rent. Edward assigned his interest to McAndrew who mortgaged the land to the defendants, and they had taken possession under their mortgage. The action was thus brought to enforce against the mortgagees in possession the duty of repairing the buildings which had been erected upon the land, but had not been kept in repair. No question arose upon the liability to pay the rentcharge. The question was whether the covenant to repair ran with the land in favour of the assignee of the covenantee and against the assignee of the covenantor; and secondly, whether the defendants, who had taken possession of the land with notice of the covenant, must perform it. Stephen, J., treated the covenant to build and repair as a personal covenant unenforceable by an assignee, and he relied upon *Milnes* v. *Branch* (2) as an authority upon that point, binding upon him. He, however, gave judgment for the plaintiff upon the second point above stated. The Court of Appeal reversed this judgment and held on both points that the action was not maintainable. Brett, L.J., treats *Milnes* v. *Branch* (2) as an authority and says that it has always been understood as an authority to the effect that a covenant to build does not run with the rent in the hands of an assignee of the rent. He adds that Lord St. Leonards in his Vendors and Purchasers (13th Edn.), p. 473, treats the case as warranting this statement. Cotton, L.J., agrees with Brett, L.J., and Lindley, L.J., casts no doubt upon *Milnes* v. *Branch* (2), though it was not necessary for him to express any decided view upon it as in his judgment the defendant succeeded upon the second point. After this examination of *Haywood's Case* (11) it appears to me that *Milnes* v. *Branch* (2) is good law and cannot be set aside, at any rate in this court.

In *Austerberry* v. *Oldham Corpn.* (4) all the members of the court (Cotton, Lindley and Fry, L.JJ.) were of opinion that a covenant to repair the road in question did not run with the plaintiff's land, for there was no covenant to do anything whatever on the plaintiff's land, and there is nothing pointing to the plaintiff's land in particular: see per Lindley, L.J. (29 Ch.D. at p. 781). The doctrine that a covenant to pay a rentcharge does not run with the rent to the assignee of the rentcharge and the authority of *Milnes* v. *Branch* (2) was upheld in Ireland in 1844: see *Kennedy* v. *Stewart* (14), and per Lefroy, C.J., and Hayes, J.; see *Butler* v. *Archer* (10) (12 I.C.L.R. at pp. 121, 126).

Against this sequence of authority the opinion of Holt, C.J., is relied upon as expressed in *Brewster* v. *Kidgill* (*or Kitchin*) (1), wherein he says (12 Mod. Rep. at p. 170):

> "I make no doubt, but that the assignee of the rent shall have covenant against the grantor, because it is a covenant annexed to the thing granted."

Lord Ellenborough in *Milnes* v. *Branch* (2) sets this opinion aside as being extra-judicial. It is introduced in a passage which commences, "There is another matter in which I have not consulted my brothers," and there does not appear to have been any assent given by the other judges to it. In the report of the same case under the name of *Brewster* v. *Kitchin* (1), in 1 Lord Raymond 317, it would seem that Holt, C.J., was speaking of the burden of the covenant, and the passage relied upon does not appear, nor is it to be found in Holt's Report under the name of *Brewster* v. *Kidgill* (1), at p. 175. In a careful examination of the two reports—1 Lord Raymond and 12 Modern—which is to be found in Smith's Leading Cases (13th Edn.), pp. 78, 79, a passage which I have traced back to the third edition, which was edited by Sir Henry Keating and Sir James Shaw Willes, vol. 1, pp. 32, 33, it is pointed out that the real difference between the judges was not whether an action of covenant could be maintained against the defendant, as assignee of the land, but whether that which Lord Holt considered a covenant was not, in reality, part of the grant, for, if it were, the plaintiff was entitled to judgment beyond all dispute, the action being, not one of covenant, but a feigned issue to ascertain the net amount of the rentcharge. In other words, the judges, who gave judgment for the plaintiff, held that there had been a grant and that the liability did not depend upon covenant. It appears from this examination that the question to be determined in the case was that of the liability for the burden, and not the question whether the assignee of the rent can enforce a covenant in gross. It would seem, therefore, that LORD ELLENBOROUGH was right in treating LORD HOLT's statement as extra-judicial. As pointed out by BRETT, L.J., in *Haywood's Case* (11), LORD ST. LEONARDS appears to accept the authority of the decision in *Milnes* v. *Branch* (2) in his text, but at the same time adds a note in which he gives reasons for agreeing with LORD HOLT. However high the authority of that note may be placed, it remains a note, and cannot avail to set aside the authority of *Milnes* v. *Branch* (2) or *Haywood* v. *Brunswick Permanent Benefit Building Society* (11). *Bally* v. *Wells* (5) does not appear to me to support the plaintiffs' contention. In that case the question was whether the original covenantee could maintain an action against the assignee of the covenantor, and it was held that he could. The decision was upon the question of the liability for the burden and not of the right of the covenantee to sue.

The conclusion thus reached upon the main point argued concludes also the point raised upon s. 5 of the Real Property Act, 1845. LORD COZENS HARDY, M.R., in giving judgment in *Forster* v. *Elvet Colliery Co., Ltd.* (3) ([1908] 1 K.B. at p. 635), expresses the opinion that a covenant therein referred to "respecting any tenements or hereditaments" must connote one which runs with the land. FARWELL, L.J., in terms, says that the section applies only to covenants that run with the land, and the judgment of the court carries that interpretation into effect. The decision in that case was affirmed in the House of Lords: *Dyson* v. *Forster* (3), though LORD MACNAGHTEN leaves open, as in his view it was unnecessary to determine, whether the section was as confined in its operation as the Court of Appeal had held it to be. The case, as decided in the Court of Appeal, is binding upon this court, and it may be observed that no case has been called to our attention which conflicts with it, though it is now more than twenty-two years since it was decided. I am, therefore, of opinion that this s. 5 does not enable the plaintiff to maintain his action. For these reasons, in addition to those expressed by CLAUSON, J., the appeal fails and must be dismissed with costs.

LAWRENCE, L.J.—In my opinion, CLAUSON, J., was clearly right in deciding that the rentcharge created by the conveyance of April 26, 1867, was a perpetual rentcharge, and as this decision has not been seriously challenged, I need say no more than that I agree with the reasons given by the learned judge for arriving at his conclusion on this point.

The main question in this case is whether the benefit of the grantor's covenant to pay the rentcharge runs with the rentcharge so as to enable the assignees of the rentcharge to maintain an action on the covenant against the legal personal representatives of the grantor. The learned judge in a considered judgment, after carefully reviewing all the relevant authorities, and after referring to the general opinion of the profession as reflected by the recognised textbooks for many years past, came to the conclusion that it would be wrong for a judge of first instance to throw any doubt upon the correctness of the view that the benefit of a covenant to pay a rentcharge does not run with the rentcharge. I find myself in complete agreement with the learned judge, and am further of opinion that it would be equally wrong for the Court of Appeal to throw any doubt upon the correctness of that view. Had it not been for the elaborate arguments addressed to this court by counsel for the plaintiffs I should have been content to express my simple concurrence with the judgment of the learned judge; in deference, however, to those arguments I propose to state the reasons which have led me to the same conclusion as that reached by the learned judge.

Counsel for the plaintiffs based their contention upon the following dictum of LORD HOLT in *Brewster* v. *Kidgill* (*or Kitchin*) (1) (12 Mod. Rep. at p. 170):

> "I make no doubt, but that the assignee of the rent shall have covenant against the grantor, because it is a covenant annexed to the thing granted."

From the report of that case in 12 Modern it appears that the only issue between the parties was whether the rent was payable in full or whether the defendant was entitled to deduct taxes which Parliament had imposed since the date of the grant. Lord Holt, after deciding that the covenant to pay the rentcharge free from all taxes extended to all future Parliamentary taxes, said that there was another matter upon which he had not consulted his brothers and then proceeded to hold that the burden of the covenant did not run with the land out of which the rentcharge issued, and that, as the defendant was an assign of the grantor, the plaintiff could not have his judgment. It is in this part of the judgment (dealing with a point which had not been referred to in the arguments) that the dictum relied upon occurs. The report goes on to state that the other judges took a different view and that judgment was accordingly entered for the plaintiff. In my view, the dictum was clearly obiter as the plaintiff was not an assignee of the rent suing the grantor or his legal personal representatives. The case is also reported in 1 Lord Raymond 317, 1 Salkeld 198, and 5 Modern Reports 369, in none of which reports, however, is the dictum to be found.

Nearly 120 years later Lord Holt's dictum was considered by the Court of King's Bench in *Milnes* v. *Branch* (2). In that case one Barnsby, the owner in fee, conveyed a plot of land to the defendant and another, their heirs and assigns, to the use that Barnsby, his heirs and assigns, might have and take to his use a rent certain to be issuing out of the plot and subject to the rent to the use of the defendant in fee, and the conveyance contained a covenant by the defendant with Barnsby, his heirs and assigns (inter alia), to pay to him, his heirs and assigns, the said rent. Barnsby shortly afterwards demised the rent to the plaintiffs for 1,000 years. The plaintiffs then sued the defendant on his covenant and contended that, as representatives of the grantee of the rent by special assignment, they were entitled to maintain the action relying upon Lord Holt's dictum in *Brewster* v. *Kidgill* (*or Kitchin*) (1). The court held that the plaintiffs could not sue the defendant on his covenant on two grounds—first, because a covenant could not run with a rentcharge, and, secondly, because the rent in that case was reserved and arose out of the original estate and not out of the estate of the covenantor, and, consequently, there was no privity of estate between the covenantor and the plaintiff. Lord Ellenborough, in giving the leading judgment, after stating that he was inclined to think that Lord Holt's dictum was extra-judicial, and that, putting aside that dictum, he did not find any authority to warrant the position that the covenant ran with the rent, said:

> "I do not see how the analogy as regards covenants which run with the land is to be applied unless it be shown this is land; it might as well be applied to any covenant respecting a matter merely personal. The statute Henry VIII recites that at common law such only as are parties or privies to any covenant can take advantage of it; here is neither privity of contract nor privity of estate; the rent is reserved out of the original estate."

Bailey, J., after stating that he was entirely of the same opinion, added some remarks emphasising the second ground mentioned in the last sentence of Lord Ellenborough's judgment, namely, that the rent arose out of the estate of the feoffor, and that, therefore, the covenant was not one by the owner of the fee, but was a covenant in gross. Abbot, J., concurred and Holyroyd, J., having been of counsel in the case, declined to give any judgment. There is no object in pursuing the second ground of the decision in *Milnes* v. *Branch* (2), as no such question arises here. It was based on the erroneous view, somewhat widely entertained at that time, that in order to entitle the alienee to sue he must not only claim the estate of the covenantee, but must also claim it under a conveyance or appointment by the covenantor. The Real Property Commissioners, in their Third Report, negatived the soundness of this view, and consider that any doubt whether the doctrine of privity of estate applies to the covenantor as to the covenantee is set at rest by authority. I agree with the statement in Dart on Vendors and Pur-

A CHASERS (7th Edn.), p. 786, that it is impossible to see how this conclusion can be otherwise than correct if the *Prior's Case* (15) and other well-known authorities are good law.

The next case in which LORD HOLT's dictum came up for consideration was the Irish case of *Kennedy* v. *Stewart* (14), reported in a note to *Bruce* v. *Lord Ponsonby* (16) (7 I.L.R. at p. 421). In that case the facts were somewhat special, and it is B enough to state that the decision turned upon the question whether the benefit of the covenant by the grantor to pay the rentcharge did or did not run with the rent in favour of the assignees. CRAMPTON, J., held that it did not, and stated that on that question *Milnes* v. *Branch* (2) was an express authority, the principle being explicitly laid down by LORD ELLENBOROUGH in his judgment.

In *Randall* v. *Rigby* (8), where the Court of Exchequer held that an action of C debt would not lie for arrears of a rentcharge in fee which the defendant had covenanted to pay, PARKE, B., said:

> "No doubt this covenant is collateral, or in gross in one sense that it does not run with the land or rent (for that *Milnes* v. *Branch* (2) is an authority)."

In *Butler* v. *Archer* (10) the Court of Queen's Bench in Ireland considered the D question of a covenant running with a rentcharge and, although there was a difference of opinion between the learned judges owing to the special nature of the covenant and to the Irish legislation affecting the question, they all treated *Milnes* v. *Branch* (2) as having decided that a covenant to pay a rentcharge does not run with the rent. HAYES, J., after stating that the covenant in question there was a mere covenant in gross, says:

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> "It was so held in *Milnes* v. *Branch* (2), which has been considered a binding authority ever since, as well in England as in this country."

In my judgment, that statement by HAYES, J., is accurate, and holds good at the present day. I know of no case in which the decision in *Milnes* v. *Branch* (2) on this point has been questioned, and, referring to some of the recognised textbooks F on the subject, it appears to me that CLAUSON, J., was right in concluding that for many years past *Milnes* v. *Branch* (2) has been accepted by the profession as having established the proposition that a covenant to pay a rentcharge does not run with the rent. Thus, in BURTON ON REAL PROPERTY (7th Edn.), 1850, at p. 347:

> "In particular, it seems that the covenant of the grantor runs neither with the land nor with the rent, but is merely a personal engagement between the G parties":

Milnes v. *Branch* (2). In POLLOCK ON CONTRACTS (8th Edn.), p. 429:

> "An agreement to grant an annuity charged on land implies an agreement to give a personal covenant for payment; but by a somewhat curious distinction the burden of a covenant to pay a rentcharge does not run with the land H charged nor does the benefit of it run with the rent."

In 28 HALSBURY'S LAWS OF ENGLAND (2nd Edn.) 241, 242, s. 438:

> "The due payment of a rentcharge is frequently secured by the covenant of the landowner who creates it. The burden of such a covenant does not run with the land so as to bind subsequent owners of the land; nor, it seems, does I the benefit of the covenant run with the rentcharge so as to entitle subsequent owners of the rentcharge to sue. . . ."

Milnes v. *Branch* (2) and other cases are cited, and in 1 Smith, L.C. (13th Edn.), p. 98, in the notes to *Spencer's Case* (12), *Milnes* v. *Branch* (2) is cited at length for the proposition that a covenant to pay the rentcharge does not run with the rent.

The plaintiffs' counsel, however, contended that the decision in *Milnes* v. *Branch* (2) ought not to be followed, pointing out that it is not binding on this court, and that LORD ST. LEONARDS had expressed his disapproval of it as appears from his book on Vendors and Purchasers. Turning to Sugden's Vendors and Purchasers (14th Edn.), pp. 585–591, I find an elaborate argument against the soundness of the conclusion reached by the Real Property Commissioners in their Third Report that the doctrine of privity of estate does not apply to the covenantor, and that *Milnes* v. *Branch* (2) is one of the cases cited in support of the contention that a covenant does not run with the land unless the conveyance of it was actually made by the covenantor. Then on p. 591, after referring to the case where the rent is created by way of use out of a grant to a third person, the text proceeds:

> "And even where the grantor of the rent to one directly covenants to pay it to the grantee, etc., it is doubtful whether the covenant will run with the rent in the hands of an assignee,"

citing *Brewster* v. *Kidgill* (*or Kitchin*) (1), *Milnes* v. *Branch* (2), and *Butler* v. *Archer* (10). The learned author appends a footnote to this statement in which he discusses Lord Holt's dictum in *Brewster* v. *Kidgill* (*or Kitchin*) (1) and Lord Ellenborough's decision in *Milnes* v. *Branch* (2), and states:

> "There appears no foundation for shaking Holt's opinion. The rentcharge is an incorporeal hereditament and issues out of the land and the land is bound by it; the covenant may therefore well run with the rent in the hands of an assignee; the nature of the subject, which savours of the realty, altogether distinguishes the case from a matter merely personal."

The note then refers to the decision in *Bally* v. *Wells* (5). It will be seen, therefore, that Lord St. Leonards approved of *Milnes* v. *Branch* (2) in so far as it decided that the doctrine of privity of estate applied as well to covenantor as to covenantee, and that he disapproved of it in so far as it decided that a covenant could not run with a rentcharge.

In *Bally* v. *Wells* (5) an owner of tithes had demised them for a term of six years, and the lessee had covenanted not to allow the farmers of the land to have any of the tithes without the consent of the lessor. The lessee assigned his interest in the lease to the defendant, who let the farmers have the tithes without such consent, and thereupon the lessor brought an action of covenant against him. It was held that the covenant in question ran with the tithes, and, therefore, that the action was maintainable. The grounds of the decision were that no distinction could be drawn between the land and tithe, and that the covenant was not collateral, but touched or concerned the tithes. This case was relied upon by the plaintiffs in *Kennedy* v. *Stewart* (14), and Crampton, J., distinguishes it in the following passage of his judgment, with which I agree:

> "Covenant (for other reasons) runs along with the land, but it is quite new to extend the principle to rentcharges and annuities. It is argued again that covenant will run with tithes to an assignee of the reversion, and it is asked, Why should not the same principle apply to rentcharges? It has undoubtedly been so decided as to tithes, in the case of *Bally* v. *Wells* (5), but the analogy fails; the grounds assigned by the court for the determination in *Bally* v. *Wells* (5) do not apply to the case of rentcharges. They see no difference between land and tithes; 'tithes is a tenth part (say the court) of the profits of the land, and is land itself'; and, I may add, rent may be reserved by lease for tithes as for land, and to reserve rent for a rentcharge would be absurd. Secondly, the case of an assignee suing the grantor is very different from that of the owner of the estate leased suing the assignee of a lessee upon a covenant by lessee for him and his assigns (*Spencer's Case* (12))."

In *Martyn* v. *Williams* (7) the owner in fee granted to the defendant the right to dig china clay for a term of twenty-one years, and the lease contained a covenant by the defendant (inter alia) to deliver up the works in repair at the expiration of the term. The lessor afterwards conveyed the land to the plaintiff in fee, who brought an action for (inter alia) the breach of the covenant to deliver up in repair. It was held that the covenant ran with the interest of the owner of the fee expectant upon the determination of the term in the incorporeal right to dig the china clay and that the alienee of the land could sue upon it. Martin, B., in delivering the judgment of the court, after referring to *Bally* v. *Wells* (5) and the Irish case of *Earl of Egremont* v. *Keene* (17), where it was held that a lessor of market tolls could maintain an action of covenant against the assignee of the lessee for the non-payment of rent, expressed the opinion that the conveyance of the land to the plaintiff during the subsistence of the term in the incorporeal hereditament was an assignment of the reversion within 32 Hen. 8, c. 34, which in express terms extended to incorporeal hereditaments and was not confined to lands, and that consequently the statute enabled the court to decide in favour of the plaintiff.

It is to be observed that *Bally* v. *Wells* (5), *Earl of Egremont* v. *Keene* (17), and *Martyn* v. *Williams* (7) are all cases as between lessor and lessee and not as between a grantor and grantee in fee, a distinction which, according to Lindley, L.J., in *Haywood* v. *Brunswick Permanent Benefit Building Society* (11) (8 Q.B.D. at p. 410), must never be lost sight of. In *Haywood's Case* (11) land had been granted in fee in consideration of a rentcharge reserved by the grantor to himself in fee and of a covenant by the purchaser to erect and repair buildings. The assignee of the rentcharge brought an action against the alienee of the land for breach of this covenant. Three questions arose: first, whether the benefit of the covenant ran with the rentcharge in favour of the assignee of the rent; secondly, whether the burden of the covenant ran with the land so as to charge the alienee of the land; and, thirdly, whether the rule in *Tulk* v. *Moxhay* (18) applied so as to bind the alienee of the land in equity. Stephen, J., held, on the first point, that *Milnes* v. *Branch* (2) was an authority directly in favour of the defendant, and then adds (8 Q.B.D. at p. 404):

> "It is true that Lord St. Leonards appears to disapprove of this decision: 2 Vendors and Purchaser (14th Edn.), p. 591, n.; but I must regard it as a binding authority till it is overruled."

The learned judge then decided that the defendants were liable in equity on the authority of *Cooke* v. *Chilcott* (19). The Court of Appeal reversed the decision of the learned judge on the latter point and dismissed the action. Brett, L.J., commences his judgment by saying (8 Q.B.D. at p. 407):

> "I am clearly of opinion, both on principle and on the authority of *Milnes* v. *Branch* (2), that this action could not be maintained at common law. *Milnes* v. *Branch* (2) must be understood, as it always has been understood, and as Lord St. Leonards (Sugden's Vendors and Purchasers (14th Edn.), p. 590) understood it, and it will be seen, on a reference to his book, that he considers the effect of it to be that a covenant to build does not run with the rent in the hands of an assignee."

It was suggested by counsel for the plaintiffs that this passage showed that the lord justice agreed with Lord St. Leonards's adverse comments on Lord Ellenborough's decision in *Milnes* v. *Branch* (2). I do not agree with that suggestion. It may not, perhaps, be very clear what exactly the learned lord justice had in mind when referring to Lord St. Leonards's understanding of *Milnes* v. *Branch* (2). It is, however, plain that he treated *Milnes* v. *Branch* (2) as an authority to be followed and declined to overrule it as he had been asked to do by the respondent. He could hardly have intended to affirm the second ground of the decision more particularly dealt with by Bailey, J., as no point was made of the fact that the rentcharge was reserved and arose out of the original estate and not out of the estate of the covenantor. Moreover, as regards the first ground of the decision in *Milnes* v. *Branch* (2) it is clear that Lord St. Leonards understood that the court had decided that a covenant could not run with a rentcharge and that Lord Holt's dictum to the contrary ought not to be followed. Cotton, L.J., after expressing his agreement with Brett, L.J., dealt only with the question whether the rule in *Tulk* v. *Moxhay* (18) was applicable in the circumstances. Lindley, L.J., did not deal with the question of the benefit of the covenant running with the rentcharge, and, while not suggesting that *Milnes* v. *Branch* (2) was wrongly decided, pointed out that neither *Milnes* v. *Branch* (2) nor *Randall* v. *Rigby* (8) applied very closely, as in the former the plaintiff had only a leasehold interest in the rent and in the latter the question was whether debt or covenant was the proper form of action. Although it is true that in *Milnes* v. *Branch* (2) the rentcharge had been demised for a term of 1,000 years the plaintiff pleaded that he was the representative of the grantee by special assignment and was throughout the case treated as an assignee of the rent. Moreover, the decision has ever since been treated as having laid down the principle that a covenant to pay a rentcharge does not run with the rent in the hands of an assignee. The ultimate decision in *Haywood's Case* (11) was that the burden of a covenant to build does not run with the land and that the rule in *Tulk* v. *Moxhay* (18) does not apply to such a covenant. In my opinion, the Court of Appeal did not intend to cast any doubt on the decision in *Milnes* v. *Branch* (2). *Austerberry* v. *Oldham Corpn.* (4) finally established that the rule in *Tulk* v. *Moxhay* (18) is limited to restrictive covenants and does not extend to covenants to expend money on repairs or otherwise which do not run with the land at law. Fry, L.J., in his judgment, quotes a passage from Lord Holt's judgment in *Brewster* v. *Kidgill* (*or Kitchin*) (1) in support of the view that the burden of a covenant involving the expenditure of money does not run with the land. In quoting this passage, Fry, L.J., included the dictum which has been so much discussed in this case, but he makes no comment on it nor was it relevant to the question being there considered. In the circumstances I do not think that the absence of the adverse comment implies that Fry, L.J., approved of the dictum and disagreed with the decision in *Milnes* v. *Branch* (2).

Some reliance was placed by the plaintiffs on the provision in s. 39 (4) of the Settled Land Act, 1925, that on a sale by a tenant for life in consideration of a rent the conveyance should contain a covenant by the purchaser for payment of the rent. I confess that I feel a difficulty in finding any satisfactory reason for this enactment except on the supposition that the legislature thought that the benefit of such a covenant would run with the land in favour of the remaindermen, but, in view of the established rule of law that such a covenant does not run with the rentcharge, I am of opinion that this enactment cannot properly be construed as abrogating that rule and enacting that in future such a covenant shall so run. Whatever may be the foundation of the rule, and whether it rests on the broader principle that (except as between lessor and lessee) no covenant can run with an incorporeal hereditament or whether it rests on the narrower principle that a covenant to pay a rentcharge is a collateral covenant or a covenant in gross which does not touch or concern the rentcharge, or whether it rests on no principle and is merely arbitrary, I am of opinion that it is too firmly established to be disturbed by this court.

There remains the contention that, even if the covenant did not run with the rentcharge, the appellants are entitled to the benefit of the covenant by virtue of s. 5 of the Real Property Act, 1845. In my opinion, this point is concluded against the plaintiffs by authority binding on this court. In *Kesley* v. *Dodd* (20) (52 L.J.Ch. at p. 39), Jessel, M.R., held that s. 5 merely got rid of the objection as to the covenantee not being a party to the deed, and that it did not enable the benefit of a covenant to be taken by a person not in existence at the date of the deed. In *Forster* v. *Elvet Colliery Co., Ltd.* (3) the Court of Appeal approved of the decision in *Kelsey* v. *Dodd* (20) and further held that the section applied only to covenants running with the land. It is true that when *Forster's Case* (3) came before the House of Lords Lord Macnaghten said that it might be, perhaps, doubtful if the latter ground of the decision were correct, but it was not overruled, and, consequently, binds this court. As it is not suggested that the plaintiffs were alive in the year 1867 when the deed containing the covenant in the present case was executed, and as the covenant does not run with the rentcharge, it follows that on both grounds our decision must be that the plaintiffs cannot take the benefit of the covenant under s. 5. In the result, for the reasons stated, I agree that this appeal should be dismissed with costs.

ROMER, L.J.—It was held by Clauson, J., that the deed of April 26, 1867, was effectual to limit a rentcharge in fee simple, notwithstanding the omission of the usual words of inheritance. He was, in my judgment, clearly right in so holding, having regard to the principle stated in Challis's Real Property (3rd Edn.), p. 222, and to the provisions of the Wilton Estates Act, 1837. But though he was so far in favour of the plaintiffs, he came to the conclusion that they were not entitled to the benefit of the covenant for payment of the rentcharge contained in the deed, and, accordingly, dismissed the action. From that decision the plaintiffs appeal.

It, therefore, becomes necessary to decide whether the benefit of such a covenant runs with a rentcharge at common law. For, though the plaintiffs contended before us that they were in any case entitled to the benefit of the covenant by reason of the express provisions of s. 5 of the Real Property Act, 1845, it has been laid down by this court in *Forster* v. *Elvet Colliery Co., Ltd.* (3) that the covenants mentioned in that section are covenants that run with the hereditament apart from the provisions of the section. That decision has never been overruled, though Lord Macnaghten expressed his doubts as to its correctness in the same case when it was before the House of Lords: see *Dyson* v. *Forster* (3) ([1909] A.C. at p. 102.) If I may be permitted to criticise the decision, I would venture to suggest that, if it be correct, the reference to covenants might just as well have been omitted altogether. It is, however, a decision that is binding upon this court, and it, therefore, becomes unnecessary to consider whether the section refers to incorporeal hereditaments. For, assuming that it does, we have still to consider whether the covenant in question in the present case runs with the rentcharge apart from the section, and the section, accordingly, carries us no further.

I return, therefore, to the question whether the benefit of a covenant to pay runs with a rentcharge at common law. Speaking for myself, I regard this question as being identical with the question whether there is any case that decides that it does. For in connection with the subject of covenants running with land, it is impossible to reason by analogy. The established rules concerning it are purely arbitrary, and the distinctions, for the most part, quite illogical. Why should the benefit of a vendor's covenant run with the land at common law, and the benefit of a lessee's covenant not so run with the reversion, if that be the law, as seems to be the better opinion and was certainly the opinion of the legislature in the time of Henry VIII? Why, too, should it have been held that the burden of a lessee's covenant runs with the land at common law, but that the burden of a purchaser's covenant does not so run? Why, again, should a covenant have to be one touching the land in order that the benefit and the burden of it may run? Why, for instance, in a lease of land to be used solely for a particular trade should a covenant by the lessor not to build any other house to be used for the same trade, not enure for the benefit of the lessee's assigns? Why, again, should a covenant by a lessee in connection with something not in esse at the date of the lease but to be done on the land in the future bind his assigns if they are expressly mentioned and not otherwise? All these and other cognate questions have been argued and discussed for centuries by men learned in the law, and, so far as I have been able to ascertain, without coming to any very satisfactory, still less to any unanimous, conclusion. Apart, therefore, from decisive authority one way or another, it seems to me that it is impossible to answer the question whether a covenant to pay runs with a rentcharge one way or the other. The question: "Why should it?" cannot be answered merely by reference to principles with any greater conviction than can the question: "Why should it not?"

In these circumstances, I turn to the authorities to which our attention has been called. The first of these to which it seems necessary to refer is that of *Brewster* v. *Kidgill* (*or Kitchin*) (1). In that case a rentcharge had been granted out of a manor, and the grantor had covenanted for payment of the rent freed from all taxes. The question to be determined was whether the defendant, who was the terre-tenant of the land charged, was entitled to deduct a particular tax. HOLT, C.J., delivered the opinion of the court that the deduction could not be made. It appears to have been the view of the judges other than the Chief Justice that the rentcharge had been granted free of the particular tax. The Chief Justice, however, considered that the rentcharge had not been so granted, in which case, apparently, the tax could have been deducted by the defendant unless he were bound by the covenant made by the grantor of the rentcharge. As to this the Chief Justice said:

> "There is another matter in which I have not consulted my brothers, and that is, whether the terre-tenant in this case is obliged by the covenant: this is a covenant by the grantor of the rent, who was seized in fee of the manor. Now who this terre-tenant is does not appear, whether he be heir or assignee; for if he be assignee, I do not think him chargeable in law; for this covenant does not run with the land. Hard. 87. I make no doubt, but that the assignee of the rent shall have covenant against the grantor, because it is a covenant annexed to the thing granted; but that covenant should run with the rent against the assignee of the land, I see no reason. If this rent was granted so to be paid, it would be another matter; but here is only a covenant, and no words amounting to a grant; and therefore there can be no relief in this case against the terre-tenant, but in equity; and therefore for this point I do not see how the plaintiff can have his judgment."

This expression of opinion that the benefit of the covenant would run with the rent was obviously a mere dictum, and was not even concurred in by the other judges. On this point, the Chief Justice, though purporting to deliver the judgment of the court, had not consulted his brothers. Perhaps he could not find a convenient opportunity, for, according to LORD RAYMOND, they were much occupied in talking of "agreements, intent of the party, binding of the land, and I know not what." (1 Ld. Raym. at p. 322.)

A case much more in point is that of *Milnes* v. *Branch* (2). An owner of land in fee simple had in that case conveyed it to the use that he, his heirs and assigns might have, and take a rentcharge and subject thereto to the use of the defendant, his heirs and assigns, and the defendant covenanted with the owner of the land, his heirs and assigns to pay the rent and to build one or more messuages on the premises for better securing the rent. The covenantee subsequently demised the rentcharge to the plaintiff in the action for 1,000 years. The plaintiff then sued the defendant in covenant for non-payment of the rent and for not building the messuages. It was held that the plaintiffs were not entitled to sue upon the covenant. BAYLEY, J., decided the case upon the ground that, having regard to the form of the conveyance, the rentcharge arose out of the estate of the covenantee and was not granted by the covenantor, and that the covenant was, accordingly, a covenant in gross. LORD ELLENBOROUGH, on the other hand, decided the case upon two grounds, of which the latter only was that upon which BAYLEY, J., had founded his judgment. The first ground, however, was that the covenant did not run with the rent. He said this, referring to *Brewster* v. *Kidgill* (*or Kitchin*) (1):

> "I am inclined to think that the language of LORD HOLT, as to the right of the assignee of the rent to have covenant, was extra-judicial; and putting aside that dictum, I do not find any authority to warrant the position that this covenant runs with the rent. I do not see how the analogy, as it regards covenants which run with the land, is to be applied, unless it be shown that this is land; it might as well be applied to any covenant respecting a matter merely personal."

It was contended before us that this passage in LORD ELLENBOROUGH's judgment is referable to the fact that the plaintiff had only a term of years in the rentcharge.

I cannot accept this suggestion. It is, in my judgment, quite clear that Lord Ellenborough intended to decide and did in terms decide that the benefit of the covenant did not run with the rentcharge.

Unless, therefore, there is some other authority that conflicts with this decision, it is, in my opinion, decisive upon the question at issue. For myself, I cannot find that any of the cases cited to us throw any doubt at all upon the decision. On the contrary, there are cases both in England and Ireland in which the decision is treated as an authority for the proposition for which the respondents contend in the present case. I will not refer to them all. It is sufficient to refer to what was said by Parke, B., in *Randall* v. *Rigby* (8) and Brett, L.J., in *Haywood* v. *Brunswick Building Society* (11) (8 Q.B.D. at p. 467). I must, however, refer at greater length to the cases which the plaintiffs' counsel contend are in conflict with Lord Ellenborough's decision.

The one most relied upon by them is *Bally* v. *Wells* (5). In that case the plaintiff, as owner of certain tithes, had granted a lease of them to one Whitmarsh, who entered into a covenant with the plaintiff not to let any of the farmers of the lands from which the tithes issued have any part of them. Whitmarsh then assigned his lease to the defendant, and the question was whether the defendant was bound by the covenant. It was, therefore, one relating to the running of the burden of a covenant as between a lessor and a lessee. It was held that the defendant was liable on the covenant. In the course of his judgment, Wilmot, C.J., expressed the opinion that a covenant might be annexed to and pass with an incorporeal inheritance as well as a corporeal one. But this meant no more than that he could give no answer to the question: "Why should it not?" Nor can I. The question, however, that has to be answered is the one "Why should it?" As regards this question, he certainly gave various reasons why the burden of the particular covenant in that case should run with tithes as between a lessor and lessee. But the case is of no assistance in the present one unless we are to reason from some analogy between tithe and a rentcharge and between the lessee of the one and the grantee of the other, and that is a thing which we ought not to do. As Lindley, L.J., said in *Austerberry* v. *Oldham Corpn.* (4):

> "We are not dealing here with a case of landlord and tenant. The authorities which refer to that class of cases have little, if any, bearing upon the case which we have to consider."

In *Haywood* v. *Brunswick Permanent Benefit Building Society* (11) he uttered a similar warning: "This is not a case of landlord and tenant; we must never lose sight of that distinction."

The next case to which reference should be made is *Martyn* v. *Williams* (7), which, it is contended, is an authority for the proposition that the benefit of a covenant will run with an incorporeal hereditament. In my opinion, it is nothing of the sort. The owner of land upon which there was a bed of china clay had granted to another a right to work such clay for a term of twenty-one years, the grantee entering into a covenant to deliver up the works in good repair at the end of the term. It was, indeed, held that the assignee of the land was entitled to sue upon the covenant. But, if the case be carefully looked at, it will be seen that this was because the plaintiff was regarded as being the assignee of the reversion in the china clay expectant upon the determination of the twenty-one years within the meaning of the statute of Henry VIII, just as truly as though he had been himself the grantee of a right to work the clay in perpetuity and had then granted the term of twenty-one years out of his own incorporeal hereditament. The decision, therefore, was one upon the statute and has no bearing upon the question that we have to decide.

The only other case to which I need refer is *Austerberry* v. *Oldham Corpn.* (4). In itself it has no direct bearing upon the present case, being concerned with the question of when a covenant will be held to touch or concern the land of the covenantee. It is said, however, that Fry, L.J., quoted with approval the passage from Lord Holt's judgment in *Brewster* v. *Kidgill* (*or Kitchin*) (1), to which I have already referred. That he quoted it is true enough, and that he approved of it so far as it was dealing with the burden of the covenant is obvious. For the lord justice was dealing with the question of the running of the burden of a covenant he was supposing to have been entered into by the grantors of a right of way over their road to maintain the road in repair. But I do not think that the lord justice was in any way considering the question whether the benefit of the covenant would run with the land for the convenience of which the right of way had been supposedly granted. He had already disposed of the question of the running of the benefit. Furthermore, if he had been dealing with the running of the benefit of such a covenant, it would have been necessary for him to decide whether the case for the appellant could properly be stated in what the lord justice said was the most favourable way in which it could be put. Could it have been properly put in that way, then, if the lord justice had approved of Lord Holt's dictum as to the running of the benefit, his decision upon that point would have been in favour of the plaintiffs. Moreover, *Milnes* v. *Branch* (2) had been cited in argument, and it is inconceivable that the lord justice would have expressed the view that the benefit of a covenant can run with a rentcharge without making some reference to that case.

For these reasons I have come to the conclusion that the benefit of the covenant in the present case has not run with the rentcharge so as to be enforceable by the appellants. In so holding, I am glad to think that I am in agreement not only with Clauson, J., but with the opinion entertained by the large majority of the writers of textbooks, past and present. I agree that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Grover, Humphreys & Boyes*; *Hatchett-Jones, Bisgood, Marshall & Thomas, for Withington, Petty & Boutflower*, Manchester.

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

MOON (LAMBETH REVENUE OFFICER) *v.* LONDON COUNTY COUNCIL

POTTERIES ELECTRIC TRACTION CO., LTD. *v.* BAILEY (STOKE-ON-TRENT REVENUE OFFICER)

[HOUSE OF LORDS (Lord Buckmaster, Lord Dunedin, Lord Warrington, Lord Tomlin and Lord Thankerton), November 24, 25, December 15, 1930]

[Reported [1931] A.C. 151; 100 L.J.K.B. 153; 144 L.T. 410; 95 J.P. 64; 47 T.L.R. 154; 29 L.G.R. 131; [1926–31] 2 B.R.A. 573]

Rates—De-rating—Industrial hereditament—Test of purposes for which hereditament is used—Irrelevance of purposes to which goods produced applied—Irrelevance of whether factory carried on for gain—Burden of proof—"Maintenance"—"Primarily"—Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3 (1).

In considering whether a hereditament is an "industrial hereditament" within s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, regard must be had solely to the purposes for which the hereditament is occupied and used and the purpose to which the goods produced are to be applied has no bearing on the question.

Accordingly, where premises were occupied, in one case, for the printing of tramway-car tickets to be used, not for sale, but on the occupiers' cars, and, in another case, for the manufacture of spare parts, to be used, not for sale, but on the occupiers' omnibuses,

Held: in each case the hereditament was an industrial hereditament.

Per LORD BUCKMASTER and LORD DUNEDIN: The construction of an article needed to maintain differs from what is meant by the word "maintenance" [in s. 3 (2) of the Act]. "Maintenance" points to something done to the vehicle on the premises, as, e.g., painting it.

Per LORD DUNEDIN: If once a hereditament is qualified as a factory or workshop by direct description [in s. 3 (1)], that part of the inquiry is ended, and a discussion whether the factory is carried on for gain or not and the citation of such a case as *Nash* v. *Hollinshead* (1), [1901] 1 K.B. 700, is quite irrelevant. . . . "For the purposes of" in those paragraphs might perfectly well have been expressed by the one word "as.". . . If the occupier of a hereditament proves that it is a factory, it is then for the revenue officer either to elicit by cross-examination or to prove by independent witnesses that the hereditament is primarily used for any of the purposes mentioned in paras. (a) to (f).

Per LORD DUNEDIN and LORD TOMLIN: The purposes mentioned in para. (f) of s. 3 (1) are ejusdem generis with those mentioned in paras. (a) to (e).

Per LORD DUNEDIN, LORD WARRINGTON and LORD THANKERTON: "Primarily" in the proviso to s. 3 (1) means "mainly."

Per LORD WARRINGTON: Where a hereditament is clearly used only as a factory there is no ground for the application of the proviso [to s. 3 (1)].

Per LORD TOMLIN: The object of the proviso to s. 3 (1) seems to be to exclude from the category of industrial hereditaments premises occupied and used in some way which, taken alone, would not constitute them a factory or workshop although, by reason of some ancillary machinery used or work done thereon the definition of a factory or workshop contained in the Factory Acts applies to them.

Notes. MOON (LAMBETH REVENUE OFFICER) *v.* LONDON COUNTY COUNCIL:—Considered: *Toogood & Sons, Ltd.* v. *Green*, [1932] All E.R.Rep. 309. Referred to: *Bottomley* v. *West Derby Assessment Committee*, etc., [1931] All E.R.Rep. 409; *Carmarthen Revenue Officer* v. *United Dairies* (*Wholesale*), *Ltd.* (1931), 95 J.P.Jo. 88; *Sedgwick* v. *Watney, Combe, Reid Co.*, [1931] A.C. 447; *Re London

Passenger Transport (Valuation for Rating) Order, 1935, *Re Charlton Works* (1941), 105 J.P.Jo. 592; *London Co-operative Society, Ltd.* v. *Southern Essex Assessment Committee*, [1941] 3 All E.R. 252; *Davis Cohen & Sons, Ltd.* v. *Hall*, [1952] 1 All E.R. 157; *Automobile Proprietary, Ltd.* v. *Brown*, [1955] 2 All E.R. 214.

Potteries Electric Traction Co., Ltd. *v.* Bailey (Stoke-on-Trent Revenue Officer):— Considered: *Bottomley* v. *West Derby Assessment Committee, etc.*, [1931] All E.R.Rep. 409; *Cardiff Revenue Officer* v. *Cardiff Assessment Committee, etc.*, ante, p. 30. Followed: *London Transport Executive* v. *Betts (Valuation Officer)*, [1958] 2 All E.R. 636. Referred to: *Re London Passenger Transport Board (Valuation for Rating) Order*, 1935, *Re Charlton Works* (1941), 105 J.P. 592; *London Co-operative Society, Ltd.* v. *Southern Essex Assessment Committee*, [1941] 3 All E.R. 252; *Hendon Corpn.* v. *Stranger*, [1948] 1 All E.R. 377; *Cockram* v. *Tropical Preservation Co., Ltd.*, [1951] 2 All E.R. 520; *Davis Cohen & Sons, Ltd.* v. *Hall*, [1952] 1 All E.R. 157; *Automobile Proprietary, Ltd.*, [1955] 2 All E.R. 214.

As to the de-rating of industrial hereditaments, see 27 Halsbury's Laws (2nd Edn.) 439 et seq.; and for cases, see Digest Supps., tit. Rates and Rating, cases 226a et seq. For Rating and Valuation (Apportionment) Act, 1928, see 20 Halsbury's Statutes (2nd Edn.)173.

Cases referred to:

(1) *Nash* v. *Hollinshead*, [1901] 1 K.B. 700; 70 L.J.K.B. 571; 84 L.T. 483; 65 J.P. 357; 49 W.R. 424; 17 T.L.R. 352; 3 W.C.C. 125, C.A.; 24 Digest (Repl.) 1025, *32*.

(2) *Fielding* v. *Morley Corpn.*, [1899] 1 Ch. 1; 67 L.J.Ch. 611; 79 L.T. 231; 47 W.R. 295, C.A.; affirmed sub nom. *Fielden* v. *Morley Corpn.*, [1900] A.C. 133; 69 L.J.Ch. 314; 82 L.T. 29; 48 W.R. 545, H.L.; 42 Digest 604, *52*.

(3) *Inland Revenue* v. *Donaldson & Co.*, 1930 S.C. 348; Digest Supp.

(4) *White Horse Distillers, Ltd.* v. *Inland Revenue*, 1930 S.C. 426; Digest Supp.

(5) *Inland Revenue* v. *M'Intyre & Co.*, 1930 S.C. 465; Digest Supp.

(6) *Inland Revenue* v. *Melville, Dundas and Whitson*, 1930 S.C. 477; Digest Supp.

(7) *Inland Revenue* v. *Currie & Co.*, 1930 S.C. 513; Digest Supp.

Appeals from orders of the Court of Appeal.

The Attorney-General (*Sir William Jowitt, K.C.*), *Wilfrid Lewis*, and *Colin H. Pearson* appeared for the revenue officer in each case.

Moon *v.* London County Council

The London County Council occupied a printing establishment where they printed tickets for the council tramways, which was an industrial purpose. The part of the hereditament which was used for industrial purposes was valued for the purposes of the Rating and Valuation (Apportionment) Act, 1928, at £770. The hereditament was also used for non-industrial purposes, namely, as statistical offices. This was valued at £230. Printing establishments were factories under Part I of Sched. VI to the Factory and Workshop Act, 1901. The assessment committee and quarter sessions entered the hereditament in the special list for de-rating and it was apportioned as above stated. The Divisional Court held themselves bound to look at the ulterior purpose of running tramway-cars as the primary purpose of the hereditament and to hold that the factory purpose was only ancillary to that purpose. They, accordingly, reversed the orders of the assessment committee and quarter sessions and excluded the hereditament from the special list. The Court of Appeal held that the decision of the Divisional Court was erroneous since the ulterior purpose must be disregarded, and the primary purpose and use of the hereditament were as a factory. The hereditament was, therefore, restored to the special list. The revenue officer appealed.

Konstam, K.C., and *Michael E. Rowe* for the ratepayers.

A POTTERIES ELECTRIC TRACTION CO., LTD. v. BAILEY

The occupiers, the appellants, Potteries Electric Traction Co., Ltd., operated a fleet of 198 motor omnibuses, and the hereditament was occupied and used by them in part (a) as a garage for motor omnibuses, and (b) for the manufacture of spare parts, and other manufacturing and repair processes distinct from the work B of ordinary maintenance in connection with the fleet. The appellants also occasionally sold parts manufactured on the hereditament to other omnibus proprietors, but such sales were negligible. The hereditament (apart from the garage and certain other parts, which it was not claimed were occupied and used for industrial purposes) comprised workshops where a large variety of spare parts were manufactured and a number of repair processes, additional to ordinary maintenance, C carried out. The hereditament was registered under the Factory and Workshop Acts, 1901–1920. The number of persons employed in the hereditament was, in the parts not claimed to be an industrial hereditament, forty-five, and, in the parts claimed to be an industrial hereditament, forty-eight. The appellants occupied the hereditament solely because of its suitability as an omnibus workshop, and the use of part thereof as a garage was a temporary expedient only. If the appellants had D not themselves manufactured the parts and carried out the processes referred to, they would have had to purchase the parts from, and had the said processes carried out by, manufacturers at prices higher than the present cost to the appellants. The Court of Appeal held, affirming the decision of the Divisional Court, that the hereditament was used for the housing and maintenance of the omnibuses within the meaning of s. 3 (2) of the Rating and Valuation (Apportionment) Act, 1928, E which provided that

> "any place used by the occupier for the housing or maintenance of his road vehicles . . . shall . . . be deemed not to form part of the factory or workshop,"

and that subsection prevented the hereditament being de-rated. The occupiers appealed.

F *Pritt, K.C.*, and *S. Turner* for the appellants.

Cur. adv. vult.

Dec. 15. The following opinions were read.

LORD BUCKMASTER.—The Rating and Valuation (Apportionment) Act, 1928, has for its purpose the separation of certain classes of hereditaments into indepen- G dent portions of the valuation lists. To such classes it was intended wholly or partially to grant relief from the burden of local taxation for the purpose of restoring industry. Whether this purpose will be achieved time alone can tell. The immediate effect appears to have been the relief of a depressed profession. Upwards of 18,000 appeals are said to be pending to quarter sessions, and 800 from quarter sessions to the Divisional Court, and we have been asked to take these cases without H delay in order that the plague of litigation may be stayed.

MOON v. LONDON COUNTY COUNCIL

The circumstances which have given rise to this particular appeal can be summarised in a few sentences. The London County Council own and occupy certain offices and printing works, 51–53, Effra Road. Such premises are indisputably a factory within the literal words of the Factory and Workshop Act, 1901, under I which, by s. 149 (1) and Sched. VI, para. 17, there is included under the definition of factory " 'letterpress printing works,' that is to say, any premises in which the process of letterpress printing is carried on." The London County Council own a tramway undertaking and the printing and preparation of tickets, fare bills, notices, posters and forms in connection therewith are all carried out upon the premises 51–53, Effra Road. No printing of tickets and no other work is carried on for third parties. In these circumstances the London County Council claimed to have the premises in question set apart and distinguished under s. 1 (1) (b) of the Rating and Valuation (Apportionment) Act, 1928, as an "industrial hereditament," and a draft special list was prepared by the assessment committee so including them. A To this the revenue officer objected, and appealed to quarter sessions, who dismissed the appeal. The order of quarter sessions was appealed to the Divisional Court, who directed that it should be quashed, and that judgment should be entered for the revenue officer. This judgment was again appealed to the Court of Appeal, who restored the order of the court of quarter sessions, and their judgment has been appealed to this House. B

The above statement is sufficient to show that the question is whether the London County Council is entitled to the benefit of certain statutory provisions, and it follows that the construction of the Act of Parliament is the only thing that is in issue. As an aid to this construction the preamble to the Act is not without value and may properly be examined: see *Fielding* v. *Morley Corpn.* (2). It is as follows:

> "An Act to make provision, with a view to the grant of relief from rates in C respect of certain classes of hereditaments, for the distinction in valuation lists of the classes of hereditaments to be affected, and the apportionment in valuation lists of the net annual values of such hereditaments according to the extent of the user thereof for various purposes."

It then provides by s. 1 (1) that three classes of hereditaments, "(a) agricultural hereditaments; (b) industrial hereditaments; [and] (c) freight transport heredita- D ments," are to be distinguished from each other, and from all other hereditaments. We are only concerned with industrial hereditaments. The provisions relating to these are to be found in s. 3 (1). This, omitting all that is not material for the present purpose, runs as follows:

> "In this Act the expression 'industrial hereditament' means a hereditament E . . . occupied and used . . . subject as hereinafter provided, as a factory or workshop; Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say (a) the purposes of a dwelling-house; (b) the purposes of a retail shop; (c) the purposes of distributive wholesale business; F (d) purposes of storage; (e) the purposes of a public supply undertaking; (f) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop."

By sub-s. (2) the expressions "factory" and "workshop" are declared to have the same meanings as in the Factory and Workshop Acts, 1901 to 1920. The hereditament in question of the London County Council comes, therefore, within the G provisions of sub-s. (1), unless excluded under its later words.

The argument in support of its exclusion, which the appellants urge, is that the purpose of the printing is not that of the manufacture and supply of tickets to any who wish to buy, but that it is merely a branch of and ancillary to the tramway undertaking of the London County Council, and, therefore, that its purpose is not that of a factory or workshop. This argument depends, and all the arguments that H have been addressed to us in the many cases that have already arisen depend, upon the assumption that in order to ascertain what are the purposes referred to in the Act, "which are not those of a factory or workshop," it is permissible to inquire, not as to the purpose for which the premises are used, but as to the purpose to which the goods that they produce are to be applied. I cannot accept this contention. It appears to me that running through the statute is the idea of exempting I particular premises described throughout as hereditaments, and that it is the use to which those premises are put that must be considered and not what may be ultimately done with whatever commodity they create.

Examination of the earlier branches of the section which are relied upon by the revenue authorities, to my mind, only strengthen the view I have expressed. If one wants to see whether the hereditament is used for the purposes of a dwelling-house, one examines what takes place within the boundaries in which that hereditament is confined. So again for the purposes of a retail shop. The retail shop is to be found upon the hereditament itself and not elsewhere, for were it otherwise every manufacturer of goods which ultimately find their way into the hands of the public through the channel of retail dealing would be robbed of the benefit of the Act, and as SCRUTTON, L.J., has pointed out, the Act would become a nullity. Subsection (c) must, in my opinion, be treated in the same way, although the hereditament is a factory and workshop; if it is primarily occupied for a distributing wholesale business it is outside the purpose of the statute, and so again with regard to storage. The purposes of a public supply undertaking are slightly different as there actual examination of the premises might not enable the question to be determined; but when once it was resolved to exclude a public supply undertaking the meaning is plain. When, therefore, we come to s. 3 (1) (f), it is necessary to look at the premises and see what are the "other purposes" for which the hereditament is alleged to be occupied and used. If it be found that, notwithstanding the fact that the hereditament may come within the definition of a factory and workshop, it is primarily occupied and used for other purposes, it cannot get the benefit of the statute. In other words, a hereditament primarily occupied and used for purposes which are not those of trade or factory, cannot take advantage of the fact that a trade and factory is there carried on, so that the premises might be regarded as a factory under the Factory Acts and by this means obtain the benefit of the statute. In cases where both uses are made of the premises and they are not "primarily used" for any of the named purposes, s. 4 (1) shows how in such a case annual value can be apportioned between the user for industrial purposes and those outside.

Many authorities were referred to and in but a few of them was any help to be obtained. In *Inland Revenue* v. *Donaldson & Co.* (3) the benefit of the Act was refused to the respondents upon the ground that the hereditament was primarily used for the purposes of storage and also of a distributive wholesale business. In *White Horse Distillers, Ltd.* v. *Inland Revenue* (4) a hereditament was occupied by a whisky company where their packing cases were repaired and re-painted, and bottles were washed. It was argued that they were not entitled to exemption because the processes were not carried on by way of trade or for purposes of gain, and this was accepted by the valuation committee, but was definitely rejected by LORD SANDS, though the determination of the committee was held to be right upon grounds not material for the present purpose. In *Inland Revenue* v. *M'Intyre & Co.* (5) the hereditament was used by a firm of plasterers in connection with their business and contained a store for tools and material, a garage and an office. A certain amount of manufacturing of slabs was done, the greater part of which were used in connection with the firm's own business, the remainder being sold. It was held that they were not industrial lands and heritages. So far as the decision depended upon the fact that the premises were an ordinary plasterers yard, which appears to have been LORD SANDS' view, it would not be open to question, and the fact that there were no findings to show the extent to which the premises were used for manufacturing purposes robs the decision of any real relevance. But so far as there underlies the judgment the idea that the manufacture on the premises of slabs for the company's use prevented it from being an industrial hereditament, I do not think the decision was sound. In *Inland Revenue* v. *Melville, Dundas and Whitson* (6) public works contractors occupied premises where they did a large amount of building work in making reinforced concrete and also for overhauling their plant. The argument there certainly raised a point similar to that in the present case, for it was argued that the premises were not a factory or workshop because the work done was not by way of trade or for purposes of gain, but was merely ancillary to contracting work done elsewhere. LORD HUNTER, in declaring that the premises were not entitled to be separately entered, said (1930 S.C. at p. 479) that "what is done by way of manufacture is not done with a view to producing a separate entity," by which I understand him to mean separate trade or business apart from the general work of the public works contractor. With that opinion I cannot agree. It is quite easy to see how on other grounds the decision was reached, but upon the facts found it would appear that the premises ought to have been divided up, the storage exempted from the provisions of the Act, and also the garage, while the work in constructing the concrete, the steel bars and similar work would appear to be work entitling the hereditament to be described as an industrial hereditament within the meaning of the Act. *Inland Revenue* v. *Currie & Co.* (7) was a case where certain cement merchants occupied premises used for the making of asphalt for use on outside contracts. The valuation committee held they ought to be de-rated. This decision was overruled by the Court of Session, but I am unable to agree with their conclusion. Lord Hunter says (1930 S.C. at p. 515) that the occupiers did not directly deal in the sale of asphalt, but used asphalt in connection with the completion of outside contracts. If this be the foundation of the judgment it is contrary to the opinion that I have expressed as to the true construction of the statute. Lord Sands, however, did think that the premises ought not to be registered as a factory at all. If that were so the matter would not, for another and perfectly valid reason, have been within the earlier provisions of s. 3, and the question as to whether they were taken out of it by the subsequent reservation would not arise.

The whole difference of opinion upon this Act resolves itself into the proposition which I stated in an earlier period of this opinion. Can one, for the purpose of determining whether a hereditament is primarily occupied and used for purposes which are not those of a factory or workshop, consider not merely the actual indisputable use of the premises themselves, but the use that is going to be made of the work done on the premises. I am clearly of opinion that this cannot be done. Throughout the whole statute it is the hereditament that has to be examined. It is the use to which the hereditament is put that determines whether it is a factory or a workshop, and it is again the use to which the hereditament is put that determines whether its primary occupation is for other purposes.

Potteries Electric Traction Co., Ltd. *v.* Bailey

In this case the appellants own and operate a fleet of 198 motor omnibuses and they occupy a hereditament described as a tram depot power station, etc., situate in the borough of Stoke-on-Trent. The use to which the premises are put is stated in the Special Case to be as follows:

> "(a) in part as a garage for thirty-six of the said motor omnibuses; and (b) for the manufacture of spare parts for the said fleet, and other manufacturing and repair processes distinct from the work of ordinary maintenance (which is carried out on other premises occupied by the respondent occupiers) in connection with the said fleet. Any new parts required in the course of ordinary maintenance are also manufactured upon the said hereditament; and (c) the respondents also occasionally sell parts manufactured upon the said hereditament to other omnibus proprietors, but such sales are negligible."

No question arises as to the garage or the stores, but part of the premises is said not to be an industrial hereditament within the meaning of the statute and not entitled to be so entered in the valuation list. The assessment committee decided that the said hereditament should be so entered and an appeal by the revenue officer was dismissed by quarter sessions. The King's Bench Division quashed the order of quarter sessions and the Court of Appeal affirmed their judgment.

So far as this case depends upon the fact that the work done upon the premises is done for the purpose of being used in the business of the people who own and occupy the premises, it has already been dealt with, but another consideration arises under s. 3 (2) which has not hitherto been considered. That subsection is as follows:

> "(2) For the purposes of this Act any place used by the occupier for the housing or maintenance of his road vehicles or as stables shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory or workshop and used in connection therewith, be deemed not to form part of the factory or

workshop, but save as aforesaid, the expressions 'factory' and 'workshop' have respectively the same meanings as in the Factory and Workshop Acts, 1901 to 1920."

It is said that these hereditaments are used for the maintenance of the road vehicles, and, accordingly, that they are disentitled to the benefit of the statute. I find myself unable to accept this view having regard to the findings in the Special Case. The fact that spare parts are necessary for repairing omnibuses does not, in my opinion, make the manufacture of the spare parts a maintenance of the omnibus within the meaning of the statute. The processes carried out are distinctly held in the Special Case to be processes that are additional to ordinary maintenance. I think the word "maintenance" is sufficiently well known in this connection to entitle us to rely upon the special finding of the fact in the Case. The finding that the work done in the manufacture of all the various articles specified, every one of which, as found in the case, would have to be purchased by the appellants if not made upon their own premises, shows that in substance the work carried on is the work of the manufacture of a large number of articles incident to the construction and the maintenance of a fleet of omnibuses. But the construction of an article needed to maintain differs in my opinion from what is meant by the word "maintenance" and, as already decided, it is the purpose to which the premises are put and not the purpose to which their products are devoted that is the question to be regarded. There is, however, one part of the building that is specially used for a purpose that obviously may be that of maintenance. It is that part which is devoted to the painting of omnibuses. It was urged by the appellants that there was nothing to show how much of this painting was done by way of repair and how much is original work, but in the workshops of an omnibus company owning a fleet of 198 omnibuses there must be constant re-painting required, and I think it is safe to assume that this part of the hereditament is devoted to that object and not entitled to the benefit of relief. It would be impossible further to elaborate the matter without sending the case back, and this quite rightly and properly the appellants' counsel did not ask us to do. Except, therefore, so far as the premises marked on the plan and there stated to be used as a paint shop, this appeal succeeds.

LORD DUNEDIN.—These cases have come before your Lordships raising a point of very general application in the construction of the De-rating Act as to which there has been a difference of opinion between the Divisional Court and the Court of Appeal. In the second of the cases there is a special point, not of such general application, which I shall separately deal with. It will be expedient, for clearness sake, to begin with the facts of the first case, the London County Council case, which are exceedingly simple, there being no controversy as to them between the two parties.

MOON *v.* LONDON COUNTY COUNCIL

The county council are owners and occupiers of a hereditament known as 51 and 53, Effra Road. The hereditament is occupied and used as a printing establishment where are printed tickets and other printed matter for use on the council's system of tramways. The tramway undertaking occupies an entirely separate hereditament. The county council claimed that the hereditament in Effra Road should be placed on the special list as an industrial hereditament. This was opposed by the appellant, the revenue officer for the Lambeth assessment area. The assessment committee entered the hereditament on the list, it having been omitted by the rating authority. The court of quarter sessions, on appeal, confirmed this judgment. They stated a Special Case for the opinion of the King's Bench Division. The Divisional Court allowed the appeal and removed the name from the list. Appeal being taken to the Court of Appeal, they reversed the judgment of the Divisional Court and restored the judgment of the court of quarter sessions. From this judgment of the Court of Appeal the present appeal is taken to your Lordships.

I now turn to the Act, being the Rating and Valuation (Apportionment) Act, A
1928. The scheme of the Act seems to me remarkably clear. Taken in conjunction with the following Act it was, as set forth in the preamble, to give a certain relief from rates to certain classes of hereditaments by exempting, to a certain extent, what were to be, in the terms of the Act, agricultural, industrial, or freight transport hereditaments. This brings me straight to the section on which the question for us turns, it being understood that we have here to do with an industrial B
hereditament. Section 3 (1) of the Act provides as follows:

> "In this Act the expression 'industrial hereditament' means a hereditament (not being a freight-transport hereditament) occupied and used as a mine or mineral railway or, subject as hereinafter provided, as a factory or workshop: Provided that the expression industrial hereditament does not include a C
> hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say: (a) the purposes of a dwelling-house; (b) the purposes of a retail shop; (c) the purposes of distributive wholesale business; (d) purposes of storage; (e) the purposes of a public supply undertaking; (f) any other purposes, whether or not similar to any of the foregoing, which are not those D
> of a factory or workshop."

Now, the first thing that a person making a claim to have his hereditament included in the special list must show is that the hereditament is a factory or workshop. In order to do that he must go to the Factory and Workshop Acts which define various ways in which the character of a factory or workshop can be obtained. In the present case the hereditament is a factory because it is a printing works and E
printing works are one of the works enumerated in Sched. VI, para. 17, of the Act of 1901, which, under the head of "Lists of Factories and Workshops" puts "letterpress printing works, that is to say, any premises in which the process of letterpress printing is carried on."

The claimant has now got so far on his way; but, though he has shown that the hereditament is a factory, it may still be that it is not entitled to be called an F
industrial hereditament because it may be struck at by the terms of the proviso. I go to the proviso, but before doing so I remark that if once the hereditament is qualified as a factory or workshop by direct description, that part of the inquiry is ended, and a discussion, as was raised in some of the learned judges' judgment in the Court of Appeal, whether the factory is carried on for gain or not and the citation of such a case as *Nash* v. *Hollinshead* (1), a case which was brought to G
settle whether a particular place where a workman was working when injured was or was not a factory, is quite beside the mark and irrelevant. As to the proviso, the reasons for it are, I think, plain. Once the term factory or workshop (I shall not go on repeating the double term) is given, the whole hereditament obtains that character. A workman injured in any part of the hereditament, however removed from where the machinery was, would, under the old law, before it was swallowed H
up under the wider provisions of the Workmen's Compensation Acts, have obtained relief. But it was not wished to extend this rating benefit to a hereditament which, although it was called a factory, yet was not primarily—and that, I take it, is equivalent to "mainly"—used for factory purposes. To do so when the factory engaged but a small portion of the hereditament would be to give relief little in keeping with the true industrial tenement sought to be relieved. Accordingly, I
there is an enumeration of various things which are not factory operations. But be it observed that in each and all of the sentences—(a) to (f)—the nominative is a hereditament which is described as being used and occupied primarily for a specific purpose which is not a factory purpose. Obviously part of the hereditament is a factory, but the portion occupied for the other purposes is in contradistinction to the portion occupied for factory purposes, and the question is: Which is primarily or most occupied? In other words, the whole hereditament is being considered, for upon that whole the relief would necessarily be calculated in order to see

whether it is used and occupied primarily or mainly for non-factory purposes, in which case the privilege is not accorded. The truth is that "for the purposes of" might perfectly well be expressed by the one little word "as." All this has nothing to do and could have nothing to do with the product of the factory itself. That is, of course, quite apparent in the earlier sentences. No factory makes dwelling-houses, retail or wholesale shops, or storage. But the Court of Appeal has gone on the terms of the last para., (f): "any other purposes . . . which are not those of a factory or workshop."

To my mind, the use of this paragraph is clear. The earlier ones do describe various uses to which the parts of the area not actually used by the factory might be put. Then comes this sub-division, which is ejusdem generis and is put in to cover anything that might be omitted. But suddenly to change the whole scheme, no longer to consider how the area is occupied, except in so far as it is occupied by the factory, but to bring in the question whether the product of the factory is for the purpose of being used by something which was not a factory is, to my mind, and with deference to the learned judges who have so thought, quite fantastic. Its operation would defeat the whole scheme of the Act, and all this is to be drawn out of the word "purpose." Here I must deal with an argument pressed by the learned Attorney-General, who said that if the meaning was the meaning given by the Court of Appeal, the section might have been much more simply expressed. I agree. I have already said that the word "as" would do just as well as "for the purpose of." It is true that sometimes in considering an Act of Parliament when it is very difficult to find a meaning it is legitimate as against one proffered meaning, to say: "That could have been more simply said in other words," but when there is no difficulty in finding a meaning, and here I find no difficulty, it is not legitimate to say: "That meaning could have been more simply expressed, and, therefore, you must seek, not for the obvious meaning of the words used, but for some more recondite meaning which would differ from the simple one." The scheme of the Act as I have described it is most logically carried on in s. 4. If industrial hereditament had been made equivalent to factory the whole hereditament would have enjoyed the privilege. If the most part of it is used, not as a factory or, to use the exact words, if the hereditament is used primarily for non-factory purposes, the privilege is not obtained; but even if the privilege is obtained it may yet well be that much of the hereditament is not used for factory purposes and then, under the provisions of s. 4, there must be apportionment. A practical example of this is given in the second case. I am, therefore, clearly of opinion that in the first case the judgment of the Court of Appeal is right.

POTTERIES ELECTRIC TRACTION CO., LTD. v. BAILEY

On the general question the second case is, in my opinion, ruled by the decision given in the first. The facts here are that the hereditament is used for the manufacture of spare parts for motor omnibuses, but part of it is used as a garage, and for certain other purposes. The whole judgment of the Divisional Court rests on the fallacious view that the ultimate fate of the product of the factory rules the question of what are the purposes for which the hereditament is primarily occupied. This is quite an illustrative case because much of the hereditament was occupied for purposes which were obviously not factory purposes, e.g., as a garage, and these portions have been apportioned, under s. 4, with the portions occupied as a factory as shown on a plan produced; but the Divisional Court, on the main question, found that the hereditament was occupied primarily for non-factory purposes on the ground that the factory was used to make spare parts which were used, not for sale, but for employment in repairing the occupier's own fleet of omnibuses. This is again a case of judging the purpose by the use of the product, and, accordingly, shares the fate of the previous case.

There was, however, a particular question which arose in this case. Section 3 (2) says:

> "For the purposes of this Act any place used by the occupier for the housing or maintenance of his road vehicles or as stables shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory or workshop and used in connection therewith, be deemed not to form part of the factory or workshop."

The Court of Appeal held that, inasmuch as the spare parts manufactured in the factory were used for the omnibus fleet, this was a case in which the place was used for the "maintenance" of road vehicles. I cannot assent to this. "Maintenance" is taken along with housing, and points, I think, to something done to the vehicle on the premises. It is really the same story over again. The ultimate fate of the part made is to maintain a vehicle. That does not show that maintenance is done on the hereditament. While this is so, and displaces the view of the Court of Appeal, we have been driven to look for ourselves at the account given of the premises in the Special Case, and, if that is looked at, it seems pretty clear that the painting shop is used for the purpose of real maintenance. I am, therefore, of opinion that following the severance pointed at in s. 3 (2) the painting shop ought to be transferred to that part of the hereditament which is non-industrial.

I have now dealt with both cases, but there are two other matters which I think I should be wrong not to mention. The first is that the judgment of the Court of Appeal was given after the hearing of seventeen cases, and there are, accordingly, in that judgment many remarks as to other questions arising under the Act which did not touch this case. I have studiously refrained from making any comment on such observations because I think it most inexpedient under the head of general observations to prejudice questions which may arise and come before us on other appeals. The second is in regard to certain observations by GREER, L.J. (143 L.T. at p. 671), as to the burden of proof. I cannot help thinking that these observations may be misunderstood. I am not canvassing this view as to what must be legally proved for the privilege of getting the hereditament on the special list, but I say unhesitatingly that if the occupier of the hereditament proves that it is a factory in any of the ways in which that can be done, it is quite enough for him to say: "My hereditament is not occupied primarily for any of the purposes specified in paras. (a) to (f) of s. 3 (1)," and then to rest content, leaving it for the revenue officer either to elicit by cross-examination or to prove by independent witnesses that his answer was a mistaken one. What I am afraid of in the lord justice's remarks is that it might be thought that it was necessary for the occupier to produce independent witnesses to go over the various subsections of the Act and be asked: "Did you find that the hereditament was not mainly occupied as a dwelling-house, as a store," &c. In my view, such a proceeding would be quite unnecessary.

MOON v. LONDON COUNTY COUNCIL

LORD WARRINGTON.—This is an appeal by the revenue officer from an order of the Court of Appeal (SCRUTTON, GREER and SLESSER, L.JJ.), dated July 11, 1930, allowing an appeal by the London County Council from an order of the King's Bench Division (AVORY, TALBOT and FINLAY, JJ.), whereby an appeal by the present appellant upon a Case stated by the court of quarter sessions was allowed and the decision of that court was reversed. The respondents are the occupiers of a certain hereditament in Effra Road, Lambeth, comprising printing shops used for printing tickets and other matter for use in connection with their tramway undertaking and certain offices and other rooms used for various purposes incidental to the printing works. The hereditament is a factory, namely, "premises in which the process of letterpress printing is carried on" within Sched. VI, para. 17, of the Factory and Workshop Act, 1901, and is registered as such. The hereditament is occupied and used by the respondents solely in connection with their tramway undertaking and no printing of tickets or other work is carried on for third parties. On these facts the court of quarter sessions decided that the hereditament was an industrial hereditament within the meaning of the Rating and Valuation (Apportionment)

Act, 1928, and ought to be included in the special list accordingly, and this decision was ultimately affirmed by the Court of Appeal as above stated.

The question turns upon the true construction and effect of s. 3 of the Act of 1928, and, in particular, of the proviso to sub-s. (1) of that section. Shortly stated it is whether the hereditament, though occupied and used as a factory or workshop, is primarily occupied and used for other purposes which are not those of a factory or workshop. Section 3 (1) of the Act of 1928 is in the following terms so far as it is material for the decision of the question:

> "In this Act the expression 'industrial hereditament' means a hereditament (not being a freight-transport hereditament) occupied and used as a mine or mineral railway or, subject as hereinafter provided, as a factory or workshop: Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say: (a) the purposes of a dwelling-house; (b) the purposes of a retail shop; (c) the purposes of distributive wholesale business; (d) purposes of storage; (e) the purposes of a public supply undertaking; (f) any other purposes, whether or not similar to any of the foregoing which are not those of a factory or workshop."

It was admitted in argument before this House that unless the case could be brought within head (f) in the proviso the appeal would fail. I propose, therefore, to consider the construction and effect of the section in reference to that head of exception and to that alone, though, of course, a decision on the construction in reference to that head must in some respects affect the construction as to others.

It is contended on behalf of the appellant that the factory in this case is primarily occupied and used for other purposes not those of a factory because it is occupied and used for the production of printed matter to be used exclusively in connection with the tramway undertaking of the respondents. In my opinion, this contention is based on a confusion between the purposes for which the hereditament itself is occupied and used, and the purposes to which the products of that occupation and user are devoted. It is, I think, reasonably clear that in this Act the purposes for which the hereditament itself is occupied and used, and those alone, determine the question whether it is an industrial hereditament or not. The words are "if it," that is to say the hereditament occupied and used as a factory or workshop, is primarily used for another purpose. There is no suggestion here that the disposition of the product has any bearing on the question. Again, the use of the word "primarily" suggests a comparison in the minds of the framers of the Act between classes of purposes for which the hereditaments may be used, some of which may be regarded as the main or substantial purposes and the others as secondary or subsidiary, but it is still the occupation and use of the hereditament itself the purposes of which are being considered. That this is the case is, I think, confirmed by s. 4, which provides for the apportionment of the annual value where the hereditament is used partly for industrial purposes and partly for other purposes. Nowhere is there the least indication—except possibly in reference to public supply undertakings (head (e))—that the use made of the products of the factory affects the question. In the present case the hereditament itself is clearly used and used only as a factory, and when that is the fact there is no ground for the application of the proviso. I prefer to express no opinion on the true construction of the exception under head (e). This will have to be dealt with when and if it arises. I would like to point out, however, that the purposes therein mentioned appear to stand in a category by themselves inasmuch as having regard to the definition of "public supply undertaking" in s. 3 (4) of the Act the supply for particular purposes of the product of the hereditament is an essential characteristic of its use. The appeal, in my opinion fails, and should be dismissed with costs.

A

This is an appeal from an order of the Court of Appeal dated July 11, 1930, affirming an order of the King's Bench Division, dated April 15, 1930, whereby an order of the court of quarter sessions for the county borough of Stoke-on-Trent in favour of the present appellants was set aside. The hereditament in question is occupied and used by the appellants in part as a garage for thirty-six out of their B fleet of 198 motor omnibuses, and in part for the manufacture of spare parts and other manufacturing and repair processes distinct from ordinary maintenance (which is carried out on other premises occupied by the appellants) in connection with their fleet. The part used as a garage and certain other parts are not claimed as an industrial hereditament. The remainder of the hereditament was entered in the special list as an industrial hereditament and this was confirmed by the order C of the court of quarter sessions. The question in this case is whether that order was correct in law.

The appeal raises two questions: (i) the same question as that decided in *Moon* (*Lambeth Revenue Officer*) v. *L.C.C.*, and (ii) a minor point affecting, as I think, certain parts only of the hereditament, but, in the view of the Court of Appeal, preventing any part from being an industrial hereditament.

D

As to the first point. The hereditament is unquestionably used and occupied as a factory, and is an industrial hereditament unless it is primarily occupied and used for any of the purposes mentioned in s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928. The only material head of exception is (f). The Court of Appeal came to the same conclusion on this point as in the *L.C.C. Case*. The two cases are in this respect indistinguishable, and I agree with the Court of E Appeal that, but for the second point, the appellants were entitled to have the order of quarter sessions upheld. The second point raises a question as to the construction and effect of s. 3 (2) of the above-mentioned Act. This is as follows:

> "For the purposes of this Act . . . (b) any place used by the occupier for the housing or maintenance of his road vehicles or as stables shall, notwithstanding that it is situate within the close curtilage or precincts forming a factory or F workshop and used in connection therewith, be deemed not to form part of the factory or workshop."

This provision appears plainly to contemplate the exclusion from a factory of certain parts not used for factory purposes, and (but for one very minor point to be mentioned hereafter) effect was given to it by excluding those parts from the factory. But the learned lords justices are of opinion that inasmuch as the spare parts and G the repair processes and other matters described in the Special Case were all, in their opinion, used and employed in the maintenance of the omnibuses, the whole of the works must be deemed not to form part of the factory, and that the hereditament could not be treated as an industrial hereditament. With all respect I cannot agree with this view. With one minor exception to be mentioned presently the whole of the workshops and so forth described in the Special Case have been found H to be used for purposes all of which are ordinary purposes of a factory. It is true the things made there are used in connection with the appellants' fleet of omnibuses and are (except to a negligible degree) not supplied to the public, but, as already pointed out in the *L.C.C. Case*, the purposes for which the products of a factory are used are not to be treated as purposes for which the factory itself is used. The Court of Appeal seem to me to have done under one subsection what they have I themselves held could not be done under the other. In the Special Case the learned recorder has carefully and elaborately described the work carried on in the several departments of the factory. He has found as a fact that the hereditament is occupied and used by the appellants for the manufacture of spare parts for the said fleet and other manufacturing and repair processes distinct from the work of ordinary maintenance (which is carried out on other premises occupied by the appellants) in connection with the said fleet. Any new parts required in the course of ordinary maintenance are also manufactured upon the said hereditament. He has also found that if the appellants did not themselves manufacture the parts and carry out the processes referred to in the Special Case (being the detailed description above referred to of the work carried on in the several departments) they would have to purchase the said parts from, and have the said processes carried out by, manufacturers at prices higher than the present cost to the appellants. With one small exception there is, in my opinion, nothing in the detailed description of the work which is inconsistent with the general conclusion of the learned recorder. The exception is this. In his description of the paint shop he says it is used, among other things, for painting omnibuses, lorries and cars. This is, I think, a matter of ordinary maintenance and the paint shop should, therefore, have been excluded from the factory.

On the whole I think the appeal succeeds and the order appealed from together with the order of the King's Bench Division should be reversed, and, with the slight variation mentioned above, the decision of the court of quarter sessions should be restored. The variation is so small that I think it should not affect the costs. These both in this House and below should be paid by the respondents.

MOON *v.* LONDON COUNTY COUNCIL

LORD TOMLIN.—The respondents own and operate a tramway undertaking. They are the occupiers of 51 and 53, Effra Road, Lambeth. They use these premises as printing works to print tram tickets, fare bills and other matter required by them for the purposes of their tramway undertaking. The premises in question are admittedly a factory within the Factory and Workshop Acts, 1901–1920. Section 149 (1) (a) and Sched. VI (para. 17) of the Factory and Workshop Act, 1901, expressly includes "letterpress printing works" in the definition of non-textile factory. The question on this appeal is whether the premises are an "industrial hereditament" within the meaning of s. 1 (1) of the Rating and Valuation (Apportionment) Act, 1928 (which I will refer to as the Rating Act), so as to entitle the respondents to rating relief in respect thereof under s. 68 of the Local Government Act, 1929. The Lambeth assessment committee included the premises in the special list for the rating area of the metropolitan borough of Lambeth as an industrial hereditament. The revenue officer for the Lambeth assessment area (who is the present appellant) appealed to the court of quarter sessions. The appeal failed, but a Special Case was stated for the opinion of a Divisional Court of the King's Bench Division. That court quashed the order of the court of quarter sessions and directed judgment to be entered at quarter sessions for the present appellant with the result that the premises were ordered to be removed from the special list. On appeal taken to the Court of Appeal the decision of the Divisional Court was reversed and the premises were ordered to be restored to the special list as an industrial hereditament. Against that decision the revenue officer appeals to your Lordships' House.

Section 3 of the Act of 1928, so far as it is material, is in the following terms:

> "Section 3. (1) In this Act the expression 'industrial hereditament' means a hereditament (not being a freight-transport hereditament) occupied and used as a mine or mineral railway or, subject as hereinafter provided, as a factory or workshop. Provided that the expression 'industrial hereditament' does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say: (a) the purposes of a dwelling-house; (b) the purposes of a retail shop; (c) the purposes of distributive wholesale business; (d) purposes of storage; (e) the purposes of a public supply undertaking; (f) any other purposes whether or not similar to any of the foregoing which are not those of a factory or workshop. (2) For the purposes of this Act . . . (b) any place used by the occupier for the housing or maintenance of his road vehicles or as stables shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory or workshop and used in connection therewith,

> be deemed not to form part of the factory or workshop, but save as aforesaid, the expressions 'factory' and 'workshop' have respectively the same meanings as in the Factory and Workshop Acts, 1901 to 1920. . . . (4) In this Act the following expressions have the meanings hereby respectively assigned to them, that is to say . . . 'Public supply undertaking' means any undertaking primarily carried on for the supply of gas, water, electricity, or hydraulic power for public purposes, or to members of the public, or to any one or more undertakings carried on under any special Act or Order having the force of an Act. 'Retail shop' includes any premises of a similar character where retail trade or business (including repair work) is carried on."

"Mine" and "mineral railway" are also defined in the section, but these definitions are immaterial for the purposes of the present case. Section 4 (1) of the Act provides as follows:

> "Section 4. (1) In every valuation list every industrial hereditament occupied and used wholly for industrial purposes shall be shown as being so occupied and used, and as respects every such hereditament occupied and used partly for industrial purposes, the net annual value thereof shall be shown, in the prescribed manner, as being apportioned between the occupation and user of the hereditament for industrial purposes, and the occupation and user thereof for other purposes."

A definition of a freight-transport hereditament is contained in s. 5 (1) of the Act, but the premises with which the present appeal is concerned are not within that definition.

In dealing with premises which are not a freight-transport hereditament and are not occupied and used as a mine or mineral railway the process prescribed by the Act of 1928 for determining whether they are an industrial hereditament seems to be reasonably clear. First, it must be ascertained whether the hereditament is a factory or workshop within the meaning of the Factory and Workshop Acts, 1901–1920, regard being had to the provisions of s. 3 (2) of the Act of 1928. If it is such a workshop or factory, then, secondly, it must be ascertained whether it is taken out of the category of industrial hereditaments by the operation of the proviso in s. 3 (1) of the Act. It is by the application of the terms of this proviso, properly construed with reference to the facts of this case, that this appeal must be determined.

It is said by the appellant, as I understand the argument, that there is a distinction to be drawn between the phrase "occupied and use as" and the phrase "occupied and used for the purposes of" and that the first relates to the physical occupation of the premises and the second to the ulterior purposes to which the products are applied with the result that it is necessary and permissible to consider what is done with the products of the factory or workshop in order to determine whether the factory or workshop is primarily occupied and used for any of the purposes mentioned in cll. (a) to (f) of the proviso. The appellant further contends that if in fact, as in the present case, the products are not put upon the market for the purpose of direct gain, but are only used by the occupier of the factory or workshop in connection with and as ancillary to some other undertaking or business which he is carrying on elsewhere, the factory or workshop is then primarily occupied and used for a purpose which is not that of a factory or workshop and falls within cl. (f) of the proviso. He seeks to support his argument by reference to the decision in *Nash* v. *Hollinshead* (1). This, to my mind, is erecting an over-elaborate superstructure upon inadequate foundations. The object of the proviso in s. 3 (1) of the Act of 1928 seems, broadly speaking, to be to exclude from the category of industrial hereditaments premises occupied and used in some way which, taken alone, would not constitute them a factory or workshop, although, by reason of some ancillary machinery used or work done thereon the definition of a factory or workshop contained in the Factory Acts applies to them. An examination of the premises and of the things done upon them will in most cases make it clear whether the proviso does or does not apply. Thus, under cll. (a), (b), (c) and (d) such an examination will disclose whether the uses (apart from the element which attracts the statutory definition) to which the premises are appropriated are of such character and extent as to justify describing the premises as mainly either a dwelling-house or a retail shop or a place where a wholesale distributive business is carried on or a place of storage. Clause (e) is, I think, a special case somewhat out of line with the general run of the cases previously mentioned. Under that clause it may not be apparent from a mere examination of the premises and of what is done thereon that those who occupy and use them are doing what they do as undertakers of and in connection with a public supply undertaking. Some inquiry outside may be necessary to complete the relevant information. Finally, there is cl. (f) which, to my mind, is only intended to deal with cases ejusdem generis with the general run of the cases expressly mentioned. This construction renders intelligible the words "purposes . . . which are not those of a factory or workshop" and relates them to the main use which is made of the premises in cases where there is something in the nature of a mixed user. Thus, the proviso covers what may be called the mixed user cases as distinct from cases where there is on the premises a separation of users which are left to be dealt with by s. 4 of the Act. The respondents' works are "letterpress printing works" and as such brought expressly within the statutory definition of a non-textile factory contained in the Factory and Workshop Act, 1901, by Sched. VI, para. 17, to that Act. They are carried on for a trade purpose inasmuch as the products are used in the respondents' tramway business. It is not suggested that there is anything in this user which excludes the works from the statutory definition. Their inclusion in the statutory definition is admitted. The production of printed matter is without doubt a purpose of this statutory factory. What is there, then, in the language of the proviso to s. 3 (1) of the De-Rating Act to make the purpose of the works, while not inconsistent with the statutory definition of a factory, a non-factory purpose within the meaning of the proviso? I can find nothing which has this effect. Further, I am unable to see why upon the foregoing presentment of the matter either the decision in *Nash* v. *Hollinshead* (1) or the absence of any sale of the products has any relevancy to this case. I think that the premises in question were properly restored to the special list and that the appeal fails.

Potteries Electric Traction Co., Ltd. *v.* Bailey

In this appeal the occupiers are the appellants and the revenue officer is the respondent. This has come about because the Court of Appeal, while in regard to the proviso to s. 3 (1) of the De-Rating Act applying the same principles as in the *L.C.C. Case* and arriving at a similar conclusion, have held that, by reason of s. 3 (2), the premises are not a factory or workshop. It is admitted by the respondent that so far as the proviso is concerned this case must be governed by the decision of your Lordships in the *L.C.C. Case*. The only question, therefore, is whether or not, having regard to the facts found by the learned recorder, the premises are a "place used by the occupier for the housing or maintenance of his road vehicles or as stables" within s. 3 (2). These words seem to me to refer to what is done on the premises. The manufacture of spare parts for use elsewhere is not, in my view, within the contemplation of the subsection. The findings of fact of the learned recorder make it plain, in my opinion, that the premises (other than the paint shop) are not used for maintenance in the sense which I have indicated. I do not think, therefore, that s. 3 (2) applies to the case except so far as the paint shop is concerned. I agree with the motion proposed.

Moon *v.* London County Council

LORD THANKERTON.—I concur in the motion proposed. The facts which have given rise to this particular case have been already stated, and I need not repeat them or cite again the terms of s. 3 of the Act of 1928. It is important to observe that s. 3—except in sub-s. (3), with which we are not here concerned—

relates to a single hereditament, which forms a separate unit on the valuation list, A and that sub-s. (3) contains the only express authority to have regard to other separately valued units. Subsection (4) is merely a definition subsection, and we have, therefore, to consider the substantive provisions of sub-ss. (1) and (2), subject to resort to sub-s. (4) for the definition of terms used in these two subsections. Further, for present purposes, we may disregard any reference to hereditaments occupied and used as a mine or mineral railway. Subsections (1) and (2) appear B to me to lay down three conditions which must be complied with in order to qualify the hereditament to be entered in the special list as an "industrial hereditament," namely: (a) that the hereditament, or some part of it, is occupied and used as a factory or workshop within the meaning of the Factory and Workshop Acts, 1901 to 1920; (b) if so, that any place used by the occupier for the housing or maintenance of his road vehicles or as stables, which is within the close, curtilage or precincts C forming such factory or workshop, is to be deemed not to form part of such factory or workshop for the purposes of s. 3; and (c) if such hereditament is primarily used and occupied for any of the purposes specified under heads (a) to (f) of the proviso to s. 3 (1), then the hereditament is not an industrial hereditament. The hereditament here in question admittedly satisfies the first condition and is not affected by the second condition, but the appellant maintains that the hereditament is primarily D occupied for purposes which are not those of a factory or workshop, and falls within head (f) of the proviso, and, therefore, is not an industrial hereditament.

The appellant contends that, while it may be true to say that the hereditament is used as a factory for the production of tickets, &c., the sole purpose of that production is for the respondents' tramway undertaking and that the hereditament is, therefore, primarily used for a purpose which is not that of a factory or workshop. E In my opinion, that involves too wide a construction of the proviso, and consideration of the purposes detailed in heads (a) to (e) shows that the inquiry is confined to the actual use and occupation of the particular hereditament. For instance, under head (a) the inquiry will be whether the particular hereditament is primarily, or mainly, used as a dwelling-house, and would not relate to a case where, for instance, the particular hereditament is used for production of electricity F which provides a private supply for a house or group of houses in the same occupation, but which form separate valuation units. The same reasoning obviously applies to heads (b), (c) and (d). Head (e) may not be so clear, owing to the special definition of public supply undertaking in s. 3 (4), but in that case also it is necessary, in my opinion, to find, by inspection of the particular hereditament, that primarily or mainly it is used for the supply of gas, water, electricity or G hydraulic power, although a further inquiry is necessary as to the destination of such supply. These further inquiries are rendered necessary in order to establish that the supply is a public one, but such necessity does not, in my opinion, affect the construction of the proviso. I have had the opportunity of reading the opinion of my noble and learned friend on the Woolsack, and I desire to associate myself with his observations on the series of Scottish decisions which were cited to us. H In the *Potteries Case* I concur in the opinion of my noble friend on the Woolsack, which I have had the privilege of reading.

Orders accordingly.

Solicitors: *Treasury Solicitor*; *S. A. R. Preston-Hillary*; *Sidney Morse & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law*.] I

MELVILL *v.* MELVILL AND WOODWARD

[Court of Appeal (Lord Hanworth, M.R., Greer and Romer, L.JJ.), March 24, 25, 1930]

[Reported [1930] P. 159; 99 L.J.P. 65; 143 L.T. 206;
46 T.L.R. 327; 74 Sol. Jo. 233]

Variation of Settlement—Settlement made by respondent wife after institution of suit—Settlement on herself and after her death on "any" children—Power of appointment in favour of "any" husband—Supreme Court of Judicature (Consolidation) Act 1925, *s.* 192.

A wife respondent in a pending undefended divorce suit settled certain interests to which she became entitled by her grandfather's will and parents' marriage settlement on herself for life with remainder to her children by any marriage, reserving to herself a general power of appointment by will in default of any surviving children and also a limited power of appointment to any surviving husband. The husband petitioner was granted a decree absolute, and then petitioned for a variation of the settlement. There were two children of the dissolved marriage. On a petition by the husband to vary the settlement,

Held: section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, must be given a liberal construction, and, in accordance with s. 1 of the Interpretation Act, 1889, the plural word "parties" included the singular "party," and so must refer to the parties to the marriage or either of them; the intention of the wife in making the settlement must be ascertained by reference to the terms of the settlement and not from exterior circumstances; the document recorded the marriage, made a settlement of property, and provided that the issue of the marriage should be included among the beneficiaries; and, therefore it was a post-nuptial settlement within s. 192, and the court had power to vary it.

Notes. Section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, has been replaced by s. 25 of the Matrimonial Causes Act, 1950.

Distinguished: *Burnett* v. *Burnett*, [1935] All E.R.Rep. 490. Considered: *Brown* v. *Brown*, [1936] 2 All E.R. 1616; *Gunner* v. *Gunner and Stirling*, [1948] 2 All E.R. 771; *Lort-Williams* v. *Lort-Williams*, [1951] 2 All E.R. 241; *Parrington* v. *Parrington*, [1951] 2 All E.R. 916. Referred to: *Joss* v. *Joss*, [1943] 1 All E.R. 102; *Hindley* v. *Hindley*, [1957] 2 All E.R. 653.

As to variation of settlements, see 12 Halsbury's Laws (3rd Edn.) 451–460; and for cases, see 27 Digest (Repl.) 641 et seq. For Matrimonial Causes Act, 1950, see 29 Halsbury's Statutes (2nd Edn.) 388.

Cases referred to:

(1) *Worsley* v. *Worsley and Wignall* (1869), L.R. 1 P. & D. 648; 38 L.J.P. & M. 43; 20 L.T. 546; 17 W.R. 743; 27 Digest (Repl.) 245, *1980*.

(2) *Blood* v. *Blood*, [1902] P. 190; 71 L.J.P. 97; 86 L.T. 641; 50 W.R. 547; 18 T.L.R. 588; 46 Sol. Jo. 499, C.A.; 27 Digest (Repl.) 649, *6111*.

(3) *Churchward* v. *Churchward*, [1910] P. 195; 79 L.J.P. 59; 102 L.T. 862; 26 T.L.R. 401; 27 Digest (Repl.) 644, *6084*.

(4) *Bosworthick* v. *Bosworthick*, [1927] P. 64; 95 L.J.P. 171; 136 L.T. 211; 42 T.L.R. 719; 70 Sol. Jo. 857, C.A.; 27 Digest (Repl.) 645, *6091*.

(5) *Loraine* v. *Loraine and Murphy*, [1912] P. 222; 82 L.J.P. 29; 107 L.T. 363; 28 T.L.R. 534; 56 Sol. Jo. 687, C.A.; 27 Digest (Repl.) 638, *6003*.

(6) *Hargreaves* v. *Hargreaves*, [1926] P. 42; 95 L.J.P. 31; 134 L.T. 543; 42 T.L.R. 252; 27 Digest (Repl.) 646, *6094*.

(7) *Prinsep* v. *Prinsep*, [1930] P. 35; 99 L.J.P. 35; 142 L.T. 172; 46 T.L.R. 29, C.A.; 27 Digest (Repl.) 643, *6059*.

Motion to confirm registrar's report on a petition for variation of settlements presented by Col. James Lister Melvill and cross-motions to set the report aside.

In March, 1928, the petitioner, Col. Melvill, was granted a decree nisi for the dissolution of his marriage with Mrs. Irene Melvill on the ground of her adultery with Commander Hugh Woodward on a petition which he had filed on May 26, 1927. The decree was made absolute on Oct. 22, 1928, and the wife married the co-respondent on Dec. 12, 1928. In November, 1928, Col. Melvill petitioned for the settlement of the wife's property under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 191 (1), and on June 17, 1929, the petition was amended by a claim for relief by way of variation of settlements under s. 192 as well as under s. 191. Under her parents' marriage settlement and a voluntary settlement made by her parents, her grandfather's will, and her father's will the wife was entitled to an income of between £3,000 and £4,000 a year.

After the petition for divorce had been set down for trial as an undefended cause, the wife, on Dec. 30, 1927, executed a settlement by which she settled interests (of the value of about £775 per annum) to which she was absolutely entitled under her grandfather's will and her parents' marriage settlement on herself for life, and after her death upon any of her children who, being males, should reach the age of twenty-one years, or, being females, should reach that age or marry, in equal shares. In this deed the settlor was described as the wife of Col. Melvill, which she then still was, and the consideration was "the natural love and affection of the settlor for the two children of her marriage." The settlor was also empowered to appoint the income for life, and not more than half of the trust fund in favour of any husband who survived her. The co-respondent was one of the trustees of the settlement. By a deed poll dated Dec. 7, 1928, the wife declared that her income under the settlement of Dec. 30, 1927, should be for her separate use with restraint on anticipation. The wife was also entitled to a considerable income for her life with restraint on anticipation and certain powers of appointment under her late father's will, and on Nov. 29, 1928, she assigned these interests and the interests contained in the settlement of December, 1927, to Barclays Bank as security for advances, of which in December, 1929, there was £1,743 outstanding. In December, 1929, the registrar reported that the settlement of December, 1927, was a post-nuptial settlement that could be varied, and that the restraint on anticipation in the deed poll of December, 1928, should be discharged; that all the rights, powers, and interests of the wife should be varied as if she were dead; and that the trustees should pay the income to the petitioner for the benefit of the children. The petitioner asked the court to confirm the report. There were cross-motions by the wife and the trustees of her settlement to set the report aside, on the grounds that it could not be a post-nuptial settlement and contained no reference to the marriage then about to be dissolved, and that there was no jurisdiction to interfere with the restraint on anticipation.

Bateson, J., held that the settlement was not a settlement on the wife in her character as a wife, nor was it in reference to the married state of the spouses. It was a settlement upon the wife for herself and for any children she might have in future, with power to appoint to any husband she might take, made at a time when she knew that the only possible person that she at the end of that time could think of benefiting would not be the husband who had not yet got his decree absolute, but the new husband whom she intended to take as soon as she possibly could. On these grounds the registrar's report could not stand. Accordingly, the report was set aside and the petition dismissed, so far as it concerned variation. The petitioner appealed.

Sir Patrick Hastings, *K.C.*, *R. F. Bayford*, *K.C.*, and *Bush James* for the petitioner.

Alexander Grant, *K.C.*, and *H. W. Barnard* for the wife.

J. M. Gover, *K.C.*, and *Victor Russell* for the trustees of the settlement and Barclays Bank.

LORD HANWORTH, M.R.—This is an appeal from an order made by Bateson, J., on Jan. 27 of this year, whereby he refused to confirm a report which had been made by the registrar with reference to a settlement and ordered that the report must be set aside, and the petition, so far as regards variation of the settlement under s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, be dismissed.

On July 30, 1921, Col. Melvill married his wife, Irene Melvill. There were two children of the marriage. On May 27, 1927, a petition for divorce was lodged by the husband. It proceeded in the ordinary course as an undefended action, and it was set down for trial in the undefended list on Dec. 16, 1927. On Dec. 30, 1927, Mrs. Irene Melvill made the settlement which is in question here. On March 26, 1928, a decree nisi was made upon the petition for divorce, which was undefended, and on Oct. 27, 1928, that decree was made absolute. It should be noted, from the point of view of the interest taken by Mrs. Melvill, that Mrs. Melvill's mother died on Nov. 2, 1928. On Nov. 6 the petition was lodged for an order for the settlement of the wife's property under s. 191 of the Supreme Court of Judicature (Consolidation) Act, 1925. On Dec. 7, 1928, there was a deed poll executed by the wife, under which she directed and declared, in the event of a marriage taking place which was intended shortly to be solemnised between her and the co-respondent, that the income arising from the property, subject to the trusts of the settlement which had been executed by her on Dec. 30 in the previous year, were to be paid to her during her life without power of anticipation, and that so-called deed of declaration was made supplemental to the settlement of Dec. 30, 1927. On Dec. 12 the wife married the co-respondent. On June 25, 1929, the petition was amended so as to include the claim, under s. 192, to vary the settlement. Upon that petition the registrar made a report, and after reciting the facts which I have somewhat summarily detailed, the effective part of the report was this:

> "(i) It is submitted that the settlement of Dec. 30 is such a post-nuptial settlement as can be varied; and (ii) that the restraint of anticipation imposed by the deed poll of Dec. 7, 1928, be discharged, and that the settlement of Dec. 30, 1927, be varied"

in five different ways, which were set out in the report. A motion was made before the learned judge on behalf of the petitioner to confirm the report of the registrar as to the variation of the settlement. When that came before BATESON, J., he came to the conclusion that the settlement was not such a one as came within s. 192 of the Act of 1925, for he held that it was not a settlement on the wife in her character as a wife, nor was it in reference to her married life with her first husband. He said that it was a settlement by the wife upon herself for life and for all or any of her children after her death, with power to appoint the income or any part not exceeding a moiety of the trust fund to any husband who might survive her during his life, made at a time when she knew perfectly well that the only possible person she, at that time, could think of benefiting would not be the husband who had not yet got his decree absolute, but the new husband whom she intended to take as soon as she possibly could. BATESON, J., holding that view, decided that the report of the registrar could not stand, and, therefore, he dismissed the motion which had been lodged for the purpose of confirming the report of the registrar. It is from that judgment that this appeal is taken to this court.

The settlement was a settlement which dealt with a number of different funds to which Mrs. Melvill at that time was entitled or prospectively entitled. The learned judge, who has set them out with great accuracy, says this:

> "At that date the wife was entitled to certain funds: (i) under her parents' marriage settlement absolutely on her mother's death; (ii) under the grandfather's will, also on her mother's death absolutely; (iii) under a voluntary settlement made by her parents, on her mother's death, to a small life interest without power of anticipation; and (iv) under her father's will, to a life interest in a much larger sum, also without power of anticipation."

The settlement of Dec. 30, 1927, dealt with the first two of these funds. It is made between Irene Melvill, wife of Lieutenant-Colonel James Lister Melvill, who is called the settlor, and Irene Mary Diana Simmons, of 41, Cadogan Gardens, widow, and Francis Covell, solicitor, who were the trustees, and it recites:

> "Whereas the settlor had as issue two children and no more, namely, Peter and Chloe, now by this deed made in consideration of the natural love and affection of the settlor for the said Peter and Chloe,"

the settlor assigns those two first sums to the trustees, and there is a direction that the trustees are to pay the income to the settlor during her life, and after the death of the settlor the trustees shall stand possessed of the capital and future income of the trust fund in trust for all or any the children or child of the settlor who being male attain the age of twenty-one years, or being female attain that age or marry, if more than one, in equal shares. By cl. 6 it provides that the settlor may by will or codicil appoint that the income or any part not exceeding a moiety of the trust fund shall from and after the death of the settlor be paid to any husband who may survive her during his life. It is plain, therefore, upon the face of the document that she is described as a wife, that there was issue, of the marriage by which she became a wife, two children; but it is also plain that, after reserving a life interest to herself, the future income of the trust fund was to be held in trust for all the children of the settlor, whether the two children, the issue of the then existing marriage, or whether they should be children by some subsequent marriage; and it is also plain that the provisions in cl. 6 gave a power of appointment to any husband, not merely the husband who was recited as being the husband of the settlor in the opening words of the settlement.

It is contended that that settlement is not a settlement within the purview of s. 192. Section 192 replaces a section which was originally to be found as s. 5 of the Matrimonial Causes Act, 1859. The terms of that section were:

> "The court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and make such order with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the court shall seem fit."

Attention to the words of the section makes it plain that at that time it was contemplated that it was to operate in cases where there were children of the marriage, and children of whom the spouses were spoken of as "respective parents." By an amendment contained in the Matrimonial Causes Act, 1878, s. 3, it is provided that the court may exercise the powers vested in it by the provisions of s. 5 of the Act of 1859 notwithstanding that there are no children of the marriage. Section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, is in these terms:

> "The court may, after pronouncing a decree for divorce or for nullity of marriage, inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application, wholly or in part, of the property settled, either for the benefit of the children of the marriage or of the parties to the marriage as the court thinks fit, and the court may exercise the powers conferred by this section notwithstanding that there are no children of the marriage."

I think it is plain that the interpretation to be given to the words "parties" or "children" is the interpretation which arises from the application to them of s. 1 of the Interpretation Act, 1889, where, unless a contrary intention appears, the words in the plural shall include the singular. I think it would be idle to suppose that the words "for the benefit of the children" do not include benefit of the children or child of the marriage, and equally I think, when you come to the later words "for the benefit of the parties to the marriage," it must mean the parties to

A the marriage or either of them. Applying the same principle in the earlier part of the section, it would appear to embrace a settlement made on the parties or either of them whose marriage is the subject of the decree. I say that, because at one time, if I understood the argument, it was suggested that it might be held that, unless the settlement was made on both the parties, it would not be a settlement within the section. It is said that one must construe the settlement from what are B called the surrounding circumstances, and take into account what is the substance of the matter—in other words, that in the present case one ought in some way to treat this settlement as having been made for the purposes of the future intended marriage between the co-respondent and the wife and not as being one which was made by her as the wife of Col. Melvill, although at that time she was the wife of Col. Melvill in fact. I have great difficulty in accepting that view. It appears to C me that one must apply the ordinary canons of construction to this document. One must take the document as it stands and see what it does, and derive its purpose from its terms, and one cannot give a different interpretation or meaning to its terms by reason of some outside circumstances which are to be collected from other sources.

The interpretation which is to be given to the Act has been laid down in a D number of cases as a wide interpretation. In *Worsley* v. *Worsley and Wignall* (1) (L.R. 1 P. at p. 657), LORD PENZANCE says:

> "The court would have a great difficulty in saying that any deed which is a settlement of property, made after marriage, and on the parties to the marriage, is not a post-nuptial settlement. It would not be justified in narrowing the reasonable scope of the words used in the section. The substance of the matter E is that the legislature by this section has armed the court with authority to make special arrangements in the case of a woman being found guilty of adultery, in reference to property settled upon her in her character as a wife."

The same wide interpretation of the section was adopted by GORELL BARNES, J., in *Blood* v. *Blood* (2) ([1902] P. at p. 82), where he said:

> F "Those words are extremely wide, and I am anxious that they should not, by any construction the court may put upon them, be narrowed in any way."

In *Churchward* v. *Churchward* (3) ([1910] P. at p. 197), SIR SAMUEL EVANS, P., says: "I adopt in the fullest sense, both in the letter and the spirit, the words of GORELL BARNES, J., in *Blood* v. *Blood* (2)." He then quotes the passage to which I have just referred, and adds:

> G "To narrow them would be undesirable for this reason: the various circumstances which come before the court, and for which this section is brought into operation, are so diverse that it is to my mind extremely important that, so far as possible, the court should have power to deal with all the cases that come before it, and, in dealing with them, to meet the justice of the case."

He gives there a long excerpt from the judgment of GORELL BARNES, J., and adopts H it to the fullest extent. Lastly, in *Bosworthick* v. *Bosworthick* (4) ([1927] P. at p. 72), the same point arises, and I agree with the observations that are made there by ROMER, J.:

> "What we have to do is to consider the meaning of the word in these particular sections. We have had numerous authorities cited to us, going so far back as 1861, and amongst them an authority which is binding on this court, and in I my judgment those authorities establish that where a husband has made a provision for his wife, or a wife for her husband, in the nature of periodical payments, that amounts to a settlement within the meaning of the sections. That may appear to be a very liberal construction of the sections, but I think that it is no more liberal a construction than should be given to them having regard to the obvious purposes for which they were enacted by the legislature."

I agree entirely with those words. At the same time there have been cases which show that there are some so-called settlements which would fall outside the purview of the section. Thus, in *Loraine* v. *Loraine and Murphy* (5) it was held that the court cannot affect the will or the terms of the will of the wife's father; and in *Hargreaves* v. *Hargreaves* (6) there was a settlement of property made by a young man aged twenty-one some weeks before in fact he was married, and under the settlement there was a power of appointment. In fact he did get married shortly after he had made the settlement, and he did exercise the power of appointment, because he appointed a yearly sum of £500 to his wife for her life. It was claimed that the original settlement under which the power of appointment was made was such a settlement as fell within s. 192, but it was held not to be so because in fact it was not made in view specifically of the marriage, although it may have been contemplated that a marriage would shortly take place.

It is, to my mind, not possible, nor would it be wise, to attempt to give a precise definition of the settlement that comes within the purview of this section. I think the court ought always to bear in mind the words which have been used by Gorell Barnes, J., and approved by Sir Samuel Evans, P., that the section is intended to be a wide one and embraces a large number of transactions which might not appear to be settlements in the stricter terms of a conveyancer, because the section is intended to operate in a number of cases not easy to catalogue under any definition. But we have it in the report of *Bosworthick* v. *Bosworthick* (4) that there may be a settlement, although it does not involve the settlement of property, or a charge on property for successive interests. In that case there was an annuity secured by a bond, and it was held to be a settlement within the terms of the Act.

With those observations upon the ambit of the section I come back to the question whether or not this particular settlement falls within it. I do not think it possible to accept the view that one must ascertain the intention of the wife from exterior circumstances. I think one ought to look at the terms of the settlement itself. It shows that she was the wife of Lt.-Col. James Lister Melvill; it records the fact that there had been issue of that marriage; and the issue of that marriage are included, but not exclusively, in cl. 4, under which a trust is established for the children of the wife. It is quite true that Col. Melvill is not specifically mentioned as her husband under cl. 6, but the wider term used is "any husband," making it possible, if not certain, that a fresh husband is intended; but, nevertheless, it does make a settlement of property, the wife of the existing marriage being the settlor, recording the marriage, and the issue of that existing marriage being some, or included among, the beneficiaries. In those circumstances, I do not find it possible to exclude that settlement from the terms of s. 192. It is a settlement post-nuptial, made after the marriage with Col. Melvill had taken place and after there has been issue of the marriage; and the section is required to give power to the court, whose authority cannot be circumscribed by the parties, to make such orders for the benefit of the children of the marriage (that would be of the Melvill marriage), or of the parties to the marriage, as they should think right.

It has been strenuously argued by counsel for the wife that one ought to look at the word "nuptial," and, although the settlement is post-nuptial in the sense of the nuptials of Col. Melvill and Mrs. Irene Melvill, the nuptials which ought to be contemplated are the future nuptials which, if and when the decree absolute is made, it may be possible for Mrs. Melvill to engage in with the co-respondent. Rejecting the view that you are to find the intention aliunde and outside the settlement, I have come to the conclusion that this settlement was within the terms of s. 192, that it is made by one of the parties to the then existing marriage and in favour of the children of the marriage, and thus is a post-nuptial settlement within the meaning of s. 192. It is unnecessary, as I say, to go further for the purposes of this case. I think it much wiser to leave other cases, as they may be decided, to afford illustrations of the ambit of the section. But I am not prepared to follow the learned judge, with all respect to him, in cutting down the section so far as to declare that this settlement of Dec. 30, 1927, does not fall within its scope.

For these reasons the appeal will be allowed, and the matter must go back to be determined in the ordinary course. We are not asked to do more than to deal with this point, and, we having got rid of the difficulty which embarrassed BATESON, J., it will be open to him to deal with the matter as he thinks right, in his discretion and with his experience.

GREER, L.J.—I also am of opinion that this appeal must be allowed. We are invited by counsel for the petitioner to issue a pronunciamento as to the meaning of s. 192 which would be available to future litigants in the Divorce Court, where the facts may be somewhat different from the facts of this case. If it had been necessary to give a judicial definition to the compound word "post-nuptial" in s. 192 of the Act of 1925 I should have thought it necessary to take time to consider the position and to exercise more care than I can do at the present time in selecting the appropriate words to make a definition of the words which we have to consider in this case. But, without going so far as we were invited to go, I have come to the conclusion that, whatever may be the exact scientific words which should be used in defining the term "post-nuptial settlement," in this case the settlement under consideration was within the words of s. 192. As my Lord has pointed out, it has been said by high judicial authorities over and over again that a liberal construction should be put upon the section; and I understand that to mean that a wide interpretation should be given to the words, having regard to the objects of the section, and, if the words admit of application, by any reasonable meaning of them, to the facts of the particular case, then the powers of the court given by s. 192 ought to be considered exercisable, even though some criticism may be passed from the point of view of general knowledge of what the circumstances were in which the deed came into operation.

In this case the settlement came into operation in this way. The wife, for some reason or other, formed a very strong affection for a man who was other than her husband. The husband was ready to forgive the wife and to take her back again if she would come, but she declined to come, infatuated as she was at the time by the man who was afterwards made co-respondent to the divorce proceedings. As the French poet said, *souvent la femme varie*; it does not follow that strong passions of that sort will last for ever, and it was quite conceivable before divorce proceedings took place, and conceivable even after the case had been set down as an undefended proceeding, that the parties might come together again. It was also by no means certain, having regard to the state of mind of the husband, that he would finally cut the knot of marriage by asking for the decree to be made absolute. In those circumstances the deed was entered into. It did, in fact, settle property on a lady who was the wife of the other party to the proceedings during the continuance of their marriage, however long or however short that might be. Not only did it do that, but it provided for the issue of the marriage; and it seems to me that in those circumstances to adopt a definition of "post-nuptial settlement" that would not include a deed of that kind, which might operate for many years, one of its objects, as stated in the document, being to enable the lady to give effect to the natural love and affection she had for her two children by her husband, would be to put such a narrow construction on the meaning of the words as judges have said in many cases ought not to be put upon it. One can conceive many circumstances which may make it reasonably probable, if not absolutely certain, that at the time the settlement was entered into the marriage would only last for a short time. The husband at the time of the settlement might be in such a state of health that it might be quite certain he could not live for more than nine months or a year, and the fact that the wife settled her property for the very reason that the marriage could not continue after that period could not be urged as a reason why the settlement should not be regarded as a post-nuptial settlement. It seems to me that the mere fact that there was a reasonable probability that the marriage would end in a short time by the decree of the court does not prevent the settlement which was made by one of the parties to the marriage on herself, and after her death upon her children, including these two children for whom she expressed her natural love and affection, from being a post-nuptial settlement within the meaning of the words of the section.

I am not at all certain that it was not open to the court originally to have decided that "nuptial" merely means "marriage," and that "post-nuptial" merely means "after marriage." It is quite true that in one or two cases relating to ante-nuptial settlements it has been held that a settlement made before marriage is not within the purview of s. 192, merely because it was a settlement before the marriage of the parties. There is no doubt about that now. It was laid down as long ago as *Worsley* v. *Worsley and Wignall* (1), and followed in *Hargreaves* v. *Hargreaves* (6) and in *Prinsep* v. *Prinsep* (7). But the questions for consideration which relate to an ante-nuptial settlement seem to me not necessarily the same as those which are material to consider when we are dealing with a post-nuptial settlement, because an ante-nuptial settlement may have no reference whatever to the marriage which is to take place. It may be, as it was in all these cases, a document which will operate if there never is a marriage at all, or a document which will operate if the particular marriage before the court has not taken place when the provisions of s. 192 have to be applied. In those cases one can quite see the settlement which qua marriage or qua the particular marriage, as it were, in the air, cannot be regarded as an ante-nuptial settlement. But you cannot have a settlement after a marriage which has not some relation to marriage if it settles a property and interest on one of the parties to the marriage, and still more if it settles a property and interest on one of the main objects of the marriage, according to the words of the Prayer Book, namely, the offspring of the marriage.

For these reasons, without laying down any general rule, I agree that this appeal should be allowed, but I should like to say that for my own part I was very much impressed by the wider proposition which was put forward by counsel for the petitioner. As I understand his argument it was that any settlement is a post-nuptial settlement if it is a settlement during marriage by one of the parties, which gives some interest to either of the spouses or their offspring. That is a proposition which appeals to me as a fair and reasonable representation of what the section means. But, as I have said, it is not always wise without full consideration to do more than is necessary for the decision of the particular case before the court, and in this particular case I have no doubt whatever that this settlement of Dec. 30, 1927, was a post-nuptial settlement, and, therefore, the learned judge, influenced as he necessarily was by the dicta of other judges of the Division of which he is an ornament, was wrong.

ROMER, L.J.—I agree that this appeal must be allowed. I have no intention of expressing any definite opinion as to the conveyancing ambit covered by s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925. I can only say that as at present advised I am more attracted by the definition given by Hill, J., in *Hargreaves* v. *Hargreaves* (6) than I am by the wider contention which I understood counsel for the petitioner to put forward. Hill, J., referring to s. 192, says this ([1926] P. at p. 45):

> "This section is dealing with ante-nuptial and post-nuptial settlements, and it refers to marriage. I refer to it because what it is dealing with is what we commonly know as a marriage settlement—that is, a settlement made in contemplation of or because of marriage, and with reference to the interests of married people, or their children. Nobody has referred me to any case in which it is said it has any wider meaning. The judgment of the Court of Appeal in *Loraine* v. *Loraine and Murphy* (5) shows that it has not a wider meaning than that."

However, as I say, I do not intend to express any concluded opinion upon the matter, and for this sufficient reason, that, in my opinion, without any question this particular settlement of Dec. 30, 1927, is a post-nuptial settlement within the narrow meaning of that phrase. When one looks at the settlement one sees that the property of the wife is brought into settlement and settled upon trusts which are frequently found in ante-nuptial settlements of the wife's property. It is true that no life interest is given to the husband except through the operation of a power of appointment for that purpose given to the wife, but that often occurs in marriage settlements of the wife's property. It is true that the trusts after the life interest are not confined to the children of the particular marriage, but the children of any marriage that the wife may contract. That is not unusual in ante-nuptial settlements of the wife's property. If at the time this settlement was executed Mrs. Melvill had been living in friendship with her husband, if no quarrel had taken place between them and no divorce proceedings had been taken or threatened, no one could doubt that this was a post-nuptial settlement; and the only ground on which it can be, it seems to me, argued that this is not a post-nuptial settlement is that the motive of the wife in entering into it was not to provide for her then husband as her husband at all, or for her children as the children of the marriage, or for herself as the wife of Col. Melvill, but for the purpose of providing for the event of her subsequent marriage with the gentleman who was the co-respondent in the divorce proceedings which were then pending. In my opinion, one is not entitled to regard the motive with which settlements are entered into; and in deciding the question whether a settlement is an ante-nuptial settlement or a post-nuptial settlement, that question must be decided by reference to the settlement alone, and not by any consideration of the motives which prompted it. On that point I agree with what was said by HILL, J., in *Prinsep* v. *Prinsep* (7) ([1929] P. at p. 236), where he said:

> "On the question whether a settlement is within s. 192, the motive of the settlor seems to me immaterial, except so far as it is given effect to by the terms of the deed."

For these reasons I agree that this appeal should be allowed, with the consequences which have been mentioned.

Appeal allowed.

Solicitors: *Guedalla, Jacobson & Spyer*; *Withers, Bensons, Currie, Williams & Co.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

R. A. HILL *v.* PERMANENT TRUSTEE CO. OF NEW SOUTH WALES, LTD.

[PRIVY COUNCIL (Lord Blanesburgh, Lord Tomlin and Lord Russell), June 23, 24, 26, July 29, 1930]

[Reported [1930] A.C. 720; 144 L.T. 65; 99 L.J.P.C. 191]

Australia—New South Wales—Settlement—Capital or income—Dividend paid out of profits not assessable to income tax—Intimation by company that payment to be treated as capital.

A person who is beneficially entitled in remainder to shares in a limited company is not entitled to any interest in profits lawfully distributed during the lifetime of the tenant for life by a company not in liquidation.

The respondent company was the trustee under the will of R.H., deceased, and also trustee of the trusts under a declaration of trust made by beneficiaries under the will and in that capacity held as part of the investments representing the trust estates certain shares in the B. company, an agricultural company. In 1924 the directors of the B. company sold, inter alia, its livestock, and in 1927 they declared a dividend which, they stated, was paid out of the profits arising from the sale of stock which had not been acquired for re-sale at a profit and so was free of income tax.

Held: a company not in liquidation could not make any return of capital to its shareholders except as a step in an authorised reduction of capital, and any other payment made by it to its shareholders must be made by dividing profits; moneys so paid to a shareholder who was a trustee would, in the absence of some provision in the trust instrument to the contrary, belong to the persons beneficially entitled to the income of the trust estate, and no statement by the company that moneys paid out of profits were to be treated as capital could have any effect on the rights of the beneficiaries; and, therefore, the dividend in question should be treated as income divisible among the beneficiaries and not as capital of the trusts.

Notes. Distinguished: *Re Ward, Ringland* v. *Ward*, [1936] 2 All E.R. 773. Applied: *Re Doughty, Burridge* v. *Doughty*, [1947] 1 All E.R. 207; *Re Sechiari, Argenti* v. *Sechiari*, [1950] 1 All E.R. 417. Considered: *Re Duff's Settlements Trusts, National Provincial Bank, Ltd.* v. *Gregson*, [1951] 2 All E.R. 534; *Re Winder's Will Trusts, Westminster Bank, Ltd.* v. *Fausset*, [1951] 2 All E.R. 362. Referred to: *Briggs* v. *I.R. Comrs.* (1932), 17 Tax Cas. 11; *I.R. Comrs.* v. *Reid's Trustees*, [1949] 1 All E.R. 354; *Re Harrison's Will Trusts, Harrison* v. *Milborne–Swinnerton–Pilkington* (1949), 65 T.L.R. 573; *I.R. Comrs.* v. *Pollock and Peel, Ltd.*, [1957] 2 All E.R. 483.

As to the income to which a tenant for life is entitled, see 29 HALSBURY'S LAWS (2nd Edn.) 644 et seq.; and for cases, see 40 DIGEST (Repl.) 707 et seq.

Cases referred to:

(1) *Re Bates, Mountain* v. *Bates*, [1928] Ch. 682; 97 L.J.Ch. 240; 139 L.T. 162; 72 Sol. Jo. 468; 40 Digest (Repl.) 719, *2117*.

(2) *Re Hassell, Knowles* v. *Ballarat Trustees, Executors and Agency Co., Ltd., Haslem* v. *Ballarat Trustees, Executors and Agency Co., Ltd.*, [1916] V.L.R. 594; 22 C.L.R. 212; 40 Digest (Repl.) 723, **378*.

(3) *Fisher* v. *Fisher* (1917), 23 C.L.R. 337.

(4) *Bouch* v. *Sproule* (1887), 12 App. Cas 385; 56 L.J.Ch. 1037; 57 L.T. 345; 36 W.R. 193, H.L.; 9 Digest (Repl.) 638, *4249*.

(5) *Irving* v. *Houstoun* (1803), 4 Pat. App. 521.

(6) *Re Armitage, Armitage* v. *Garnett*, [1893] 3 Ch. 337; 63 L.J.Ch. 110; 69 L.T. 619; 9 T.L.R. 630; 7 R. 290, C.A.; 40 Digest (Repl.) 728, *2176*.

Appeal from a decision of the Supreme Court of New South Wales in Equity (LONG INNES, J.) upon an originating summons taken out by the respondent company as sole trustee under the will and codicils of Richard Hill, deceased, and as sole trustee of the trusts under a declaration of trust dated Jan. 9, 1914.

The summons asked for the determination of the following questions: (i) Whether upon the true construction of the said will and in the events which had happened the sum of £19,380 which had been received by the plaintiff company as trustee of the settled shares of the defendants, Laura Maria Hill, Robert Alan Hill, and Charles Fitzwilliam Wentworth Hill, under the said will in respect of 40,800 shares in the Buttabone Pastoral Co., Ltd., should be treated as income payable to the said three defendants or as capital of their said settled shares. (ii) Whether upon the true construction of the said declaration of trust and in the events which had happened the sum of £8,360 which had been received by the plaintiff company as trustee of the said declaration of trust in respect of 17,600 shares in the Buttabone Pastoral Co., Ltd., should be treated as income or corpus of the funds the subject of the said declaration of trust. The testator died on Aug. 19, 1895, and probate of his will and codicils was granted on March 23, 1896. The testator left him surviving ten children. LONG INNES, J., held that both the sums in question were to be treated as capital. The trustee company appealed.

Wilfrid Greene, K.C., and *Wilfrid Barton* for the appellants.

John M. Gover, K.C., and *A. C. Nesbitt* for the respondents.

July 29. **LORD RUSSELL.**—The Permanent Trustee Co. of New South Wales, Ltd. (hereinafter referred to as the trustee company), is the trustee of the will of Richard Hill, deceased, and in that capacity holds as part of the investments representing the trust estate 40,800 shares in a company called the Buttabone Pastoral Co., Ltd. (hereinafter called the Buttabone company). The trustee company is also the trustee of the trust fund comprised in a trust declared by indenture dated Jan. 9, 1914, and in that capacity holds 17,600 shares in the Buttabone company. In November, 1927, the trustee company received from the Buttabone company a sum of £19,380 in respect of the 40,800 shares, and a sum of £8,360 in respect of the 17,600 shares, and the questions raised for decision on the present appeal are whether the sum of £19,380 is to be treated as corpus or income under the trusts of the said will, and whether the sum of £8,360 is to be treated as corpus or income under the trusts of the said indenture.

First, the relevant facts must be stated. The testator (who died in August, 1895) was at his death the owner of a grazing property known as "Buttabone Station"; after his death additional lands were purchased, which were paid for partly out of income of his estate and partly by moneys borrowed on the security of the lands purchased. For some years the testator's lands and the lands so purchased were worked together as one business. It is not a matter of surprise that complications and litigation ensued. The litigation was compromised in 1909, with the court's sanction so as to bind infant beneficiaries. Under the compromise all the lands, both original and additional, were sold to the Buttabone company, fully paid shares of £1 each in that company to the number of 85,000 being received by the then trustees of the said will as representing the capital of the estate employed in the said business. Other fully paid shares were issued to those individuals whose income had been used for capital purposes, in satisfaction of their claims and interest. Subsequently, namely, in 1914, the said declaration of trust was executed in exercise of powers contained in the said will for the purpose of settling upon certain trusts one of the shares of the testator's estate. Some of the said 85,000 shares were appropriated to those trusts. Some of the settled shares held under the will have become distributable and have been distributed upon the deaths of tenants for life leaving issue, with the result that at the present time the trustee company holds the said 40,800 shares and the said 17,600 shares in the capacities before mentioned.

The Buttabone company carried on business from the date of its incorporation, its business including wool-growing, the breeding and fattening of sheep and cattle, and the buying and selling of livestock. In the year 1924 the board of directors determined that the time was opportune for disposing of the Buttabone company's lands and stock to the best advantage of the shareholders, and between Dec. 9, 1924, and April 22, 1925, substantially the whole of the Buttabone company's lands, livestock and other assets were sold, but as to some of the lands the terms of sale allowed six years for the payment of the total purchase money. Save in so far as the proceeds of sale have been distributed as hereafter appears, those proceeds have been invested and the income of the investments, and the interest paid by purchasers during the six years, have been distributed as dividend among the shareholders. No resolution has ever been passed for the winding-up of the Buttabone company, but on April 12, 1926, a resolution for voluntary liquidation proposed by a shareholder at a general meeting was defeated.

The original articles of association of the Buttabone company relating to dividends were in the following form:

> "Article 122. No dividend shall be payable except out of the profits arising from the business of the company and no dividend shall carry interest.
>
> Article 124. The directors may from time to time pay to the members (on account of the next forthcoming dividend) such interim dividends as in their judgment the position of the company justifies. Subject as aforesaid the dividends shall be declared by the company at its ordinary general meetings."

By special resolution passed at an extraordinary general meeting held on April 12, A
1926, and confirmed at another extraordinary general meeting held on April 28, 1926, arts. 122 and 124 were altered and now run thus:

> "Article 122. No dividend shall be payable except out of the profits of the company, and no dividend shall carry interest.
>
> Article 124. The directors may from time to time pay to the members such B
> interim dividends as in their judgment the position of the company justifies."

On April 28, 1926, the board passed a resolution in the following terms:

> "That out of the sum of £103,342 14s. 3d., which arose wholly and exclusively from the sale of the land and improvements of the company which were not acquired for the purpose of re-sale at a profit, there be paid to the shareholders an interim dividend at the rate of 11s. 8¾d. per share, and that such dividend C
> be payable at the company's office on and after noon on May 6, 1926."

A circular letter dated May 3, 1926, was sent to the shareholders, the terms of which ran thus:

> "I have been instructed by the directors to advise that at a meeting held on the 28th ultimo the board decided to pay to the shareholders out of moneys D
> arising wholly and exclusively from the sale of the company's land and improvements, a dividend at the rate of 11s. 8¾d. per share, which is payable at the registered office of the company at noon or after on Thursday, the 6th inst. And I have further to advise that the directors decided to pay this dividend for the purpose of making a distribution of capital assets in advance of the winding-up of the company, as the company has ceased to carry on its business. E
> The directors have consulted a leading equity counsel who advises that this dividend is not subject to either State or Federal income tax."

No question arises for decision on this appeal in regard to this payment of 11s. 8¾d. per share.

On Nov. 11, 1927, the board passed a resolution in the following terms: F

> "That out of the profits of the company a cash dividend of 9s. 6d. in respect of each fully paid share in the company be declared and to be payable as soon as funds are available."

A circular letter dated Nov. 28, 1927, was sent to the shareholders, the terms of which run thus:

> G
> "I have been instructed by the directors to advise that at a meeting held on the 11th inst. it was decided to pay out of the profits of the company a cash dividend of 9s. 6d. in respect of each fully paid share in the company. In accordance with this decision I enclose cheque for , being the amount to which you are entitled, and I will be obliged if you will sign and return to me in due course the attached form of acknowledgment. I have also been H
> instructed to state that the dividend is being paid out of the profits arising from the sale of breeding stock, being assets of the company not acquired for purposes of re-sale at a profit, and that it is free of income tax."

The trustee company having received the cash dividend of 9s. 6d. per share (amounting to £19,380 in respect of the settled shares and £8,360 in respect of the shares subject to the declaration of trust) issued an originating summons for the I
determination of the questions (i) Whether upon the true construction of the said will and in the events which had happened the said sum of £19,380 should be treated as income or capital of the settled shares, and (ii) whether upon the true construction of the said declaration of trust and in the events which had happened the said sum of £8,360 should be treated as income or corpus of the funds the subject of the said declaration of trust.

No distinction was drawn in the argument before their Lordships between these two sums, or between the phraseology of the trusts declared by the two instruments.

A The case was discussed by reference only to the wording of the will, and was argued upon the footing that according as the said sum of £19,380 was to be treated as corpus or income under the will so the said sum of £8,360 was to be treated as corpus or income under the declaration of trust. The two sums stand or fall together, and may be considered as if they were both subject to the trusts of the will. It is, accordingly, only necessary to refer, and that briefly, to the terms of B the will. The first gift of income to the testator's sons and daughters is under the description of the balance or residue of "the net income to be derived from my said estate." This gift would appear to be confined to the period during which his daughter, Laura, resides in a certain cottage. There then follows a trust for sale and conversion of the whole estate and a trust of the proceeds in the following terms:

C

> "Upon trust to invest the same upon such security and generally in such manner as my trustees shall think fit with power to alter and vary any such investment or investments for another or others and to pay the net income or profits to be derived from such investment or investments in equal shares between my said ten sons and daughter during their respective lives, but so D that each of them shall have the personal enjoyment thereof and not have the power to mortgage encumber or deprive himself or herself thereof by way of anticipation the share of my said daughter to be for her sole and separate use and free from the debts control or engagements of any husband and from and immediately after the death of each of my said sons and daughter upon trust as to one-eleventh part or share of the capital of my said trust estate for the E child if only one or the children if more than one of the son or daughter so dying in equal shares and proportions as tenants in common and I declare that in the event of the death of any or either of my said sons or daughter without leaving lawful issue him or her surviving then and in such case the share of such son or daughter so dying shall be held upon trust in equal shares for the survivor or survivors of my said sons and daughter in the same manner as the original share devised to him her or them by this my will."

F

The case was also argued upon the footing that the payment of 9s. 6d. per share was the payment of a dividend by the directors in due and proper exercise of the powers conferred upon them by art. 124. Further, it is common ground, and rightly so, that the shares of the Buttabone company rank as authorised investments of the trust funds, both under the will and the declaration of trust.

G These being the relevant facts of the case, the point for decision is capable of statement thus: Is the sum of £19,380 "net income or profits to be derived from such investment or investments," or is it "capital of my said trust estate"? The question which thus arises is one which may frequently occur when investments, representing a settled trust fund, include shares in a limited company which are not restricted to a fixed rate of dividend. So long as such a company is a going H concern and is not restricted as to the profits out of which it may pay dividends, it may distribute as dividends to its shareholders the excess of its revenue receipts over expenses properly chargeable to revenue account. The balance to the credit of profit and loss account may in many cases be divided as dividend even if the company's capital account is in debit; and such a distribution by way of dividend would, primâ facie, be "income or profits" of the trust share, and belong to the I tenant for life; it would not be "capital of my trust estate." On the other hand, if the company instead of distributing the same balance as dividends, resolved upon liquidation, the shareholder would be repaid his share capital and in addition the share of surplus assets in the liquidation attributable to his shares. The moneys received by the shareholder in the liquidation may be swollen by reason of the fact that the company has in its possession undivided profits, but no part thereof would belong to a tenant for life as income; it would all be corpus of the trust estate. From this it would appear that moneys paid in respect of shares in a limited company may be income or corpus of a settled share according to the procedure adopted, i.e., according as the moneys are paid by way of dividend before liquidation or are paid by way of surplus assets in a winding-up. Each process might appear to involve some injustice, the former to the remainderman, the latter to the tenant for life. In truth the only method by which the rights of the respective cestuis que trust can be safeguarded and made incapable of being varied or affected by the conduct of the company, is by the insertion of special provisions in the trust instrument clearly defining the respective rights of income and corpus in regard to moneys received by the trustee from limited companies, in respect of shares therein held by him as part of the trust estate.

The learned judge in the present case decided that the two sums in question should be treated as corpus and not as income. The grounds of his decision appear to have been that the answer to the question depended upon what was the intention of the company in making the distribution, and that upon the whole of the evidence he came to the conclusion that the distribution was in fact, and was intended by the company to be, a distribution of capital assets in anticipation of liquidation. He further held that in order to convert profits into corpus as between tenant for life and remainderman, no conversion by the company of the profits into share capital was necessary, but that profits distributed might be corpus as between tenant for life and remainderman, even though no part of the fund was retained by the company in a capitalised form. As regards this part of his decision he realised that such a view was in conflict with the judgment of Eve, J., in *Re Bates, Mountain* v. *Bates* (1), but he felt himself bound to consider the law as settled otherwise by reason of two decisions of the High Court of Australia, namely, *Re Hassell, Knowles* v. *Ballarat Trustees, Executors and Agency Co., Ltd.* (2) and *Fisher* v. *Fisher* (3).

It will be necessary for their Lordships to consider these three authorities, and to decide which of them, in their view, is based on a correct interpretation of the law. Before doing so it would seem advisable to draw attention to certain salient points relevant to the matter in debate. (i) A limited company, when it parts with moneys available for distribution among its shareholders, is not concerned with the fate of those moneys in the hands of any shareholder. The company does not know and does not care whether a shareholder is a trustee of his shares or not. It is of no concern to a company which is parting with moneys to a shareholder whether that shareholder (if he be a trustee) will hold them as trustee for A absolutely or as trustee for A for life only. (ii) A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorised reduction of capital. Any other payment made by it by means of which it parts with moneys to its shareholders must and can only be made by way of dividing profits. Whether the payment is called "dividend" or "bonus" or any other name, it still must remain a payment on division of profits. (iii) Moneys so paid to a shareholder will (if he be a trustee), primâ facie, belong to the person beneficially entitled to the income of the trust estate. If such moneys or any part thereof are to be treated as part of the corpus of the trust estate there must be some provision in the trust deed which brings about this result. No statement by the company or its officers that moneys which are being paid away to shareholders out of profits are capital, or are to be treated as capital, can have any effect upon the rights of the beneficiaries under a trust instrument which comprises shares in the company. (iv) Other considerations arise when a limited company with power to increase its capital and possessing a fund of undivided profits so deals with it that no part of it leaves the possession of the company, but the whole is applied in paying up new shares which are issued and allotted proportionately to the shareholders, who would have been entitled to receive the fund had it been, in fact, divided and paid away as dividend. (v) The result of such a dealing is obviously wholly different from the result of paying away the profits to the shareholders. In the latter case the amount of cash distributed disappears on both sides of the company's balance-sheet. It is lost to the company. The fund of undistributed profits which has been divided ceases to figure among the company's

A liabilities; the cash necessary to provide the dividend is raised and paid away, the company's assets being reduced by that amount. In the former case the assets of the company remain undiminished, but on the liabilities' side of the balance-sheet (although the total remains unchanged) the item representing undivided profits disappears, its place being taken by a corresponding increase of liability in respect of issued share capital. In other words, moneys which had been capable of division B by the company as profits among its shareholders have ceased for all time to be so divisible, and can never be paid to the shareholders except upon a reduction of capital or in a winding-up. The fully paid shares representing them and received by the trustees are, therefore, received by them as corpus and not as income.

Their Lordships now turn to the decisions which bound the learned judge and formed the basis of his judgment. Inasmuch as much consideration was given by C the High Court of Australia and before their Lordships' Board to the decision of the House of Lords in *Bouch* v. *Sproule* (4), it is advisable to consider what was the decision in that case and what was the basis upon which it rested. It is not, in their Lordships' view, an authority for the proposition that the company's statement of intention determines as between tenant for life and remainderman whether a sum paid away by the company to a shareholder who is a trustee is income or D corpus of his trust estate. In *Bouch* v. *Sproule* (4) no moneys, in fact, left the company's possession at all. It is not an authority which touches a case in which a company parts with moneys to its shareholders. The essence of the case was that the company, not by its statements, but by its acts, showed that what the shareholders got from the company was not a share of profits divided by the company, but an interest in moneys which had been converted from divisible profits E into moneys capitalised and rendered for ever incapable of being divided as profits. In those circumstances it was held that shares which were issued to a trustee shareholder, and which represented the moneys so capitalised, were, as between his cestuis que trust, corpus and not income, because the company had decided that the profits in question should be permanently added to the company's capital. LORD WATSON stated the point concisely when he said (12 App. Cas. at p. 401):

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> "In a case like the present, where the company has power to determine whether profits reserved, and temporarily devoted to capital purposes, shall be distributed as dividend or permanently added to its capital, the interest of the life tenant depends, in my opinion, upon the decision of the company."

There is no decision in the courts of this country which justifies the view that a G person beneficially entitled in remainder to shares in a limited company is entitled to any interest in profits lawfully distributed during the lifetime of the tenant for life by a company not in liquidation, and such a view is, their Lordships think, contrary to principle. The nearest approach to such a decision is to be found in the cases which are referred to in *Bouch* v. *Sproule* (4), and are commonly known as the Bank cases, of which one, namely, *Irving* v. *Houstoun* (5), is a decision of H the House of Lords. They, however, are cases sui generis, not susceptible of easy explanation. As LORD HERSCHELL said in *Bouch* v. *Sproule* (4) (12 App. Cas. at p. 397), *Irving* v. *Houstoun* (5) is

> "an authority governing only a case similar in its facts; that is to say, a case where the company has no power to increase its capital, but has accumulated profits and used them, in fact, for capital purposes, and afterwards distributes
> I these profits amongst the proprietors."

In *Re Hassell, Knowles* v. *Ballarat Trustees, Executors and Agency Co., Ltd.* (2) the facts were that the directors of a limited company which was not in liquidation by resolution resolved upon the payment to the members of (i) a dividend of 6d. per share; (ii) a bonus of 6d. per share; and (iii) "distribution of assets 10s. per share." The holders of some shares in the company (who held them under a will upon trust for a tenant for life), having received these sums, applied to the court to have it determined whether the 10s. per share was income or capital. The will contained no special provisions relevant to the question. The 10s. per share was A paid out of accumulated profits. The High Court (ISAACS, J., dissenting) held that the moneys were capital of the trust estate, because, though they were payments of cash made out of accumulated profits, the company intended the moneys to be a distribution of capital as distinguished from dividends. A careful consideration of the judgments delivered by the majority of the High Court judges satisfies their Lordships that the decision is based upon the view that a company, B when dividing among its shareholders a sum of accumulated profit, is entitled to dictate and determine whether the moneys so received by the shareholder shall, in his hands, be deemed corpus or income. Their Lordships know of no earlier authority justifying this view. It is a matter with which the company has not the remotest concern. If payment to the shareholders is made out of profits it is income of the shares, and no statement of the company or its directors can change C it from income into corpus. Their Lordships agree with, and are content to refer to, the dissenting judgment of ISAACS, J., as a correct exposition of the law.

Before parting with the *Knowles Case* (2) their Lordships desire to say a word in reference to *Re Armitage, Armitage* v. *Garnett* (6), upon which reliance was placed by GRIFFITHS, C.J., and BARTON, J. The legal position in that case was quite plain. The old company had sold its assets (including accumulated profits) D to the new company, for a price which produced surplus assets in the winding-up of the old company to the amount of £9 5s. 6d. for each share of the old company upon which only £8 per share had, in fact, been paid up. Upon no theory could it be said that any part of the £9 5s. 6d. was payable to the tenant for life. The moneys paid were all surplus assets distributed in a winding-up and took the place in the trust estate of the shares themselves. The difference between the £9 5s. 6d. E and the £8 was a profit to the trust estate, just as if the shares had been sold and had realised £9 5s. 6d. per share, but no part of the £9 5s. 6d. was income of the tenant for life. The other decision of the High Court—*Fisher* v. *Fisher* (3)—requires no additional discussion. The majority of the judges followed their previous decisions in the *Knowles Case* (2). ISAACS, J., again dissented.

These were the two authorities which in the present case LONG INNES, J., felt F constrained to follow, in preference to adopting the reasoning of EVE, J., in the later case of *Re Bates, Mountain* v. *Bates* (1). There the directors of a limited company had made payments to shareholders out of distributable profit, but had stated: "It must be clearly understood that this is neither a dividend nor a bonus, but is a capital distribution." EVE, J., held that the payments were income receivable by a tenant for life. This appears to their Lordships to be an authority G directly applicable to the present case, and their Lordships find themselves in complete agreement with the learned judge, both as regards his decision and the reasoning upon which it is based. Their Lordships desire to adopt the language used by EVE, J., and to say in regard to the fund out of which the sums of £19,380 and £8,360 were paid by the Buttabone company to the trustee company:

> "Unless and until the fund was in fact capitalised, it retained its characteristics H of a distributable property . . . and no change in the character of the fund was brought about by the company's expressed intention to distribute it as capital. It remained an uncapitalised surplus available for distribution either as dividend or bonus on the shares or as a special division of an ascertained profit . . . and in the hands of those who received it it retained the same characteristics."

I

For these reasons their Lordships are of opinion that the two sums here in question should be treated as income and not as corpus. They are "net income or profits derived from such investment or investments"; they are not "capital of my said trust estate." Their Lordships desire to add that they see no reason for assuming that in making this distribution the directors had in mind any question of rights as between tenants for life and remaindermen beneficially interested in shares held by trustee shareholders. It may be that they had, but the wording of the circular letter of Nov. 28, 1927, appears to their Lordships to indicate that the principal questions present to the minds of the directors were (i) the relief of their shareholders from liability to pay income tax on the profits distributed, and (ii) s. 4 (g) of the Income Tax Assessment Act, 1924.

Counsel for the respondents addressed to their Lordships a new and alternative argument. It was this. It was said that the distribution of 9s. 6d. per share out of profits arising from the sale of breeding stock could not have been made if the old art. 122 of the company's had remained unaltered; that no alteration could have been made if the trustee company had voted against it; that in not voting against the alteration the trustee company has committed a breach of duty; that a breach of duty by a trustee cannot operate to alter the beneficial rights and interests of his cestuis que trust; and that as a matter of administration the court would direct the trustee company to deal with the moneys so as to prevent the remaindermen from being prejudiced by being deprived of a fund of which they could not have been deprived if the articles of association had not been altered. This would appear an unusual contention to be raised and determined upon an originating summons issued by a trustee; but it must fail in these proceedings because the basic allegation has not been proved, namely, that the distribution could not have been made under the old art. 122. This is a question upon which (depending as it does upon the consideration of materials not before them) their Lordships express no conclusion.

Their Lordships are, accordingly, of opinion, upon the materials before them, that the two sums mentioned in the originating summons should be treated as income, and that the decree of Nov. 12, 1928, should be varied by substituting the word "income" for the word "capital" in the first declaration therein contained and by substituting the word "income" for the word "corpus" in the second declaration therein contained, and they will humbly advise His Majesty accordingly. Their Lordships, however, feel that an opportunity should be given to any beneficiaries who may desire so to do, to assert in hostile litigation (and at their own risk as to costs and otherwise) a claim to have all or any part of the funds retained as capital upon the ground (as indicated above) that the dividend in question could not have been paid if art. 122 of the company's articles of association had not been altered. Their Lordships, accordingly, think that a direction should be given to the trustee company not to pay over the moneys to the tenants for life before Oct. 31, 1930. If in the meantime any action is commenced as above mentioned the trustees can apply in that action for directions as to how they should deal with the said moneys pending the decision thereof. The costs of all parties of this appeal will be taxed as between solicitor and client and paid rateably out of the two sums in question in these proceedings.

Appeal allowed.

Solicitors: *Montagu's and Cox & Cardale*; *Light & Fulton.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

FISHER *v.* OLDHAM CORPORATION

[KING'S BENCH DIVISION (McCardie, J.), March 28, April 11, 1930]

[Reported [1930] 2 K.B. 364; 99 L.J.K.B. 569; 143 L.T. 281; 94 J.P. 132; 46 T.L.R. 390; 74 Sol. Jo. 299; 28 L.G.R. 293; 29 Cox, C.C. 154]

False Imprisonment—Claim against police authority—Police officer not servant or agent of authority in arresting and detaining plaintiff.

A police constable, when carrying out his duties, acts as an officer of the Crown and a public servant and not as the servant of the police authority which appointed him.

The plaintiff was arrested in London on suspicion of having obtained money by false pretences from a tradesman at O., and was handed over to an officer of the O. borough police by whom he was kept in custody for some hours when he was released, it being ascertained that he was not the man who was wanted. In an action by the plaintiff for damages for false imprisonment against the corporation of O.,

Held: the police, in effecting the plaintiff's arrest and detention, were not acting as the servants or agents of the corporation, but were fulfilling their duties as public servants and officers of the Crown, and, therefore, the action failed.

Notes. Under the Police Act, 1946, all separate non-county borough police forces ceased to exist as separate police areas, and by s. 1 (4), Part IX, of the Municipal Corporations Act, 1882, except s. 190, ceased to have effect except as respects county boroughs. Section 140 (2), (3) and (4) of the Act of 1882 was repealed by the Local Government Act, 1933, as were some parts of Sched. V. Since 1919 the contribution of the State to the cost of a police force has been one-half thereof. As to pensions, see now Police Pensions Act, 1948. The Police Appeals Act, 1927, has been amended by the Police (Appeals) Act, 1943.

Considered: *Metropolitan Police District Receiver* v. *Tatum*, [1948] 1 All E.R. 612; *A.-G. for New South Wales* v. *Perpetual Trustee Co., Ltd., and Others*, [1955] 1 All E.R. 846. Referred to: *Rodwell* v. *Minister of Health*, [1947] 1 All E.R. 80; *Monmouthshire County Council* v. *Smith*, [1956] 2 All E.R. 800.

As to the powers and duties of police constables and the organisation of police forces, see 25 HALSBURY'S LAWS (2nd Edn.) 320 et seq.; and for cases see 37 DIGEST 179, 180, 186–188.

Cases referred to:

(1) *Hoye* v. *Bush* (1840), 1 Man. & G. 775; 2 Scott, N.R. 86; 10 L.J.M.C. 168; 133 E.R. 545; sub nom. *Hoyle* v. *Bush*, Drinkwater, 15; 5 J.P. 30; 14 Digest (Repl.) 209, *1743*.

(2) *MacKalley's Case* (1611), 9 Co. Rep. 61 b, 65 a; Cro. Jac. 279; 77 E.R. 824; sub nom. *Anon.*, Jenk. 291; 41 Digest 88, *252*.

(3) *Coomber* v. *Berks. JJ.* (1883), 9 App. Cas. 61; 53 L.J.Q.B. 239; 32 W.R. 525; 48 J.P. 421; 50 L.T. 405, H.L.; 42 Digest 648, *547*.

(4) *Metropolitan Meat Industry Board* v. *Sheedy*, [1927] A.C. 899; 137 L.T. 782; 43 T.L.R. 701, P.C.; Digest Supp.

(5) *Stanbury* v. *Exeter Corpn.*, [1905] 2 K.B. 838; 75 L.J.K.B. 28; 93 L.T. 795; 70 J.P. 11; 54 W.R. 247; 22 T.L.R. 3; 4 L.G.R. 57, D.C.; 34 Digest 39, *156*.

(6) *Enever* v. *R.* (1906), 3 C.L.R. 969; 11 Digest (Repl.) 598, **267*.

(7) *McCleave* v. *Moncton Corpn.* (1902), 32 S.C.R. 106; 38 Digest 77, *k*.

(8) *Buttrick* v. *City of Lowell* (1861), 1 Allen (Mass.) 172.

(9) *British South Africa Co.* v. *Crickmore*, [1921] App.D. 107; 38 Digest 77, *l*.

(10) *Lambert* v. *Great Eastern Rail. Co.*, [1909] 2 K.B. 776; 79 L.J.K.B. 32; 101 L.T. 408; 73 J.P. 445; 25 T.L.R. 734; 53 Sol. Jo. 732; 22 Cox, C.C. 165, C.A.; 34 Digest 136, *1054*.

(11) *Goff* v. *Great Northern Rail. Co.* (1861), 3 E. & E. 672; 30 L.J.Q.B. 148; 3 L.T. 850; 25 J.P. 326; 7 Jur.N.S. 286; 121 E.R. 594; 8 Digest 126, *811*.

(12) *Edwards* v. *Midland Rail. Co.* (1880), 6 Q.B.D. 287; 50 L.J.Q.B. 281; 43 L.T. 694; 45 J.P. 374; 29 W.R. 609; 13 Digest 398, *1218*.

(13) *Bradford Corpn.* v. *Webster*, [1920] 2 K.B. 135; 89 L.J.K.B. 455; 123 L.T. 62; 84 J.P. 137; 36 T.L.R. 286; 64 Sol. Jo. 324; 18 L.G.R. 199; 34 Digest 183, *1490*.

(14) *Wallwork* v. *Fielding*, [1922] 2 K.B. 66; 91 L.J.K.B. 568; 127 L.T. 131; 86 J.P. 133; 38 T.L.R. 441; 66 Sol. Jo. 366; 20 L.G.R. 618, C.A.; 37 Digest 180, *24*.

(15) *Hall* v. *Taylor* (1858), E.B. & E. 107; 27 L.J.Q.B. 311; 31 L.T.O.S. 151; 23 J.P. 20; 4 Jur.N.S. 877; 120 E.R. 447; 34 Digest 94, *701*.

(16) *Smith* v. *Martin and Kingston-upon-Hull Corpn.*, [1911] 2 K.B. 775; 80 L.J.K.B. 1256; 105 L.T. 281; 75 J.P. 433; 27 T.L.R. 468; 55 Sol. Jo. 535; sub nom. *Martin* v. *Smith*, *Smith* v. *Martin and Hull Corpn.*, 9 L.G.R. 780, C.A.; 34 Digest 40, *163*.

(17) *Glasbrook Bros., Ltd.* v. *Glamorgan County Council*, [1925] A.C. 270; 94 L.J.K.B. 272; 132 L.T. 611; 89 J.P. 29; 41 T.L.R. 213; 69 Sol. Jo. 212; 23 L.G.R. 61, H.L.; 37 Digest 186, *82*.

(18) *Hall* v. *Lees*, [1904] 2 K.B. 602; 73 L.J.K.B. 819; 91 L.T. 20; 53 W.R. 17; 20 T.L.R. 678; 48 Sol. Jo. 638, C.A.; 36 Digest (Repl.) 167, *904*.

(19) *Hillyer* v. *Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820; 78 L.J.K.B. 958; 25 T.L.R. 762; 53 Sol. Jo. 714; sub nom. *Hillyer* v. *London Corpn.* (*Governors of St. Bartholomew's Hospital*), 101 L.T. 368; 73 J.P. 501, C.A.; 36 Digest (Repl.) 168, *906*.

(20) *Crisp* v. *Thomas* (1890), 63 L.T. 756; 55 J.P. 261, C.A.; 19 Digest 563, *50*.

Action tried before McCardie, J., without a jury.

In March, 1929, one Fred Russell obtained money by false pretences from a tradesman in Oldham. An information was laid against him and a warrant for his arrest was issued by a justice of the peace for the borough of Oldham. The London police were communicated with as it was suspected that Russell had fled to London. The plaintiff had for some years dealt in timber at Plaistow, but in former years had become known to the London police who thought he was the wanted man. The plaintiff was, accordingly, arrested by a London police officer and placed in a cell for the night. Next morning he was taken by train to Manchester and thence by motor car to the Oldham police station and detained there for some hours. It was then discovered he was not the wanted man. He was released and now brought the present action for damages for false imprisonment. The damages were agreed, and it was admitted for the defence that there was a case of false imprisonment against an appropriate defendant. The question was whether the defendant corporation was liable for the action of the Oldham police in causing the wrongful arrest of the plaintiff and in wrongfully keeping him in custody.

Tristram Beresford for the plaintiff.

Rowland Oliver, K.C., and *W. T. Monckton, K.C.*, for the corporation.

Cur. adv. vult.

April 11. **McCARDIE, J.,** read the following judgment. This case is important to local authorities, to the police, and to the public. It presents a question of unusual interest and it raises, with sharp directness, the relations between the police and local bodies.

The action is one for false imprisonment. The facts are few and undisputed. In March, 1929, a person known as Fred Russell obtained £150 by alleged false pretences from a tradesman in Oldham. Information was duly laid, and on April 4, 1929, a warrant was issued under the hand of a justice of the peace for the borough of Oldham for the arrest of the said Russell. The man Russell was, I am told, well known to the Oldham police. He could not be found in Oldham. It was suspected that he had fled to London and the Oldham police communicated with the London police. The plaintiff had, for six years, dealt in timber at Plaistow, but in former years he also had become well known to the police and had been sentenced several times for the offence of obtaining money by false pretences. The police believed that he was the wanted man. He was, therefore, arrested by a London police officer at his premises in Plaistow, on April 25, taken to the local police station, and put into a cell till the morning of the 26th. He was then handed over to Inspector Sharples of the Oldham police, and was taken in custody to Manchester by train and then taken by a motor car to the police station at Oldham, and there detained for several hours. It was then discovered that a mistake had been made, and that the plaintiff was not the wanted man. He was, accordingly, released.

It is admitted by the defendants that there is here a case of false imprisonment as against an appropriate defendant: see *Hoye* v. *Bush* (1) and CLERK AND LINDSELL ON TORTS (8th Edn.), p. 711. If the defendants be liable then the damages are agreed at the sum of £125. The question is whether the defendant corporation are liable for the action of the Oldham police in causing the wrongful arrest of the plaintiff and in wrongfully keeping him in custody during April 26. The statement of claim, so far as material to the present point, alleges that "the defendants, acting through their watch committee, are the police authority for the county borough of Oldham and are the employers of the police for the said county borough." It is also alleged that the Oldham police and Inspector Sharples, in causing and continuing the arrest and imprisonment of the plaintiff, were "acting in the course of their employment for and on behalf of the defendants." The facts and contentions in this case clearly raise a question of wide importance. The police here did not act on any specific order from the defendant; they acted on their own initiative. Admittedly, this is the first time that the question before me has been definitely raised for decision. If the defendants are held liable, then a new and serious liability falls on many local authorities. I am glad to say that the question was fully and ably argued before me.

Now, is the relation between the defendants and the Oldham police such as to make the defendants liable in law to the plaintiff? I must first mention the Municipal Corporation Act, 1882. By s. 190 (1) it is provided:

> "The council shall from time to time appoint, for such time as they think fit, a sufficient number, not exceeding one-third, of their own body, who, with the mayor, shall be the watch committee."

By sub-s. (2):

> "The watch committee may act by a majority of those present at a meeting thereof, but shall not act unless three are so present."

Section 191 contains several important provisions. Subsection (1) says:

> "The watch committee shall from time to time appoint a sufficient number of fit men to be borough constables."

Subsection (2) says:

> "A borough constable shall be sworn in before a justice having jurisdiction in the borough, and when so sworn shall, in the borough, in the county in which the borough or any part thereof is situate, and in every county being within seven miles from any part of the borough and in all liberties in any such county, have all such powers and privileges and be liable to all such duties and responsibilities as any constable has and is liable to for the time being in his constablewick, at common law or by statute, and shall obey all such lawful commands as he receives from any justice having jurisdiction in the borough or in any county in which the constable is called on to act."

A Subsection (3):

> "The watch committee may from time to time frame such regulations as they deem expedient for preventing neglect or abuse and for making the borough constables efficient in the discharge of their duties."

Subsection (4):

> B "The watch committee, or any two justices having jurisdiction in the borough, may at any time suspend, and the watch committee may at any time dismiss, any borough constable whom they think negligent in the discharge of his duty or otherwise unfit for the same."

Section 140 of the Act of 1882 provides for the application of the borough fund and refers to Sched. V to the Act. Schedule V provides for certain payments out of C that fund, including

> "The payments to be made under this Act to or in respect of the borough police and to any special constable, including the following payments, namely (a) such salaries, wages and allowances to the borough constables, and at such periods as the watch committee, with the approbation of the council, direct."

D I pause here for a moment to say that counsel for the plaintiff submitted that the effect of the above provisions was to create, in substance, the relation of master and servant between an Oldham police officer and the Oldham Corporation. He contended that the defendants possessed (a) the power to appoint, (b) a duty to pay salary or wages, (c) a power to make regulations, and (d) a power to dismiss; and that, therefore, the above-named relation was created.

E It is necessary, however, before I consider that argument, to refer to several other statutory provisions. In the first place, the effect of ss. 20 to 24 of the Local Government Act, 1888, is that the State contributes a substantial amount towards the cost of the defendants' police force (see s. 24 (j)). In the next place, the Police Act of 1890 provides for a scheme of pensions, allowances, and gratuities for police officers throughout the kingdom. This Act indicates the fullness of F central administrative control. In the next place, the Police Act, 1919, created a police federation for the objects stated, and s. 1 (1) provides that

> "The police federation and every branch thereof shall be entirely independent of and unassociated with any body or person outside the police service."

By s. 4 of the same Act it is provided that

> G "it shall be lawful for the Secretary of State to make regulations as to the government, mutual aid, pay, allowances, pensions, clothing, expenses, and conditions of service of all members of all police forces within England and Wales and every police authority shall comply with the regulations so made."

In pursuance of s. 4, the Secretary of State framed and issued in 1920 a large body of regulations which dealt fully and minutely with such matters as ranks, desig- H nation, appointment, discipline, promotion, hours of duty, pay, allowances, clothing, and the like. Further, in 1927 the Police Appeals Act, 1927, was passed, which provided (inter alia) by s. 1:

> "A member of a police force who, after the passing of this Act, is dismissed or required to resign as an alternative to dismissal, may appeal to a Secretary I of State in accordance with this Act and the rules made thereunder."

Under s. 2, the Secretary of State may (a) allow the appeal, (b) dismiss it, or (c) vary the punishment, and may for the purposes of deciding the appeal direct that an inquiry be held. I may here observe that the Home Secretary is the central police authority: see HALSBURY'S LAWS OF ENGLAND (2nd Edn.), vol. 7, p. 85, and vol. 22, p. 516. I need not refer to any other statutory provisions.

I must now say a few words as to the common law status of police officers. Much of the relevant history of constables will be found in LAMBARD'S DUTIES OF CONSTABLES, p. 6; 2, HAWKINS' PLEAS OF THE CROWN, c. 10, s. 33; and BLACKSTONE, A vol. 1, pp. 356 and 357. Some of the errors of Blackstone are well discussed by Professor H. B. Simpson in the ENGLISH HISTORICAL REVIEW of October, 1905. I may also refer to HALSBURY'S LAWS OF ENGLAND (2nd Edn.), vol 25, p. 288 et seq. It is plain that the modern system of police forces has slowly evolved from the succession of officers of police who have, at different times and under various titles, maintained the internal peace of the kingdom. In the reign of Charles II the B practice of swearing-in constables before justices of the peace was expressly sanctioned by statute. Professor Simpson well observes in the above-mentioned article as follows:

> "Perhaps the administration of the oath to constables by justices of the peace may be fairly considered as the characteristic mark of the final subordination of local to central government in rural districts and of the conversion of a local C administrative officer into a ministerial officer of the Crown."

What is the common law view of the matter as shown by the legal decisions and authorities? It is clear from *MacKalley's Case* (2) that a constable, watchman or the like person was regarded as a servant or minister of the King. In *Coomber's Case* (*Coomber* v. *Berks. JJ.* (3)) (9 App. Cas at p. 67), LORD BLACKBURN said:

> D "I do not think it can be disputed that the administration of justice, both criminal and civil, and the preservation of order and prevention of crime by means of what is now called police, are amongst the most important functions of government, nor that by the constitution of this country, those functions do, of common right, belong to the Crown."

At p. 71, he said:

> E "The Central Government administers law and justice and keeps order; but it necessarily does it in different localities separately. . . . It is a purpose of the Imperial Government carried out in a particular locality, but not the less a purpose of the Imperial Government."

The whole ratio decidendi of *Coomber's Case* (3) was that the police were the F servants of the Crown and not of the local authority. The Privy Council have recently adopted and re-stated the principle of *Coomber's Case* (3): see *Metropolitan Meat Industry Board* v. *Sheedy* (4) ([1927] A.C. at p. 903).

It is of interest here to set out the oath which is taken before a justice of the peace by each constable of the Oldham Police Force, pursuant to s. 191 (2) of the Municipal Corporation Act, 1882. It is as follows:

> G "I of Street in the borough of Oldham do declare that I will well and truly serve and act as a constable of the said borough of Oldham for preserving the peace by day and by night and preventing robberies and other felonies and misdemeanours and apprehending offenders against the peace."

H It will be observed that this oath is not an oath to act as a servant of the corporation. It is an oath that the deponent will faithfully discharge his duties as a constable for the preservation and enforcement of the law.

I now pause to point out that s. 191 of the Municipal Corporation Act, 1882, gives but limited powers to the watch committee of the defendant corporation. Any appointment by them of a police constable is subject to the controlling regulations I of the Home Secretary and to a swearing-in before a justice of the peace. Section 191 (2) provides that a constable shall obey such orders as he receives from a justice of the peace. There is no similar provision as to the orders of the watch committee. Section 191 (3) merely relates, I think, to minor regulations for securing the efficiency of the police, their readiness and ability to obey the orders of justices of the peace and the fulfilment of their well-known statutory and common law duties. Section 192 of the Act provides that

> "the watch committee shall, on Jan. 1, July 1 and Oct. 1 in every year, send to the Secretary of State a copy of all rules from time to time made by the

> A watch committee or the council for the regulation and guidance of the borough constables."

Under s. 191 (4) the powers of suspension are shared with the local magistracy and that power equally with the power of dismissal is rigorously controlled and limited by the statutory provisions I have already mentioned.

B Primâ facie, therefore, a police constable is not the servant of the borough. He is a servant of the State, a ministerial officer of the central power, though subject, in some respects, to local supervision and local regulation. This is the view so clearly expressed in BEVEN ON NEGLIGENCE (4th Edn.), vol. 1, pp. 416 and 417, when, referring to the question of the liability of local authorities for the negligence of the police, he says:

> C "Thus, neither in the corporation nor in the watch committee, nor in the justices, nor yet in the chief constable, do those qualities inhere which are necessary to be found for the purpose of establishing a relation raising a legal liability."

The like view was stated with equal clearness in *Stanbury* v. *Exeter Corpn.* (5) ([1905] 2 K.B. at p. 841). LORD ALVERSTONE said:

> D "This case is . . . I think, very analogous to that of police and other officers appointed by a corporation, who have statutory duties to perform, where, although they owe a duty to the corporation appointing them, there is no ground for contending that the corporation are responsible for their negligent acts."

E So, too, WILLS, J. ([1905] 2 K.B. at p. 842), said:

> "This case is, to my mind, almost analogous to the case of a police officer. In all boroughs, the watch committee has to appoint, control and remove the police officers and nobody has ever heard of a corporation being made liable for the negligence of a police officer in the performance of his duties."

DARLING, J., expressed substantially the same views. *Stanbury's Case* (5) was F considered and applied by the High Court of Australia in *Enever* v. *R.* (6). Illuminating judgments were given by GRIFFITHS, C.J., BARTON, J., and O'CONNOR, J. The whole of the English decisions were discussed. As GRIFFITHS, C.J., said (3 C.L.R. at p. 975):

> "At common law the office of constable or peace officer was regarded as a G public office, and the holder of it as being, in some sense, a servant of the Crown."

At p. 977 he said:

> "Now the powers of a constable, qua police officer, whether conferred by common or statute law, are exercised by him by virtue of his office and cannot be exercised on the responsibility of any person but himself. . . . A constable, H therefore, when acting as a police officer, is not exercising a delegated authority, but an original authority, and the general law of agency has no application."

Each of the judgments in *Enever's Case* (6) is, if I may say so, most weighty and most instructive.

The like view has been taken by the Supreme Court of Canada in *McCleave* v. *Moncton Corpn.* (7), where it was held that a police officer is not the agent of the I municipal corporation which appoints him to the position, and if he is negligent in performing his duty as a guardian of the public peace, the corporation is not responsible. So, too, in *Buttrick* v. *City of Lowell* (8), BIGELOW, C.J., in giving the judgment of the Supreme Court of Massachusetts, said:

> "Police officers can in no respect be regarded as agents or officers of the city. Their duties are of a public nature."

And finally, a similar view has been taken by the Supreme Court of South Africa: see *British South Africa Co.* v. *Crickmore* (9).

I may well take an illustration at this point. Suppose that a police officer arrested a man for a serious felony. Suppose, too, that the watch committee of the borough at once passed a resolution directing that the felon should be released! Of what value would such a resolution be? Not only would it be the plain duty of the police officer to disregard the resolution, but it would also be the duty of the chief constable to consider whether an information should not at once be laid against the members of the watch committee for a conspiracy to obstruct the course of criminal justice.

I have set out the above cited aggregate of opinion and decision because I think it best to do so before entering upon the embarrassing task of considering the cases quoted to me by counsel in support of his vigorous argument for the plaintiff. Those cases indicate, I fear, the confusion which so often arises in English law either because counsel do not raise the necessary points, or because the courts do not receive a sufficient citation of the relevant authorities. I take first *Lambert* v. *Great Eastern Rail. Co.* (10). There, the Court of Appeal held that a special constable of a railway company is the servant of the company, and, if in the course of his employment he arrests a person on suspicion of felony without having any reasonable grounds for his suspicion, an action for false imprisonment will lie against the company. In that case the special constable had been appointed by the defendant railway company under the Great Eastern Railway (General Powers) Act, 1900, and had been duly sworn in before a justice of the peace. I respectfully abstain from analysing the judgment of the court. But I venture to express surprise that *Stanbury's Case* (5) was not even mentioned to the court, nor was any adequate argument presented as to the special position, duties, and powers of constables. The Court of Appeal mentioned two decisions only in their judgment, namely, *Goff* v. *Great Northern Rail. Co.* (11) and *Edwards* v. *Midland Rail. Co.* (12). Neither of those cases was reported with adequate fullness. In neither report is the special Act of the railway company set out. In each case it seems to have been assumed that the effect of the special Act was to render the constable the servant, or at least the agent, of the railway company. The earlier of the two decisions rested, apparently, on the particular words of ss. 103 and 104 of the Railway Clauses Act, 1845, which dealt, in substance, with the offence of travelling with intent to avoid payment of fare. It is difficult to know whether the later case of *Edwards* v. *Midland Rail. Co.* (12) turned on some well-known special Act of the Midland Railway Company. I assume that it did. The court in *Lambert's Case* (10) relied to some extent on *Goff's Case* (11) and *Edwards' Case* (12), but in substance, I think, rested their judgment upon the effect of s. 50 of the Great Eastern Railway Company's General Powers Act, 1900, and they held that the effect of that particular section was to make the constable of the defendant company a servant or agent so as to render the company liable for wrongful acts done within the scope of his authority. *Edwards' Case* (12), therefore, on which the plaintiffs' counsel so much relied, rests upon a special basis and is clearly distinguishable from the case now before us.

I now turn to a decision to which the plaintiffs' counsel also attached importance. I refer to *Bradford Corpn.* v. *Webster* (13). The facts, so far as material now, can be most briefly stated. A police constable, appointed by the watch committee of the Bradford Corporation, was, while on traffic duty in Bradford, injured in September, 1917, through the negligence of the defendants' servant when driving a steam wagon. He was permanently incapacitated by the injury. The plaintiff corporation thereupon brought an action against the defendant to recover (a) the pay of the police constable from September, 1917, to October, 1918, and (b) the value of the pension granted in October, 1918, on the ground of permanent incapacity pursuant to the Police Act, 1890, and the regulations thereunder. The learned judge who tried the case decided in favour of the plaintiff corporation and awarded damages under both heads. Bradford, of course, is subject to the Municipal Corporation Act, 1882, and no special Act is referred to in the report as affecting the points in dispute. The plaintiffs' counsel apparently framed their arguments on the assumption that the police constable was the servant of the plaintiff corporation. I am not concerned with that case so far as it touches the question of remoteness of damage. It is obvious, however, that the point I am dealing with to-day might there have been raised by the defendant. But, mirabile dictu, no such point was even mentioned to the learned judge, nor was there any reference to the authorities referred to in my present judgment. *Stanbury's Case* (5) was not cited. The learned judge, therefore, never even considered the point that is now before me for decision. It may be that the *Bradford Corpn. Case* (13) can be supported on a special ground. The claim rested on the old rule that a master has some sort of property in the service of a man who is his servant, or even a quasi servant. The rule is a highly artificial one. The action, for example, by a father for the seduction of a daughter, is based upon that rule. It may well be pointed out that the claim of a father to the service of a grown-up daughter who happens to be living at home at the time of the seduction and maternity, is slender to the last degree. Yet so slender a claim may afford the basis for an action. The type of action represented in the *Bradford Corpn. Case* (13) is well discussed by Sir Frederick Pollock in his masterly treatise on Torts (13th Edn.), pp. 231 to 340, and by Clerk and Lindsell on Torts (8th Edn.), pp. 201 to 208. The *Bradford Corpn. Case* (13) may, perhaps, therefore be supported as resting on a special and extremely artificial form of action. But I cannot regard it as in any way a decision that the normal relation of master and servant, or principal and agent, exists between a police officer and the municipal corporation within whose area he acts. So to hold would be contrary, in my view, to statute, to established decision and to sound public policy.

I now turn to another decision, which was, to some extent, relied on by counsel for the plaintiff. I refer to *Wallwork* v. *Fielding* (14). I need not refer in detail to the facts of that case. An action had been brought in the county court by a police inspector against the watch committee of the corporation of Blackpool for "wages." The plaintiff succeeded in the county court, but failed in the Divisional Court and the Court of Appeal. No point was apparently taken that the action was against the watch committee and not against the corporation. The case really turned upon the defendant corporation's power of suspension under s. 191 of the Municipal Corporation Act, 1882, when read with the provisions of the Police Act, 1919. The point now before me was not, I think, raised at all. I need not refer to the judgment of Pickford, L.J. There is, however, a sentence of Warrington, L.J., which was cited to me by the plaintiff's counsel. The learned lord justice said ([1922] 2 K.B. at p. 74): "The relations are those of employer and employed." This, however, if I may respectfully say so, is only an obiter dictum. The learned lord justice had not present to his mind either *Stanbury's Case* (5) or any of the authorities already cited by me in this present judgment. He did not mean to deal with such a point as the present. The words, of course, go too far if they are meant to imply that the relation between a corporation and a police officer is the normal relation of master and servant. Only in a special and limited sense can a police officer be said to be in the "employ" of a municipal corporation. With respect to the action for "wages," as they are called in that case—and I do not forget Sched. V of the Municipal Corporation Act—I think the point may well be raised some day whether any such action will lie in so far as it is framed upon an alleged contract of service in the ordinary sense. Any such action may, perhaps, be more properly brought on a special footing, namely, on the duty of the defendants to pay such sum as is due by virtue of statutory obligation plus a certain degree of contractual relationship: see the decisions neatly referred to in Lumley's Public Health, vol. 1 (9th Edn.), pp. 450–451, and see also *Hall* v. *Taylor* (15). It must be remembered that if once it is conceded that an ordinary action for wages can be brought, it may well be argued that an ordinary action for wrongful dismissal would apparently also lie. It is ever necessary to keep in mind at all times the body of legislation which governs the rights, duties and status of police officers.

I need only say a few words on several other cases cited to me. *Smith* v. *Martin and Kingston-upon-Hull Corpn.* (16) has, I think, no relevance. It turned upon the effect of the Elementary Education Acts, 1870 to 1900, in creating the relation of master and servant as between a school teacher and the education authority. Nor does *Glasbrook Bros., Ltd.* v. *Glamorgan County Council* (17) throw any real light on the point before me. The case turned on other points. So far as it goes, the principle of *Hall* v. *Lees* (18) assists the defendants' contention here. But that case is somewhat remote from the present question. The like may be said of *Hillyer* v. *Governors of St. Bartholomew's Hospital* (19). So, too, of *Crisp* v. *Thomas* (20), though the defendants in this present action may rightly say that the remarks of LORD ESHER in that case tend to support their submission to me here on the question of principle.

I have now completed my review of the decisions and the statutory provisions which bear on the serious question before me. I hold that the defendants are not responsible in law for the arrest or detention of the plaintiff. The police, in effecting that arrest and detention, were not acting as the servants or agents of the defendants. They were fulfilling their duties as public servants and officers of the Crown, sworn to "preserve the peace by day and by night, to prevent robberies and other felonies and misdemeanours and to apprehend offenders against the peace." If local authorities are to be liable in such a case as this for the acts of the police with respect to felons and misdemeanants, then it would, indeed, be a serious matter, and it would entitle them to demand that they ought to secure a full measure of control over the arrest and prosecution of all offenders. To give any such control would, in my view, involve a grave and most dangerous constitutional change. For the reasons given, there must be judgment for the defendants.

Judgment for defendants.

Solicitors: *W. A. S. Hellyer & Co.*; *Sharpe, Pritchard & Co.*, for *Joseph J. Williams*, Town Clerk, Oldham.

[*Reported by* R. A. YULE, ESQ., *Barrister-at-Law.*]

LONDON PLAYING FIELDS SOCIETY *v.* SOUTH-WEST ESSEX ASSESSMENT COMMITTEE

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Wright, JJ.), July 23, 24, 1930]

[Reported 144 L.T. 233; 94 J.P. 241; 46 T.L.R. 631; 74 Sol. Jo. 662; 28 L.G.R. 591; 1 B.R.A. 367]

Rates—Recreation ground—No statutory obligation to preserve ground for perpetual use of public—Ability to earn profits—Restriction on application.

The London Playing Fields Society, incorporated by royal charter, had, by the terms of the charter, the objects (inter alia) of encouraging the playing of sports and games by the clerks and working men and boys of London, and to increase the existing supply of public and private playing fields within or adjoining the administrative county of London. The society had power to acquire and hold land for these purposes, and the income of the society was to be applied solely towards the promotion of the objects of the society and no portion of it was to be paid by way of profit to the members. The society acquired certain freehold land, the deed of conveyance of which contained a restrictive covenant that the land should henceforth be used as public ground for the purpose of the Recreation Ground Act, 1859, and as though it had been conveyed under that Act, but with a power to sell the land or any part thereof. The land was let to clubs for small payments and access was granted to the public, subject to certain restrictions. The expenditure on the property exceeded the receipts.

Held: there was no statutory obligation to preserve the land for the perpetual use of the public as a place of recreation, the restrictions which there were, being voluntary, partial, and, possibly, transitory since the society had power to sell the land; moreover, while sterility in earning profits affected the value of the land, sterility in disposing of profits (which existed in the present case) did not; and, therefore, the society was in beneficial occupation of the land and were rateable in respect of it.

Lambeth Overseers v. *L.C.C.* (1) ([1897] A.C. 625), distinguished.

Per Avory, J.: The decision in *Manchester Corpn.* v. *Chorlton Union Assessment Committee* (2) ((1899), 15 T.L.R. 327) is irreconcilable with the decision of the House of Lords in *Lambeth Overseers* v. *L.C.C.* (1).

Notes. Distinguished: *Burnell* v. *Downham Market U.D.C.*, [1952] 1 All E.R. 601. Referred to: *North Riding of Yorkshire County Valuation Committee* v. *Redcar Corpn.*, [1942] 2 All E.R. 589.

As to the rateability of property occupied for public purposes, see 27 Halsbury's Laws (2nd Edn.) 366, 367; and for cases see 27 Digest (Repl.) 351 et seq.

Cases referred to:

(1) *Lambeth Overseers* v. *L.C.C.*, [1897] A.C. 625; 66 L.J.Q.B. 806; 76 L.T. 795; 46 W.R. 79; 13 T.L.R. 527; sub nom. *St. Mary, Lambeth (Churchwardens and Overseers)* v. *L.C.C.*, 61 J.P. 580, H.L.; 36 Digest (Repl.) 351, *13*.

(2) *Manchester Corpn.* v. *Chorlton Union Assessment Committee* (1899), 15 T.L.R. 327, D.C.; 36 Digest (Repl.) 352, *14*.

(3) *Port of London Authority* v. *Orsett Union Assessment Committee*, [1920] A.C. 273; 89 L.J.K.B. 481; 122 L.T. 722; 84 J.P. 69; 36 T.L.R. 233; 18 L.G.R. 153; 2 B.R.A. 709, H.L.; 38 Digest 563, *1017*.

(4) *L.C.C.* v. *Erith Parish (Churchwardens, etc.) and Dartford Union Assessment Committee, West Ham Parish (Churchwardens, etc.)* v. *L.C.C., St. George's Union Assessment Committee* v. *L.C.C.*, [1893] A.C. 562; 63 L.J.M.C. 9; 69 L.T. 725; 57 J.P. 821; 42 W.R. 330; 10 T.L.R. 1; 6 R. 22; sub nom. *L.C.C.* v. *Erith Overseers, L.C.C.* v. *West Ham Union, L.C.C.* v. *Woolwich Union, L.C.C.* v. *St. George's Union*, Ryde, Rat. App. (1891–93) 382, H.L.; 38 Digest 429, *42*.

(5) *Carnegie Dunfermline Trustees* v. *Dunfermline Assessor*, 1909 S.C. 678; 46 Sc.L.R. 451; 1909 1 S.L.T. 286; 36 Digest (Repl.) 354, **5*.

(6) *L.C.C.* v. *Wandsworth Borough Council*, [1903] 1 K.B. 797; 72 L.J.K.B. 399; 88 L.T. 783; 67 J.P. 215; 51 W.R. 499; 19 T.L.R. 372; 47 Sol. Jo. 405; 1 L.G.R. 462, C.A.; 36 Digest (Repl.) 352, *15*.

(7) *Herne Bay U.D.C.* v. *Payne and Wood*, [1907] 2 K.B. 130; 76 L.J.K.B. 685; 96 L.T. 666; 71 J.P. 282; sub nom. *Herne Bay U.D.C.* v. *Farley, etc.*, 23 T.L.R. 442; 5 L.G.R. 631, D.C.; 36 Digest (Repl.) 353, *18*.

(8) *Liverpool Corpn.* v. *West Derby Assessment Committee*, [1908] 2 K.B. 647; 77 L.J.K.B. 1032; 99 L.T. 435; 72 J.P. 397; 24 T.L.R. 701; 6 L.G.R. 706; 2 Konst. Rat. App. 719, C.A.; 36 Digest (Repl.) 353, *23*.

Case Stated by Essex Quarter Sessions.

The London Playing Fields Society, the respondents to the present appeal, appealed to quarter sessions against a poor rate made by the South-West Essex Assessment Committee, the present appellants, on Oct. 10, 1928, on property occupied by them in the parish and urban district of Walthamstow. On Oct. 4, 1929, the court of quarter sessions held at Chelmsford allowed the appeal and struck out the entry in the rate book subject to the following Case Stated:

1. The society were the owners and occupiers of certain property in the parish A
of Walthamstow, and were rated and assessed in respect thereof in the following entry:

Name and Situation of Property	Description of Property	Gross Estimated Rental	Rateable Value
The Elms, Coppermill Lane, Walthamstow	Dwelling House, Garden, Buildings, Playing Fields, Land and Premises	£ 365	£ 250
	Rifle Range	19	15

B

C

2. The said rate was based upon a valuation list for the said parish made and approved on Feb. 15, 1924. On Dec. 3, 1928, the society gave notice of objection to the said list and their objection was heard by the assessment committee on Dec. 17, 1928. The committee decided the objection on July 29, 1929, and refused any relief to the appellants. By notice in writing dated Aug. 15, 1929, the society appealed against the said rate and in such notice relied upon the following grounds: D
(i) that the society were not in such occupation of the said hereditaments as would make them liable to be rated in respect thereof; (ii) that the society were over-rated in respect of the gross estimated rental and rateable value of the said hereditament; (iii) that no tenant subject to the same restrictions as to user as the society would give for the hereditament a rent equal to the rateable value appealed against or any rent; and (iv) that sufficient deductions had not been made from the gross estimated E
rental of the said hereditament in order to arrive at the rateable value thereof.

3. The society were incorporated by royal charter dated Oct. 31, 1925. The preamble to the said charter contained the following recitals:

That the objects of the society are (i) to encourage and develop the playing of cricket, football and other like games by the clerks and working men and boys of London with a view to promoting the physical and moral welfare of the population; F
(ii) to ascertain, organise and represent the requirements and wishes of cricket and football players of these classes, particularly in negotiating with the public authorities in regard to the playing of games in the parks, commons and other open spaces, and with railway companies in regard to reduction of fares and facility of access; (iii) to increase the existing supply of public and private playing fields within or adjoining the administrative county of London by acquiring land and letting pitches G
and grounds for the season or otherwise, or for any particular occasion to clubs which, though not able to give the high rents necessarily demanded by persons who let for profit, can yet pay a moderate charge, and thus reduce the competition for the limited space available in the parks and public open spaces, and leave them free for the poorest players; (iv) the collection of sports gear and the distribution thereof to elementary schools and other institutions in poor neighbourhoods; and (v) the H
provision of miniature rifle ranges or other facilities for military purposes with a view to National Defence. That the society is dependent for its support upon the fees paid in respect of pitches and other accommodation provided by them, voluntary subscriptions, donations and other sums and income derived from funds invested in the names of trustees. That the settled policy of the society has been to endeavour to make each playing field self-supporting, leaving only such sums as I
may be required for capital improvement to be found from its funds.

4. The following clauses of the charter were also material to the case:

(ii) For the purpose of maintaining, carrying on, and extending the work and objects aforesaid, the president, vice-presidents, chairman, vice-chairman, treasurer, and members for the time being of the society shall by the name of "The London Playing Fields Society" be and become and are hereby constituted a body politic and corporate with perpetual succession and a common seal, with power to alter, vary, break, or renew the same at their discretion and may by the said name of the

London Playing Fields Society sue and be sued in any court or place of judicature within the dominion of us, our heirs and successors, and also shall have power without any further licence in mortmain to acquire and take any lands, tenements, and hereditaments or interests therein now held and possessed by the society or by any persons in trust for the society and also to acquire and purchase any additional lands, tenements, and hereditaments whatsoever, situated within our United Kingdom of Great Britain and Northern Ireland, the yearly value of which does not exceed £20,000, such annual value to be calculated and ascertained at the time of the respective acquisition thereof: and to have, hold, and possess all or any lands, tenements, and hereditaments which the corporation is hereby authorised to acquire in perpetuity or on lease, and the corporation shall with the approval of the Charity Commissioners in all cases, where such approval is required by s. 29 of the Charitable Trusts Amendment Act, 1858, be capable in law to grant, sell, exchange, mortgage, lease, or otherwise dispose of or deal with any of the lands, tenements, or hereditaments so held by them as may seem to them expedient. And we do further for us, our heirs, and successors grant to all persons (otherwise competent thereto) full licence and authority to assure in mortmain to the extent aforesaid, any lands, tenements, and hereditaments in perpetuity or otherwise to the corporation.

(iii) The property of the corporation shall consist of all such real and personal property as now belongs to or is held in trust for the society so soon as the same shall have been lawfully conveyed or otherwise lawfully assured to the corporation and of all such further sums of money, investments, and property, whether real or personal, as may, subject to the provisions of these presents from time to time be acquired or purchased by or given, granted, conveyed, or transferred to or for the benefit of the corporation.

(iv) Any funds or property which are now lawfully held by any persons as trustees of the society for and in connection with the society upon any special trusts or for any special purposes in connection with the society shall if and when lawfully transferred or otherwise lawfully assured to the corporation be held by the corporation as trustees upon such special trusts and for such special purposes and be applied accordingly and any further sums of money or other property whether real or personal as may at any time hereafter subject to the provisions of these presents be lawfully given, granted, conveyed, or otherwise transferred to the corporation upon any lawful special trusts or for any lawful special purposes in connection with the society may be accepted and held by the corporation as trustees upon such special trusts and for such special purposes and be applied accordingly.

(v) The income of the corporation shall be applied solely towards the promotion of the charitable objects of the corporation as set forth in this our charter, and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus, or otherwise howsoever by way of profit to the members of the corporation or any of them: Provided that nothing herein contained shall prevent the payment in good faith of remuneration to any officers or servants of the corporation or to any member thereof in consideration for services actually rendered to the corporation, or the payment of interest at a rate not exceeding 6 per cent. per annum upon money borrowed from any member of the corporation, or the payment to the donor of any land, money or securities, or his or her nominee or nominees, of any annuity by way of annual interest guaranteed by the corporation on the amount of such gift during a period not exceeding the life of the donor or such nominee or nominees, and at the rates for the time being prescribed by the council.

(xxiii) The council shall have power to do all such acts and things not inconsistent with this our charter and the byelaws as they may think wise for the furtherance of the objects of the corporation, and, subject to this our charter, may exercise all such powers and functions, and make such contracts and agreements, and generally do all such acts and things as are not reserved to an annual or special meeting, and subject as aforesaid the council shall have unrestricted control over the workings and management of the playing fields, sports grounds, houses, pavilions, huts, and other buildings of the corporation, the letting of pitches and other accommodation and apparatus and appliances, and over its officers and servants, the organisation of games, negotiations with public and other authorities in regard to the playing of games in parks, commons and other open spaces and places, and with railway and other transport companies in regard to reduction of fares, facility of access to playing fields and other privileges and facilities.

(xxiv) The council shall have and may exercise (without prejudice to the generality of the provisions of the immediately preceding article) the following powers, namely: Power to (a) Receive gifts of, acquire, purchase or take on lease any lands, grant, sell, exchange, mortgage, lease, surrender and accept surrenders of leases or otherwise dispose of any of the lands, tenements or hereditaments of the corporation, and purchase, receive gifts of, acquire, take on lease and surrender other lands, tenements or hereditaments in place thereof or in addition thereto. (b) Expend such moneys of the corporation in the laying out, maintenance, repair and renewal and equipment of grounds for cricket, tennis, football, hockey, lacrosse and any other game, or any houses, pavilions, huts or buildings belonging to the corporation as may appear to them from time to time to be necessary or proper.

5. The property, known as the Elms Playing Field, comprised 34¾ acres of land upon which were situate a pavilion, twenty dressing sheds, an old house known as "The Elms," stabling, a cartshed, and a club room. There were twelve grass tennis courts on the land, and the remainder was occupied by football and cricket pitches, used by clubs connected with churches, chapels, and other institutions.

6. (i) The property was freehold and was conveyed to the society by deed of conveyance dated Sept. 29, 1927. The following restrictive covenant appeared in the deed: That the property hereby assured shall henceforth be used as a public ground for the purpose of the Recreation Grounds Act, 1859, and as though it had been conveyed under the said Act, but with power (with the sanction of the Charity Commissioners for England and Wales if and so far as such sanction may be necessary) to sell the whole or any part thereof. (ii) The material parts of the said Recreation Grounds Act, 1859, were as follows:

> "Section 1. Any lands may be lawfully conveyed to trustees to be held by them as open public grounds for the resort and recreation of adults and as playgrounds for children and youth or either of such purposes, and for any estate and subject to any reservation, restrictions, and conditions which the donor or grantor may think fit. But this enactment shall not extend to authorise any lands to be so conveyed for any greater estate or interest than the donor or grantor would independently of this Act have power to dispose of.
>
> Section 6. The managers and directors may from time to time make and enforce any such byelaws, orders and regulations for the management, preservation, disposition and care of the said grounds, and the government of all persons using or frequenting the same as shall be approved by the said [Charity] Commissioners, and in accordance with the conditions of the grant, and no byelaws, orders, or regulations in any manner restricting the public use or enjoyment of the said grounds shall be valid unless sanctioned with such approbation."

7. Certain byelaws made pursuant to the Recreation Grounds Act and approved by the Charity Commissioners were in force with respect to the said property. The following of these byelaws were material to this case:

> "(i) The London Playing Fields Society, hereinafter called 'the managers,' are and shall be the managers and directors of the said playing field. All powers and authorities vested in or exercisable by the managers shall be exerciseable either by them or on their behalf by the chairman or secretary for the time being of the society, or of the North-Eastern District Committee thereof, or by any member of the society or of the committee of management thereof or by the groundsman or his deputy for the time being in charge of the playing field or otherwise as mentioned in these byelaws.

A (ii) The playing field shall be open to members of the public for resort and recreation between the hours of 9 a.m. and sunset or for players only until half an hour after sunset, but not so as to obstruct or interfere with games or sports which are intended to be the primary use of this public open space, and shall be open for games or sports on such days and at such hours as the managers shall think proper, having regard to the condition of the ground and B the preservation of it in good repair. Provided that the playing field or any part thereof may be closed to the public during such times as drainage or any works of repair or improvement may be in hand, and may be closed to the public for not more than ten days in any year for the purpose of holding any special matches, athletic sports, school feasts, or any such gatherings. For such gatherings the managers may make such arrangements as they may think C fit for payment for use of the playing field or of the ground reserved for the special purpose.

(iii) The playing field shall be used for cricket, football, hockey, lawn tennis, and other games and sports by clubs or persons authorised by the managers, who may make such reasonable charges for the use of pitches and grounds as they think proper. Such charges may be made for the season or day or other D times or occasions as the managers think proper, and shall be payable in advance or otherwise as the managers think proper.

(iv) The managers shall have uncontrolled discretion as to the clubs or persons to whom licence or permission to play games or follow or practise sports on the playing fields shall be given and as to the places where and times when play or sports shall take place.

E (v) No person shall play or make any preparation for playing any game or follow or practise any sport on any part of the playing field without the previous licence or permission of the managers. All persons playing any game or following or practising any sport, or who have come into the playing field for any such purpose or as spectators or as members of the public shall obey and conform to all rules and regulations made by the managers with reference to any F game or sport and shall obey and conform to any directions or requests made by the groundsman or his deputy or any assistants of his.

(vii) No person shall obstruct or interfere with the playing of any game or the following or practice of any sport by any persons authorised by the managers on any part of the playing field. No person shall remain on any part of the playing field where in the opinion of the groundsman or his deputy the G presence of such person is dangerous to himself or is likely to obstruct or interfere with the players of any game or the following or practice of any sport.

(xxv) Nothing in these byelaws shall take away, abridge, limit, or interfere with any remedy now existing by way of indictment or shall take away, abridge, or limit or interfere with the powers of the police or any authority legally existing for preventing or punishing any offence, or for securing the proper H management, preservation, disposition, or care of the playing field, or with the powers of the London Playing Field Society or the trustees as having the control of the playing field."

8. The playing fields were managed by the society in accordance with their charter and byelaws and were open to the public daily between 9 a.m. and sunset, subject to the playing of games not being interfered with. The tennis courts and I football and cricket pitches were hired out on one or two days a week to clubs, mostly connected with churches, chapels, and other institutions. The clubs paid such rents for the pitches as they could afford and as could be obtained consistently with the objects of the charter. In addition to such clubs, the local elementary schools were allowed to use the pitches free of charge on certain days of the week. In 1926, 1927 and 1928, as well as upon an average of all the years during which the society had been in occupation of the property, the expenditure necessary for the carrying on and maintenance of the same for the purposes for which it was

used exceeded the receipts. The average annual cost of repairs and maintenance A was particularly heavy owing (inter alia) to the great length of wooden fencing bounding the same. The condition of the property both as regards the land and buildings was very poor. Before the fields could be made fit for letting on a commercial basis it would be necessary to allow them to remain unused for a considerable period, and some substantial expenditure on reconditioning and improving them would have to be incurred. B

9. The society contended: (i) That by reason of the terms of their charter and the conditions under which they owned the property, they had no rateable occupation thereof, but that the occupation was that of the public. (ii) That they were not in beneficial occupation of the said property, and were not liable to be rated in respect thereof. (iii) That in any event the true rateable value of the said property was nil. The assessment committee contended: (i) That any restriction giving C access to the public to the property was voluntarily and self-imposed by the society, and that the society were in rateable occupation thereof. (ii) That such occupation being of some value to the society for the purpose of carrying out the objects of their charter constituted beneficial occupation. (iii) That the gross and rateable values appealed against were correct.

10. Upon the aforesaid facts and contentions quarter sessions decided: (i) That D the society were not in rateable occupation of the property. (ii) That the society were not in beneficial occupation of the said property. (iii) That there was no rateable occupation of the property and that consequently the property had no rateable value. The question for the opinion of the court was whether quarter sessions were right in law in coming to these conclusions.

Montgomery, K.C., and *Blanco White*, for the assessment committee, referred E to *Lambeth Overseers* v. *L.C.C.* (the *Brockwell Park Case*) (1); *Port of London Authority* v. *Orsett Union Assessment Committee* (3); *L.C.C.* v. *Erith Overseers* (4); *Carnegie Dunfermline Trustees* v. *Dunfermline Assessor* (5); *L.C.C.* v. *Wandsworth Borough Council* (6); *Herne Bay U.D.C.* v. *Payne and Wood* (7); *Manchester Corpn.* v. *Chorlton Union Assessment Committee* (2).

Konstam, K.C., and *Michael Rowe*, for the society, also referred to *Liverpool* F *Corpn.* v. *West Derby Assessment Committee* (8).

LORD HEWART, C.J.—This is a Special Case stated for the opinion of this court by the court of quarter sessions for the county of Essex. The society at quarter sessions, the London Playing Fields Society, are the owners and occupiers of certain property in the parish of Walthamstow. They were rated and assessed G in respect of that property for the purposes of a poor rate made on Oct. 10, 1928. They appealed against that assessment and the court of quarter sessions, having heard the appeal, allowed it, and, accordingly, struck out the entry from the rate book, subject to this case. The facts are clearly stated in the Case, and it is not necessary that I should read them. The appeal to quarter sessions was brought on four grounds: (i) That the society are not in such occupation of the said heredita- H ment as would make them liable to be rated in respect thereof; (ii) that the society are over-rated in respect of the gross estimated rental and rateable value of the hereditament; (iii) that no tenant subject to the same restrictions as to user as the society would give for the hereditament a rent equal to the rateable value appealed against or any rent; (iv) that sufficient deductions have not been made from the gross estimated rental of the said hereditament in order to arrive at the rateable I value thereof. The court of quarter sessions came to the conclusion that the society were not in rateable occupation of the property; that they were not in beneficial occupation of the property; that there was no rateable occupation of the property; and that, consequently, the property had no rateable value. The question for us is whether quarter sessions was right in law in coming to those conclusions. It is common ground that no question of quantum arises. The question is whether in point of law the contentions offered by the assessment committee and accepted by quarter sessions are correct. The main one is obviously No. (iii):

A
> "That no tenant subject to the same restrictions as to user as the society would give for the hereditament a rent equal to the rateable value appealed against or any rent."

The controversy has really turned on that contention; it is, therefore, important to see what and whence derived are the restrictions relied on.

B The society are a body incorporated by royal charter, and the preamble and certain provisions of the charter are set out in the Case. I do not reiterate them, but it is interesting to observe that by cl. (xxiv) of the charter:

> "The council shall have and may exercise (without prejudice to the generality of the provisions of the immediately preceding article) the following powers, namely: Power to (a) receive gifts of, acquire, purchase, or take on lease any C lands, grant, sell, exchange, mortgage, lease, surrender and accept surrenders of leases, or otherwise dispose of any of the lands, tenements or hereditaments of the corporation, and purchase, receive gifts of, acquire, take on lease and surrender other lands, tenements or hereditaments in place thereof or in addition thereto."

It is not correct to say, nor does the Case state, that the property here in question D was conveyed to the society under the Recreation Grounds Act, 1859. On the contrary, as appears from the Case Stated and from the conveyance, it was conveyed to the society out and out. It is true that the conveyance contains a restrictive covenant, which is in part set out in the Case:

> "That the property hereby assured shall henceforth be used as public ground for the purpose of the Recreation Grounds Act, 1859, and as though it had E been conveyed under the said Act, but with power (with the sanction of the Charity Commissioners for England and Wales if and so far as such sanction may be necessary) to sell the whole or any part thereof."

It was, therefore, by covenant that the Recreation Grounds Act, 1859, was brought into the matter, and it was brought in subject to the clearly expressed power to F sell the whole or any part of the property. It may be observed that under the byelaws made by the society the playing field or any part thereof

> "may be closed to the public for not more than ten days in any year for the purpose of holding any special matches, athletic sports, school feasts, or any such gatherings. For such gatherings the managers may make such arrangements as they may think fit for payment for use of the playing field or of the G ground reserved for the special purpose."

More than that, by byelaw No. (iii):

> "The playing field shall be used for cricket, football, hockey, lawn tennis and other games and sports by clubs or persons authorised by the managers, who may make such reasonable charges for the use of pitches and grounds as they H think proper. Such charges may be made for the season or day or other times or occasions as the managers think proper, and shall be payable in advance or otherwise as the managers think proper."

In those circumstances, and others like unto them, it is contended on behalf of the society, not that the rateable value is very low, but that there is no rateable value at all, and that the proper course to take is that taken by quarter sessions, I namely, to strike out the entry entirely. It has been strenuously argued that this case is on all fours with *Lambeth Overseers* v. *L.C.C.* (1). But, in my opinion, that case is not upon the same footing as the present one; rather it affords a useful contrast to it. In that case all the judgments in the House of Lords made it plain that the turning point was that there was by statute a perpetual obligation to preserve the park for the perpetual use of the public as a place of recreation. LORD HALSBURY said ([1897] A.C. at p. 630):

> "If the statute, as in this case, prevents him (the occupier) from earning anything, there can under the Parochial Assessment Act be no rateable occu-

> pation, as under that Act the rate is to be measured by the rent which a tenant would pay."

Again on the same page:

> "Once it has been found as in this case, that the occupation cannot as a matter of law be a beneficial occupation, there is an end of the question, I say as matter of law, because that it does not give a beneficial occupation as matter of fact is nothing to the purpose. Here there is no possibility of beneficial occupation to the county council; they are incapable by law of using it for any profitable purpose. They must allow the public the free and unrestricted use of it."

In like manner LORD HERSCHELL said in that case (see [1897] A.C. at p. 631):

> "In order to determine whether the respondents are liable to be rated in respect of the park and its adjuncts, the question which has to be answered is, at what rent, if any, the hereditament might reasonably be expected to let, taking one year with another. Now it is well settled that in answering this question regard must be had to any restrictions which the legislature has imposed upon their use, and the hypothetical tenant must be supposed to take them subject to these restrictions. Bearing that in mind, it seems clear that the park and the buildings thereon can have no rateable value. No tenant would give anything for them, seeing that every part of them is dedicated to the public use."

Taking those two judgments together, I think that the question whether there is any beneficial occupation in fact is not the point. The question is whether there can be any beneficial occupation as matter of law, and that means whether there are any restrictions imposed by the legislature. As LORD HERSCHELL said in the *Brockwell Park Case* (1) ([1897] A.C. at p. 632):

> "I am not satisfied that the county council are occupiers of this park for rating purposes, though the legal possession is no doubt vested in them. They seem to me to be merely custodians as trustees to hold it and manage it for the use of the public."

Similarly, when one turns to the views expressed in the House of Lords in *Port of London Authority* v. *Orsett Union Assessment Committee* (3) one finds that LORD DUNEDIN said ([1920] A.C. at p. 299):

> "I think the confusion was exposed and got rid of by LORD HERSCHELL in the *Erith Case* (4) ([1893] A.C. at p. 591). He speaks of the expression 'struck by sterility,' and he says:
>
>> 'Now if land is struck with sterility in any and every body's hands, whether by law or by its inherent condition, so that its occupation is, and would be, of no value to anyone, I should quite agree that it cannot be rated to the relief of the poor. But I must demur to the view that the question whether profit (by which I understand is meant pecuniary profit) can be derived from the occupation by the occupier is a criterion which determines whether the premises are rateable.'
>
> This seems to me to be the key of the whole matter. Sterility in earning profits is one thing, sterility in the disposing of profits is another. The former affects the value: the latter does not."

To apply those observations to the present case, it seems to me that the question is not: What is the position of the land in the hands of the present occupiers? It is: Are these lands "struck with sterility" by operation of law? The same principle was put clearly by LORD DUNDAS in the Scottish case, *Carnegie Dunfermline Trustees* v. *Dunfermline Assessor* (5). In the present case the restrictions were not under a statute: it was by the voluntary act of the persons conveying the land that for a time restrictions are placed on the user of the hereditament. Those restrictions are voluntary, partial, and may be transitory. There is a clear power to sell the land, and I think that the attempt to show that it has no rateable value fails, and that the appeal ought to be allowed.

AVORY, J.—I am of the same opinion, and should not have thought it necessary to add anything, but that I desire to comment on *Manchester Corpn.* v. *Chorlton Union Assessment Committee* (2). The question in the present case, stated shortly, is whether it comes within the principle laid down in *Lambeth Overseers* v. *L.C.C.* (1). It is not necessary to repeat the passages read by my Lord to show that the case does not come within that principle. The *Manchester Case* (2) was in some respects similar to the present one, and it is, in my view, impossible to reconcile the decision in that case—I say it with all respect—with the decision of the House of Lords in *Lambeth Overseers* v. *L.C.C.* (*the Brockwell Park Case*) (1); for it was pointed out that the *Brockwell Park Case* (1) was distinguishable and that the Act in question in the *Manchester Case* (2) did not declare that the particular land there in question should be dedicated to the public, but left the selection of the land to the appellants, who might later sell it and dedicate other land, and the dedication was therefore not irrevocable. It seems to me that that argument ought to have prevailed. The judgments, so far as they are briefly reported, do not even notice that point of distinction, and I cannot help thinking that it was overlooked. In the present case, not only is there express power to sell the land, but I can see nothing to prevent the Playing Fields Society from selling this field at any moment when it might appear convenient or profitable to do so. I agree that the appeal should be allowed.

WRIGHT, J.—I agree. The present case is so far from coming within *Lambeth Overseers* v. *L.C.C.* (1) that it appears to me rather to come within the language used by LORD HERSCHELL of the case which he contrasts with that case. The land which is here in question, and which is at present appropriated as a playing field, is not dedicated by statute to that use. The society can purchase fields where they like, and remove at any time. I treat as immaterial the necessity for the consent of the Charity Commissioners, because I take it that that consent would not be unreasonably withheld. With regard to *Manchester Corpn.* v. *Chorlton Union Assessment Committee* (2), DARLING, J., said that it was concluded by the *Brockwell Park Case* (1). If he said that, he must have proceeded on the ground that the dedication was irrevocable. The report is not very clear, but I cannot find in it any intention to deviate from the principle laid down in the *Brockwell Park Case* (1).

Respondents' appeal allowed.

Solicitors: *Mackrell, Maton, Godlee & Quincey*; *Bircham & Co.*

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

NACHIMSON *v.* NACHIMSON

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), April 11, May 16, 1930]

[Reported [1930] P. 217; 99 L.J.P. 104; 143 L.T. 254; 95 J.P. 211; 46 T.L.R. 444; 74 Sol. Jo. 370; 28 L.G.R. 617]

Conflict of Laws—Marriage—Marriage celebrated abroad—Marriage in form recognised by English law—Effect of foreign law regarding divorce—Divorce by consent or unilateral wish.

In 1924 the parties, who were both domiciled Russians, went through the procedure requisite for a legal marriage under Russian law at the Moscow Provincial Registration Office and were by Russian law deemed to be married. By Russian law a marriage registered in 1924 lasted during the lifetime of the spouses, and was a union for life between the parties thereto to the exclusion of all others, but it could be terminated by mutual consent—in which case the dissolution had merely to be registered—or it could be terminated by the unilateral desire of either of the spouses, in which case an application had to be made to a court of law, to which the other spouse had to be summoned, whereupon the dissolution was registered by the judge as of course. On a question whether the court had jurisdiction to entertain a suit by the wife for a decree of judicial separation,

Held: the conditions on which, according to Russian law, the marriage could be dissolved were not of the essence of the contract of marriage, and were not to be regarded as a test of the validity of the marriage under English law nor as a relevant factor in determining whether the marriage was one which an English court would recognise as valid; the marriage conformed to the definition of a valid marriage as understood by English law; and, therefore, the court had jurisdiction to deal with the case.

Notes. Applied: *Mehta* (*otherwise Kohn*) v. *Mehta*, [1945] 2 All E.R. 690. Considered: *Apt* (*otherwise Magnus*) v. *Apt*, [1947] 2 All E.R. 677; *De Reneville* v. *De Reneville*, [1948] 1 All E.R. 56. Referred to: *Gottliffe* v. *Edelston*, [1930] 2 K.B. 378; *Spivack* v. *Spivack*, post, p. 133; *Fender* v. *Mildmay*, [1936] 1 K.B. 111.

As to the validity of marriages celebrated abroad, see 7 HALSBURY'S LAWS (3rd Edn.) 88 et seq.; and for cases see 11 DIGEST (Repl.) 455 et seq.

Cases referred to:

(1) *Berthiaume* v. *Dastous*, [1930] A.C. 79; 99 L.J.P.C. 66; 142 L.T. 54, P.C.; 11 Digest (Repl.) 462, *954*.

(2) *Warrender* v. *Warrender* (1835), 2 Cl. & Fin. 488; 9 Bli.N.S. 89; 6 E.R. 1239, H.L.; 11 Digest (Repl.) 356, *250*.

(3) *Salvesen* (*or Von Lorang*) v. *Austrian Property Administrator*, [1927] A.C. 641; 96 L.J.P.C. 105; 137 L.T. 571; 43 T.L.R. 609, H.L.; 11 Digest (Repl.) 478, *1069*.

(4) *Harvey* v. *Farnie* (1882), 8 App. Cas. 43; 52 L.J.P. 33; 48 L.T. 273; 47 J.P. 308; 31 W.R. 433, H.L.; 11 Digest (Repl.) 481, *1084*.

(5) *Sottomayer* v. *De Barros* (1879), 5 P.D. 94; 49 L.J.P. 1; 41 L.T. 281; 27 W.R. 917; 11 Digest (Repl.) 461, *946*.

(6) *Re Bethell, Bethell* v. *Hildyard* (1888), 38 Ch.D. 220; 57 L.J.Ch. 487; 58 L.T. 674; 36 W.R. 503; 4 T.L.R. 319; 11 Digest (Repl.) 455, *907*.

(7) *Hyde* v. *Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130; 35 L.J.P. & M. 57; 14 L.T. 188; 12 Jur.N.S. 414; 14 W.R. 517; 11 Digest (Repl.) 455, *906*.

(8) *Brook* v. *Brook* (1861), 9 H.L.Cas. 193; 4 L.T. 93; 25 J.P. 259; 7 Jur.N.S. 422; 9 W.R. 461; 11 E.R. 703, H.L.; 11 Digest (Repl.) 457, *915*.

(9) *Brinkley* v. *A.-G.* (1890), 15 P.D. 76; 59 L.J.P. 51; 62 L.T. 911; 6 T.L.R. 191; 11 Digest (Repl.) 456, *909*.

A (10) *R.* v. *Hammersmith Superintendent Registrar of Marriages, Ex parte Mir-Anwaruddin*, [1917] 1 K.B. 634; 86 L.J.K.B. 210; 115 L.T. 882; 81 J.P. 49; 33 T.L.R. 78; 61 Sol. Jo. 130; 15 L.G.R. 83, C.A.; 11 Digest (Repl.) 489, *1123*.

(11) *Bater* v. *Bater*, [1906] P. 209; 75 L.J.P. 60; 94 L.T. 835; 22 T.L.R. 408; 50 Sol. Jo. 389, C.A.; 11 Digest (Repl.) 482, *1087*.

B (12) *Lord Advocate* v. *Jaffrey*, [1921] 1 A.C. 149; 89 L.J.P.C. 209; 124 L.T. 129; 36 T.L.R. 820; 64 Sol. Jo. 713, H.L.; 11 Digest (Repl.) 356, *253*.

Appeal by the wife from an order of HILL, J. ([1930] P. 85), refusing her petition for judicial separation on the ground of want of jurisdiction.

Serjeant Sullivan, K.C., and *Eric Dance* for the wife.

C *F. L. C. Hodson* and *A. M. Krougliakoff* for the husband.

Cur. adv. vult.

May 16. The following judgments were read.

LORD HANWORTH, M.R.—The question to be decided in this case is whether the parties have contracted a marriage that is to be recognised as such by the courts of this country. On March 19, 1924, the parties, who are both domiciled D Russians, went through the procedure requisite for a legal marriage under Russian law at the Moscow Provincial Registration Office, Krasno Presna section, Moscow, and, having thus carried out the formalities duly, were by Russian law deemed to be married. It is not suggested that they could have done more than they did to acquire the status of man and wife or to carry into effect a contract of marriage, and no question arises as to capacity or as to mutual consent freely given. E Subsequently, they cohabited for some few years, a child being born on Nov. 2, 1925. As the law in Russia stood at the date of the above proceedings, under a statute passed in 1918, a marriage lasted during the lifetime of the spouses, but could be terminated either by the mutual consent of both spouses, or by the unilateral desire of either of them. The dissolution by mutual consent had to be registered at the proper office of registration without more, but in the absence of mutual consent, F an application had to be made to a court of law by the party desiring the dissolution, the court of the residence of the other party, and it was necessary to summon that other party, or to show that it was impossible to do so. Subject to this procedure, the dissolution was obtained as of course. As one of the witnesses called expressed it: "The judge merely registered the divorce—that was his duty; it was not necessary to have any proof of any causes, mere desire was sufficient." By a G law passed in 1927 dissolution of the marriage was made even simpler; mere registration of the dissolution at the proper office was alone required. It is, however, unnecessary to consider the situation under this later law, for the question is whether the proceedings in 1924 created a valid marriage. Nor have we to determine or even to discuss the question whether, if it is a valid marriage, it has been duly dissolved. That question will require argument and possibly evidence at a H later step in the suit—for the present this court is concerned to determine the question above stated alone.

In a recent case, *Berthiaume* v. *Dastous* (1) ([1930] A.C. at p. 83), LORD DUNEDIN says:

> "If there is one question better settled than any other in international law, it I is that as regards marriage—putting aside the question of capacity—locus regit actum. If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or other of the spouses."

That extract is a re-statement of what had been laid down in many cases previously. In *Warrender* v. *Warrender* (2), a case which, as LORD DUNEDIN said in *Salvesen (or Von Lorang)* v. *Austrian Property Administrator* (3) ([1927] A.C. at p. 660), is a decision of great moment in marriage law, LORD BROUGHAM had said (2 Cl. & Fin. at p. 530): "Thus a marriage good by the laws of one country is held good in all others where the question of its validity may arise." In *Harvey* v. *Farnie* (4) (8 App. Cas. at p. 50), LORD SELBORNE said: A

> "Let it be granted (and I think it is well settled) that the general rule internationally recognised as to the constitution of marriage is, that where there is no personal incapacity attaching upon either party, or upon the particular party who is to be regarded, by the law to which he is personally subject, that is the law of his own country, then marriage is held to be constituted everywhere if it is well constituted secundum legem loci contractus." B

Further, marriage is not only to be regarded as a contract. It confers and constitutes a status—a status which is not only recognised in the country of the domicil of the spouses but universally: see *Harvey* v. *Farnie* (4) and per SIR JAMES HANNEN, P., in *Sottomayer* v. *De Barros* (5) (5 P.D. at p. 101), if authority be needed for the proposition. It seems clear, therefore, that the marriage of these parties created that status in the country of their domicil and so is to be recognised universally. I do not apprehend that HILL, J., doubted or disagreed with the above propositions. But he held that, by reason of the facilities for the dissolution of the marriage by Russian law, the nature of the contract between the parties was such that it could not be held to be a marriage intended and contemplated in what is now the Supreme Court of Judicature (Consolidation) Act, 1925, s. 21, and Part VIII of that Act. His judgment is summarised thus ([1930] P. at p. 98): C D

> "I hold that 'marriage' in English law means a voluntary union of one man and one woman to the exclusion of all others, which is by them indissoluble except by death. If this be the true meaning of marriage in English law, it is the antithesis of a union which the parties or a party can dissolve at will by complying with the forms prescribed by law." E

This view leads one to consider whether the means to dissolve the marriage is a test of the validity of the marriage in our law, so long as the procedure results in a status of marriage according to the law of the domicil, and the marriage is monogamous and does not permit polygamy. The definition of marriage as understood in Christendom is the voluntary union of one man and one woman to the exclusion of all others. If a marriage satisfies this test, is it to be further examined to discover on what grounds, and with what facilities, it can be dissolved in the state where it was effected? LORD BROUGHAM put the question tersely in his judgment in *Warrender* v. *Warrender* (2) (2 Cl. & Fin. at p. 532): F G

> "But it is said that what is called the essence of the contract must also be judged of according to the lex loci; and as this is a somewhat vague, and for its vagueness, a somewhat suspicious proposition, it is rendered more certain by adding that dissolubility or indissolubility is of the essence of the contract."

A little later on he demonstrates the fallacy of this proposition in that

> "it confounds incidents with essence: it makes the rights under a contract, or flowing from and arising out of it, parcel of the contract; it makes the mode in which judicatures deal with those rights, and with the contract itself, part of the contract; instead of considering, as in all soundness of principle we ought, that the contract and all its incidents, and the rights of the parties to it, and the wrongs committed by them respecting it, must be dealt with by the courts of the country where the parties reside [i.e., are domiciled] and where the contract is to be carried into execution." H I

This answer as to whether indissolubility is of the essence of the contract appears to be complete. The wife in the present case stated in evidence that when she married she intended the union to be for life. Further, it must not be overlooked that, although the union may be readily dissolved, until the dissolution is made effective by registration, it subsists, and excludes the possibility of there being any other party who could share the status of marriage with the two on whom it has been conferred by the law of their domicil. Some countries allow greater facilities for the dissolution of the marriage tie than others, and if dissolubility was of the essence of the contract and a test of the validity of the marriage tie, it will be a matter of degree to be determined in varying cases in various countries as to whether the marriage is to be estimated as binding. Lord Brougham (2 Cl. & Fin. at p. 535) gives the illustration of an Englishman marrying in Prussia, where, he says, the law then obtained—what it may be to-day I know not—that incompatible temper, i.e., disagreement, will provide reason for the dissolution of the marriage contract; but he holds that the marriage is good as being contracted in accordance with the lex loci, though in England it could not be dissolved on such a ground. He finds from this an answer to the argument of the alleged essential quality of indissolubility.

There can be no doubt as to the rigidity of the rule of English law which requires marriage to be of one man with one woman for life to the exclusion of all others. It is by reason of this rule that polygamous marriages are excluded from recognition here. So, too, a man of English domicil who formed a union with a woman of the Baralong tribe, and desired to be regarded as being for the purpose of the relationship a member of the tribe, was held not to have contracted a marriage recognisable as such by English law. Stirling, J., held that

> "the proper inference is that he meant to enter into no higher or other union than that which between members of the tribe was regarded as a marriage":

see *Re Bethell, Bethell* v. *Hildyard* (6) (38 Ch.D. at p. 235). By the customs of the tribe polygamy was allowed, but such a union could not satisfy the test required by the law of English marriage: see also *Hyde* v. *Hyde and Woodmansee* (7), a Mormon marriage.

So, too, where two British subjects with a British domicil contracted a marriage in accordance with the lex loci, but contrary to the law of their domicil, their marriage was held void in this country: *Brook* v. *Brook* (8). But a marriage will be recognised as valid here if it is contracted in a non-Christian country in accordance with the law of that country, provided that the parties are during its subsistence precluded by that law from marrying anyone else: per Hannen, J., in *Brinkley* v. *A.-G.* (9) (15 P.D. at p. 79). The distinction between a valid marriage and the possibilities of its dissolution is well marked in *R.* v. *Hammersmith Superintendent Registrar of Marriages, Ex parte Mir-Anwaruddin* (10), where a valid marriage in England between an Indian of the Mohammedan faith and an English woman was upheld, and the power of dissolution at the will of the husband according to his faith by a writing of divorcement was held not to attach to the marriage. The requisites of a valid marriage in English law are, in my opinion, correctly stated in Rayden on Divorce (2nd Edn.), paras. 8–12, and it will be noticed that the possible reasons and grounds for dissolving the contract are not included. If they were considered essential a serious inroad would have been made upon the universally accepted rule stated above which has a continuous chain of authority to support it.

Another rule must be remembered. Proceedings for the dissolution of the marriage are governed by the law of the domicil of the spouses at the time when they are instituted: see *Bater* v. *Bater* (11) and per Lord Haldane in *Lord Advocate* v. *Jaffrey* (12) ([1921] 1 A.C. at p. 152). It may be that our minds, trained to regard marriage as in some cases sanctified by religious rites—in others by a civil procedure not less binding—recoil at the recognition of a union capable of being dissolved so easily as the marriage of these spouses when contracted in Russia appears to have been. Nevertheless, that marriage has the essential ingredients. It is the union of one man and one woman to the exclusion of all others; it is to last for life unless it is dissolved in a manner that is made definite and final by registration; it was duly entered into in accordance with the forms required by the lex loci of the domicil of the parties to it. I find myself unable conscientiously with the authorities to criticise or to weigh the strength that ought to attach to the tie which forms the nexus and union of the spouses or to qualify the essence of the marriage by consideration of the means whereby it may be dissolved when that question falls to be determined by the law of the domicil of the parties when it arises. For these reasons the appeal must be allowed and the issue answered that the parties did become husband and wife by their marriage on March 19, 1924.

LAWRENCE, L.J.—The question on this appeal is whether a marriage, celebrated in Russia, according to the forms prescribed by Russian law as it stood in 1924, between Russian subjects domiciled and resident in Russia, ought to be recognised by English law as a valid marriage.

The principles upon which the answer to this question depend are not in dispute; the difficulty which has arisen lies entirely in the application of those principles to the facts of the present case. As all the relevant authorities have been fully dealt with by the learned judge and by the Master of the Rolls, and as none of them has been questioned in this court, I do not propose to review them again. The definition of marriage as "the voluntary union for life of one man and one woman to the exclusion of all others," given by LORD PENZANCE in *Hyde* v. *Hyde and Woodmansee* (7) (L.R. 1 P. & D. at p. 133), has been accepted and relied upon by counsel on both sides. The three experts in Russian law called as witnesses at the trial were entirely agreed that a marriage celebrated in Russia in conformity with the relevant Russian law strictly complies with this definition. Notwithstanding this consensus of opinion among the experts, however, the learned judge has held that, in view of the law of divorce prevailing in Russia at the time when the marriage in question in the present case was celebrated, it ought not to be recognised by English law because (although complying with the definition of marriage in all other respects) it was not in essence a union for life. With the greatest respect for the opinion of the learned judge I am unable to agree with that decision.

Both in Russia and in England something more than mere agreement between the parties is required in order to constitute a valid marriage; in both countries a marriage is regarded as an institution and confers a status; and in both countries the status so conferred carries with it certain rights and obligations. According to the relevant Russian law, it is essential for the constitution of a valid marriage that the parties should attend before an official appointed by the State, whose duty it is to register marriages, and unless the marriage is duly registered it is not recognised in Russia as valid. The formalities attending the celebration of a Russian marriage are thus not unlike those attending the celebration of a civil marriage in England. In Russia, as in England, the parties cannot obtain the registration of a marriage which is limited in its duration. The only marriage contract which the relevant Russian law and the English law recognises is a contract constituting a union for life.

The laws of both countries, however, recognise divorce, and it is the difference between the laws of the two countries in the matter of divorce which has given rise to the difficulty in the present case. Although in both countries the law provides for the dissolution of a marriage, the grounds upon and the procedure by which the dissolution may be effected differ substantially in the two countries. There is no need to dwell upon the English law of divorce. The grounds upon which a decree will be granted, and the procedure for obtaining a decree are well known. It is sufficient for the purposes of this judgment to mention that, according to English law, a marriage can only be dissolved by a decree of a competent court, and that such a decree cannot be obtained by consent, but is only pronounced by the court on proof of certain matrimonial offences. Under the relevant Russian law, however, if both the spouses desired to obtain a divorce they could do so by appearing together before the official in charge of the register in which the marriage had been recorded, and on their declaring their desire to be divorced the registrar was bound to register the divorce, and, when so registered, the marriage was dis-

A solved. Thus the formalities required by the relevant Russian law for effecting a valid dissolution of a marriage, in cases where both spouses were agreed, were mutatis mutandis the same as those required for constituting the marriage, registration being the essential formality in both cases. This kind of divorce was called by the experts "a divorce by registration." If one of the spouses desired to obtain a divorce against the wishes or without the consent of the other, then the spouse
B desirous of obtaining the divorce had to institute legal proceedings in the court having jurisdiction in the place of residence of the other spouse, who had to be duly summoned. In such proceedings it was sufficient in order to obtain a decree that the spouse instituting the proceedings should declare his or her desire to be divorced, and, provided that the prescribed formalities were complied with, it was the duty of the court to pronounce a decree, the judge having no discretion to with-
C hold it. There was no appeal against such a decree, but it might be quashed by a superior court on the ground of want of jurisdiction (e.g., where there had been no valid marriage) or on the ground of some irregularity in the procedure. The net result of the relevant Russian law was that either or both of the spouses, on taking the prescribed steps, could obtain a dissolution of the marriage, although it was a union for life, and although no matrimonial offence had been committed.

D The learned judge has held that the grounds upon which, and the procedure by which, a marriage could be dissolved under the relevant Russian law were of such character as in effect to render the marriage terminable at the pleasure of either party, and that, therefore, it ought not to be recognised by the courts of our country as a true marriage such as is the subject of rules of private international law. This conclusion is based on the fact that, although the relevant Russian law
E required some act of State in order to effect a valid dissolution, the only act of State so required was a purely ministerial act, and that, consequently, the marriage contract constituted in essence merely a union at will and not a union for life. In my opinion, the learned judge, in arriving at this conclusion, has erroneously treated the provisions for the disruption of the marriage tie enacted by the Russian law as conditions incorporated in and forming part of the marriage contract, instead
F of treating them, as in truth they are, as conditions of defeasance enacted by the law of the domicil of the spouses, which conditions in no way depended upon any agreement between them, and which moreover they were powerless to alter or escape from. Mr. Dovrin, the leading expert in Russian law, stated that, according to the relevant Russian law, any agreement made between the parties when entering into a marriage about its duration would be absolutely void, because in
G Russia a marriage was always a marriage for life, but that the Russian law gave the parties the right, on complying with certain formalities, to put an end to it, which right, however, was not conferred by the contract between the parties, but was the result of the public law.

Lord Brougham, in *Warrender* v. *Warrender* (2), after stating that marriage is one and the same thing substantially all the Christian world over, dealt with the
H argument that the Scottish courts had no power to dissolve a marriage celebrated in England where according to the law then prevailing a marriage was indissoluble except by Act of Parliament, as follows (2 Cl. & Fin. at p. 532):

> "The fallacy of the argument that 'indissolubility is of the essence,' appears plainly to be this: it confounds incidents with essence; it makes the rights
> I under a contract, or flowing from and arising out of it, parcel of the contract; it makes the mode in which judicatures deal with those rights, and with the contract itself, part of the contract; instead of considering, as in all soundness of principle we ought, that the contract and all its incidents, and the rights of the parties to it, and the wrongs committed by them respecting it, must be dealt with by the courts of the country where the parties reside, and where the contract is to be carried into execution."

Lord Brougham then gives several illustrations showing the absurd consequences which would result from the doctrine of confounding with the nature of the contract that which is only a matter touching the jurisdiction of the courts of the country in which the parties happen to be residing, pointing out that, according to the doctrine, if the marriage had been solemnised in Prussia either party might obtain a divorce here on the ground of incompatibility of temper; if it had been solemnised in France during the earlier period of the revolution the mere consent of the parties ought to suffice for dissolving it here; and that if there were a country in which marriage could be dissolved without any judicial proceedings at all, merely by the parties agreeing in pais to separate, every other country ought to sanction a separation had in pais there and uphold a second marriage contracted after such a separation. It is worth noting that LORD BROUGHAM, while pointing out the absurd result of holding that the lex loci as to divorce was incorporated in the contract of marriage, thus enabling the spouses to import that law into all countries where they might thereafter take up their residence, does not suggest that a marriage celebrated in a country the laws of which permitted its dissolution on the grounds and in the manner indicated by him would be invalid. The distinction clearly stated by LORD BROUGHAM to exist between the terms of the contract of marriage, on the one hand, and the rights and obligations of the parties flowing from or arising under such a contract, on the other hand, is all important in determining the present case. The validity and construction of the contract, no doubt, depend upon the lex loci contractus, but the status of the spouses and their rights and obligations arising under the contract are governed by the law of the country in which for the time being they may happen to be domiciled.

In my judgment, the validity of a marriage celebrated in a foreign country conforming in all respects to the definition of a Christian marriage, as understood by our law, does not depend upon whether under the law of the country where it was celebrated it could be dissolved more or less readily. Neither the grounds upon which nor the procedure by which a dissolution can be effected under the lex loci contractus for the time being in force are, in my opinion, relevant factors in determining whether a marriage is one which our courts will recognise as valid. There are countries where incompatibility of temper is a sufficient ground for divorce, and no substantial distinction can be drawn between such a ground and the mutual agreement of the parties to separate, yet counsel did not suggest that a marriage celebrated in such a country would not be recognised as valid here. It was, however, strenuously contended that no marriage in a country the laws of which permitted the parties to obtain a divorce without a decree of a competent court, pronounced in judicial proceedings, ought to be recognised in our courts as a valid marriage. I know of no authority which compels this court to come to such a conclusion, nor, indeed, have I found any case where the court has investigated either the grounds on which or the procedure by which a marriage may be dissolved in the country where it was celebrated in order to determine its validity here. In my opinion, it is contrary to the generally recognised rules of private international law that our courts should refuse to recognise a marriage made in a foreign country confroming in all respects to the laws of that country and to our conception of a Christian marriage merely because under the laws for the time being in force in that country the facilities for divorce happened to be far greater than in England and such as would probably not commend themselves to most English people. The adoption of such a rule would lead to the embarrassments referred to by LORD BROUGHAM in his judgment in *Warrender* v. *Warrender* (2), where he asks the question (2 Cl. & Fin. at p. 549):

> "What can be more embarrassing than that a person's status should be involved in uncertainty, and should be subject to change its nature as he goes from place to place; that he should be married in one country and single, if not a felon, in another; bastard here, and legitimate there?"

The present case might possibly have assumed a different complexion if it could have been proved, either that the particular marriage in question had in fact been a mere sham and a mere cloak for casual intercourse, or else that the relevant

Russian law was such that all marriages celebrated while it was in force were only marriages in name, conferring no status and entailing no obligations. The evidence in this case, however, completely negatives the existence of either of those conditions. The wife deposed to the fact that her bonâ fide intention in marrying her husband was to constitute a union for life; the husband's counsel did not dispute this—on the contrary, in the court below, he insisted that the marriage was a valid marriage; and the experts in Russian law deposed to the fact that a marriage celebrated in accordance with the relevant Russian law was recognised in Russia as an institution conferring a status and entailing definite obligations.

The decision in *Brinkley* v. *A.-G.* (9) shows that a marriage celebrated in a non-Christian country, if conforming to our notion of a Christian marriage, will be recognised by our law as valid. In that case, a British subject, whilst temporarily residing in Japan, married a Japanese woman in Japan according to the forms required by the Japanese law. SIR JAMES HANNEN held that the marriage was valid in this country on the ground that it conformed to our notion of a Christian marriage inasmuch as according to the laws of Japan the husband was precluded from intermarrying with any other woman during the subsistence of the marriage. No evidence was adduced in that case as to the Japanese law of divorce, and, so far as known to the court, there might have been a law which permitted the dissolution of marriages by mutual consent without any judicial proceedings. It is true that, in answer to a question put by the learned President during the argument, counsel for the Attorney-General conceded that the marriage in question would be a valid marriage if it were established that it excluded the possibility of the husband marrying another wife while that marriage subsisted, but I cannot help thinking that, in spite of the concession so made, the very experienced and learned President would not have upheld the validity of the marriage in the absence of evidence as to the Japanese law of divorce if he had considered that the validity of the marriage depended upon whether, under that law, it could or could not have been dissolved without a decree pronounced in judicial proceedings.

In the present case, the learned judge placed much reliance on the following passage in the judgment of STIRLING, J., in *Re Bethell, Bethell* v. *Hildyard* (6) (38 Ch.D. at p. 234):

> "I am bound to hold that a union formed between a man and a woman in a foreign country, although it may there bear the name of a marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England unless it be formed on the same basis as marriages throughout Christendom, and be, in its essence, the voluntary union for life of one man and one woman to the exclusion of all others."

This passage must, however, be read in reference to the question which the learned judge had to decide, namely, the validity of a so-called marriage between an Englishman and a native woman celebrated according to the rites of the Baralong tribe, among the members of which polygamy prevailed, the evidence showing that the so-called husband meant to enter into no higher or other union than that which between members of the tribe was regarded as a marriage. The decision in that case has no application to the facts of the present case; and the point to which the passage in question was directed was that a Baralong marriage did not conform to our conception of a Christian marriage inasmuch as it did not preclude the man from marrying another woman during its subsistence. The mind of the learned judge was not directed to the effect of the local law of divorce on a marriage which conformed in all respects to our conception of a Christian marriage. The decision of the learned judge in the present case, if right, would entail the strange consequence that no valid marriage would have been possible in Russia while the relevant Russian law was in force, even between two British subjects temporarily resident in, but unable to leave, that country, however much they might have desired to get married and to enter into a union for life.

The learned judge seems to have based his judgment on the following two

propositions, neither of which, in my opinion, is well founded—(i) that the only A
marriage recognised as such by English law is one by which "the parties are bound to one another until death unless the State dissolves the bond"; and (ii) that the contract of marriage included the conditions of defeasance prescribed by the Russian law. As to the first of these propositions, as a rule persons do not enter into a contract of marriage with an eye to its defeasance but only with an eye to its continuance, but if it be right to qualify the definition of a valid marriage by B
the introduction of a reference to its dissolution (which, in my opinion, it is not), the qualification, instead of being "unless the State dissolves the bond," shall be "unless the bond is dissolved during the lifetime of the spouses in accordance with the law of their domicil for the time being." As to the second proposition, I have already fully stated my reasons for coming to the conclusion that the conditions of defeasance prescribed by the relevant Russian law formed no part of the contract C
of marriage. In the result, for the reasons stated, I agree that this appeal should be allowed.

ROMER, L.J.—On March 19, 1924, the parties to these proceedings were married to one another in Moscow in the only way permitted by the law of Soviet Russia. It has been held, however, by HILL, J., that the marriage is not one that D
can be recognised by the courts of this country. Whether he was right in so holding is the question, and the only question, to be decided upon this appeal.

The atittude of the law of England towards marriages celebrated in foreign countries has on many occasions been the subject of consideration by our courts. In *Warrender* v. *Warrender* (2) the House of Lords was called upon to consider whether it was competent for the Scottish courts to entertain a suit to dissolve a E
marriage entered into in England between a man domiciled in Scotland and a woman domiciled here. The question, therefore, was one as to the attitude of the law of Scotland to a marriage celebrated in another country. But in the course of his speech, LORD BROUGHAM expressed himself in terms that are equally applicable to the law of England. He said this (2 Cl. & Fin. at p. 530):

> "A marriage good by the laws of one country, is held good in all others where F
> the question of its validity may arise. For the question always must be: 'Did the parties intend to contract marriage?' And if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than as intending a marriage contract. The laws of each nation lay down the forms and solemnities, a compliance with which shall be deemed the only criterion of the intention to enter into the G
> contract."

He then explained, at p. 531, what he meant by the word "marriage" in this statement.

> "If indeed there go two things under one and the same name in different countries—if that which is called marriage is of a different nature in each— H
> there may be some room for holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing, a different status, from Turkish or other marriages I
> among infidel nations, because we clearly never should recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorise and validate. This cannot be put upon any rational ground except our holding the infidel marriage to be something different from the Christian, and our also holding Christian marriage to be the same everywhere. Therefore, all that the courts of one country have to determine is, whether or not the thing called marriage, that known relation of persons, that relation which those courts are acquainted with,

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> and know how to deal with, has been validly contracted in the other country where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been made; the relation has been constituted; and those courts will deal with the rights of the parties under it according to the principles of the municipal law which they administer."

A marriage celebrated in a foreign country in accordance with the laws of that B country will, therefore, be regarded in our courts as a valid marriage if it be what LORD BROUGHAM called a "Christian marriage." He did not indicate what he meant by a Christian marriage, further than appears from the passage which I have just read.

In *Hyde* v. *Hyde and Woodmansee* (7), however, LORD PENZANCE defined a Christian marriage in terms that have ever since been accepted by the courts of C this country. The subject-matter of investigation in that case was a marriage celebrated in Salt Lake City in accordance with the rites and ceremonies of the Mormons, of whose doctrine polygamy formed part. In holding that the marriage was not one that could be recognised by the matrimonial court of England, LORD PENZANCE said:

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> "Marriage has been well said to be something more than a contract either religious or civil—to be an institution. It creates mutual rights and obligations as all contracts do, but beyond that it confers a status. The position or status of 'husband' and 'wife' is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties and induce definite rights upon their offspring. What, then, is the nature of this institution as understood in Christendom? E Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however it varies in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage as understood in Christendom may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others."

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The only words in this definition that create any difficulty are the words "for life." LORD PENZANCE's judgment was given in the year 1866, at a time, therefore, when the Matrimonial Causes Act, 1857, had been in operation for several years, and at a time when in most Christian countries a marriage could be dissolved for various causes. It seems clear, therefore, that in deciding whether any particular union G of one man and one woman is for life, the fact that the union is made dissoluble in certain events by the laws of the country where it is entered upon must be disregarded. And this is in precise accordance with the statement made by LORD BROUGHAM in *Warrender* v. *Warrender* (2) that dissolubility or indissolubility is not of the essence of the contract of marriage. He said this (2 Cl. & Fin. at p. 533):

> "The fallacy of the argument, 'that indissolubility is of the essence,' appears H plainly to be this: it confounds incidents with essence, it makes the rights under a contract, or flowing from and arising out of it, parcel of the contract; it makes the mode in which judicatures deal with those rights, and with the contract itself, part of the contract; instead of considering, as in all soundness of principle we ought, that the contract and all its incidents, and the rights of the parties to it, and the wrongs committed by them respecting it, must be I dealt with by the courts of the country where the parties reside, and where the contract is to be carried into execution."

He then pointed out what ridiculous conclusions would result from importing into the contract of marriage the provisions of the lex loci as to dissolubility. If this were done, then, in the case of a marriage of a domiciled Englishman in a foreign country, the courts here might have to grant a divorce for a reason that is treated as adequate by the law of that foreign country, but is not an adequate one according to our law. I will not read the passage in which LORD BROUGHAM dealt with this aspect of the matter. It is on p. 534 of the report. It is, however, interesting to

observe that in this passage LORD BROUGHAM seems to be treating as Christian A
marriages those made in Prussia, where either party might obtain a divorce on the ground of incompatibility of temper; those made in France during the earlier part of the revolution when apparently they could be dissolved merely by consent; and those made in a country in which marriage could be dissolved without any judicial proceeding at all, merely by the parties agreeing in pais to separate. It would seem that LORD BROUGHAM treated all those marriages as Christian marriages. He B
would not otherwise have referred to them as marriages, or have regarded even the possibility of the courts here being asked to deal with them in any way.

So far as I am aware, the circumstances in which a marriage is made dissoluble by the law of the country where it is contracted have never, prior to the present case, been regarded as throwing light upon the question of its validity in this country. In *Brinkley* v. *A.-G.* (9) the validity of a marriage celebrated in Japan C
between a man of Irish domicil and a Japanese woman came into question. The evidence showed that, according to Japanese law, the man was precluded from marrying any other woman during the subsistence of the marriage. SIR JAMES HANNEN pronounced for the validity of the marriage, without, apparently, thinking it relevant to inquire in what circumstances a marriage can be dissolved in Japan. He seemed to treat the words "during the subsistence of the marriage" as a suffi- D
cient compliance with the words "for life" in the definition of a Christian marriage given by LORD PENZANCE.

Let me now turn to the facts of the present case. The Soviet law does not recognise religious forms of marriage. The parties in the present case, therefore, contracted a civil marriage before the proper registration officer, and an entry of it was made in the appropriate register. The marriage produced various consequences. E
So long as it continued neither party could lawfully marry another. Even when it was dissolved, some of the duties imposed upon the parties by virtue of the marriage continued for a time. Mr. Dovrin stated that each party was obliged to support the other party and the children for a year after the dissolution. There can be no doubt that, apart from the question of dissolubility, the marriage falls within the definition given by LORD PENZANCE. The three experts in Russian law F
called before HILL, J., were unanimous as to this. Mr. Dovrin was asked: "In 1924 was not a marriage in Russia the union of one man with one woman presumably for life?" and he answered "Yes, and it is now." He explained this answer later by pointing out that it was impossible for the parties when entering into the contract of marriage to make any stipulations as to its duration. He said: "It will be absolutely void, because marriage by itself always was a marriage for G
life, but the law gave the right to the parties to put an end to it. It is not a result of their contract when entering into the marriage or at any time. It is the law." Mr. Konkevitch said that he had heard Mr. Dovrin's evidence and confirmed it entirely. Dr. Idelson was asked, "Do you agree that in 1924 a marriage in Russia was a union for life of one man with one woman to the exclusion of others," and he said that he did. H

HILL, J., however, has held that, notwithstanding all this, the marriage cannot be recognised in the courts of this country by reason of the Soviet law relating to its dissolubility. That law in the year 1924 was as follows. If both parties agreed to a dissolution, they could effect it by registration at the office where the register of their marriage was kept, it being necessary that both parties should appear before the registrar and make a declaration I
of their desire that the marriage should be dissolved. If the dissolution was sought by one only of the parties against the wish of the other judicial proceedings were necessary. The court, however, does not seem to have had any discretion in the matter. The fact that one party desired a dissolution being established, it was the duty of the court to make a decree dissolving the marriage. In 1927 the necessity of making an application to the court in such a case was abolished. If the court by its decree had merely to give effect to the desire of the applicant, it was no doubt felt that the desire might just as well be expressed before a registrar

A and given effect to by a registration. As from that time, therefore, a marriage can be dissolved at the instance of one only of the parties and against the will of the other by mere registration. It is obvious, therefore, that a marriage in Russia is a thing of a much more precarious nature than is a marriage contracted in England. But is it for that reason to be treated as a marriage that cannot be recognised as valid by the English courts? Upon this question HILL, J., summed B up his views in these words ([1930] P. at p. 98):

> "I hold that 'marriage' in English law means a voluntary union of one man and one woman to the exclusion of all others, which is by them indissoluble except by death. If this be the true meaning of marriage in English law, it is the antithesis of a union which the parties or a party can dissolve at will by C complying with the forms prescribed by law. In Christian marriage, using the term 'Christian' in the wide sense, that is, in marriage recognised as such by English law, the parties are bound to one another until death unless the State dissolves the bond. In a marriage under the law of the U.S.S.R. the parties are bound to one another until death or until one (or both) desire a dissolution and procures the ministerial act of State which gives legal force to D the desire. In the one case the promise is: 'I take you for my spouse until death parts us.' In the other it is: 'I take you for my spouse until death or the choice of either parts us.' It may be, and no doubt is, that the law of the U.S.S.R., recognising such a union, attaches legal consequences to it and calls it by a Russian word which is properly translated 'marriage.' But by the term 'marriage' the law of the U.S.S.R. and the law of England do not mean E the same thing."

It will be observed that HILL, J., here (i) includes in the contract of marriage the conditions of defeasance, and that (ii) so including them he draws a distinction between a dissolution of the bond by the State and a dissolution of the bond by one or both parties desiring a dissolution and obtaining the ministerial act of State that gives legal force to the desire. With great respect to the learned judge I F venture to disagree with him on both these points.

As I understand LORD BROUGHAM's observations in *Warrender* v. *Warrender* (2), the contract of marriage does not include the conditions of defeasance. If it be regarded as doing so, the difficulties pointed out by him will at once arise, and a marriage effected by a man of English domicil in a country whose laws provide for dissolution on the ground of incompatibility of temper might on that ground have G to be dissolved by the courts of this country. But the dissolubility or indissolubility of a marriage in truth depends upon the domicil of the parties to it at the time it is sought to dissolve it. If, therefore, the validity of a marriage in a foreign country is to depend upon the circumstances in which it can be dissolved, it must depend upon the domicil of the parties to it and the state of the laws of the country of that domicil in relation to divorce. If the dissolubility of the marriage be imported H into the contract, a marriage between two domiciled English people temporarily resident in Russia should, therefore, be regarded as a contract under which the parties are bound to one another until the English court dissolves the bond, and two persons of Russian domicil married in this country should be regarded as contracting to be bound to one another until one or both desires to be released and makes the necessary declaration and obtains the necessary registration of dissolution I in Russia. Nor, so far as I can see, would the validity of a marriage depend merely upon the law as to divorce prevailing in the locus contractus at the time of the marriage. For if the parties to a marriage are to be deemed to be entering into a contract with a condition for its defeasance in the events provided for in the divorce law of the country where it is celebrated, I can see no reason why this law should not be the law of the country from time to time. If that be so, then a marriage celebrated in Imperial Russia would have to be regarded as invalid after the coming into operation of the Soviet system of law. In this connection it may be observed that HILL, J., has incorporated into the contract of marriage between these parties a condition of defeasance at the instance of one of the parties by A mere registration, though this method of dissolving the marriage without going to the court was not permissible at the time when the marriage was effected. None of these difficulties arises except upon the somewhat cynical hypothesis that parties intend to contract marriage, not for life, but only until its dissolution in accordance with the laws of the country where it is celebrated. LORD BROUGHAM regarded the intention of the parties as going to the root of the matter, and, for myself, I prefer B to consider each of two persons contracting marriage in this country as intending to be bound to one another for life rather than as intending to be bound until the other one commits adultery. Whatever may be the law of Soviet Russia as to divorce, I cannot see why two decent-minded people who happen to be resident there and get married in the only way that law permits, should not be regarded as intending to be entering into a union for life. The wife in the present case has C sworn that at the time of her marriage she did so intend, and there is nothing to show that the husband had any different intention. It is said, however, that if the court is to treat their marriage as a valid one, then it must treat as valid a marriage entered into one day and dissolved the next by mutual consent or at the instance of the one party. It is meant by this, I suppose, to suggest that what is little more than an act of promiscuous intercourse may have to be treated as a D valid marriage. If one can conceive the possibility of two people going to the trouble of attending before a registrar and registering their marriage for such a purpose, I think that the courts of this country would know how to deal with the case if the facts were brought to its notice. But if a man should persuade a woman to marry him, her intention being to form a union for life, and his being, unknown to her, to form a union for a day or two, I see no reason why the courts E of this country should assist him in his nefarious scheme by refusing to recognise the validity of the marriage.

But, even assuming that there is to be imported into every marriage contract the conditions of its defeasance according to the law of the country where it is entered into, then the contract is one to last for life or until its earlier termination in accordance with the laws of divorce that may be applicable to it. HILL, J., has F taken the view, and has come to the conclusion, that where those laws permit of a dissolution of the marriage by the State the marriage may be regarded as a Christian marriage, but where they permit of a dissolution by the act of the parties the marriage is not to be so regarded, even though, as in Russia, they have to obtain a ministerial act of State which gives legal force to their desire. For myself, I am unable to understand this distinction, assuming, as of course I must assume, G that HILL, J., regards a dissolution of marriage in this country as being made by the State. For it is only made by the State in the sense that in certain circumstances one of the parties is entitled to come to the court and express a desire to have the marriage dissolved. The court has, of course, to be satisfied that the particular circumstances have arisen, but, having been so satisfied, the court has in general no discretion in the matter. It has to perform the ministerial act of H State which gives effect to the desire of the petitioner. The only distinction between our law and the law of Soviet Russia seems to be that the circumstances to be proved by the party applying for a dissolution of the marriage are different and no doubt widely different. But the dissolution in Russia is as much or as little a dissolution by the State as it is in England. It is true that in Russia the ministerial act of State was in the year 1924 performed by a registrar where both I parties desired a dissolution, and at the present time even when only one party desires it. But can that make any real difference? In Russia the State official to whom has been given by the State the duty of exercising the ministerial act is a registrar. In this country he is a judge. But the difference between a Christian and a non-Christian marriage cannot turn upon the distinction between a judge and a registrar. We have not been given any evidence as to the laws of divorce in other Christian countries, but it is easy to conceive of a law that permits of divorce merely for incompatibility of temper. A husband and wife must be the best judges of whether their tempers have proved to be incompatible, and if they both agree that it is so, I could well understand the ministerial duty of recording their agreement and of giving effect to their desire being entrusted to some official other than a judge. If there should in truth be a country possessing such a law, I am not prepared to say that a marriage celebrated within its territory is not a Christian marriage. Yet that would seem to be the result of the judgment under appeal.

For these reasons I agree that the appeal should be allowed, and the issue answered in the manner indicated by the Master of the Rolls.

Appeal allowed.

Solicitors: *A. E. Wyeth & Co.*; *Charles Russell & Co.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

BOWIE (OR RAMSAY) v. LIVERPOOL ROYAL INFIRMARY

[HOUSE OF LORDS (Lord Buckmaster, Lord Dunedin, Lord Thankerton and Lord Macmillan), March 24, 25, May 27, 1930]

[Reported [1930] A.C. 588; 99 L.J.P.C. 134; 143 L.T. 388; 46 T.L.R. 465]

Domicil—Change of domicil—Evidence—Abandonment of former domicil animo et facto—Long continued residence in place of new domicil—Need of additional proof of intention.

A domicil of origin can be changed and in its place a domicil of choice acquired, but the alteration is a serious matter not to be lightly assumed, for it results in a complete change of law in relation to two of the most important facts of life, marriage and devolution of property. To acquire a new domicil it is essential to show that the person who is said to have changed his domicil has abandoned his former domicil animo et facto. In some cases the animus can be established by the fact, which is the bare fact of residence within the new domicil, and the proof of a change of domicil does not necessarily fail because it is only from the fact that the intention can be ascertained. Long continued residence, therefore, may in certain circumstances show that the domicil is changed, but an intention to change a domicil is not to be inferred from an attitude of indifference or a disinclination to move increasing with increasing years. The quality of the residence as well as its duration must be considered. For an intention to change to be inferred the characteristics of the residence as deduced from the whole story of what has happened must be taken into account, and if the residence is absolutely colourless and there is nothing else the animus remains unproved. Prolonged actual residence is an important item of evidence of such animus, but it must be supplemented by other facts and circumstances of intention.

Circumstances in which it was **held** that, although resident for some thirty-five years in England, the testator had not acquired a new domicil, but was still domiciled in Scotland.

Notes. Considered: *Gatty and Gatty* v. *A.-G.*, [1951] P. 444; *Travers* v. *Holley*, [1953] 2 All E.R. 794. Referred to: *Re Liddell-Graingers Will Trusts, Dormer* v. *Liddell-Grainger*, [1936] 3 All E.R. 173; *I.R. Comrs.* v. *Cohen* (1937), 21 Tax Cas. 301; *Re Gape*, [1952] 1 All E.R. 827.

As to evidence of change of domicil, see 7 HALSBURY'S LAWS (3rd Edn.) 19 et seq.; and for cases see 11 DIGEST (Repl.) 335 et seq.

A

Cases referred to:

(1) *Donaldson* v. *McClure* (1857), 20 Dunl. (Ct. of Sess.) 307; affirmed sub nom. *Maxwell* v. *McClure* (1860), 3 Macq. 852; 2 L.T. 65; 6 Jur.N.S. 407; 8 W.R. 370, H.L.; 11 Digest (Repl.) 349, *175*.

(2) *Marchioness of Huntly* v. *Gaskell*, [1906] A.C. 56; 75 L.J.P.C. 1; 94 L.T. 33; 22 T.L.R. 144, H.L.; 11 Digest (Repl.) 339, *102*.

B

(3) *Aikman* v. *Aikman* (1861), 4 L.T. 374; 7 Jur.N.S. 1017; 3 Macq. 854, H.L.; 11 Digest (Repl.) 328, *37*.

(4) *Winans* v. *A.-G.*, [1904] A.C. 287; 73 L.J.K.B. 613; 90 L.T. 721; 20 T.L.R. 510, H.L.; 11 Digest (Repl.) 329, *41*.

(5) *Bell* v. *Kennedy* (1868), L.R. 1 Sc. & Div. 307, H.L.; 11 Digest (Repl.) 329, *39*.

(6) *Udny* v. *Udny* (1869), L.R. 1 Sc. & Div. 441, H.L.; 11 Digest (Repl.) 326, *22*. C

Appeal from an interlocutor of the First Division of the Court of Session (the LORD PRESIDENT, LORD BLACKBURN and LORD MORISON), affirming an interlocutor of LORD MACKAY, the Lord Ordinary.

The respondents were the residuary legatees under the last will and testament of the deceased, George Bowie. The appellant was the deceased's niece and next-of-kin, and had taken steps in England to be appointed sole administratrix of his estate upon the footing that he had died intestate, his will, which was unattested, being admittedly invalid according to English law. In the action the respondents, who were pursuers, claimed a declaration (i) that the deceased, who latterly resided at 4, Welfield Place, Liverpool, and died there on Nov. 5, 1927, and unmarried, was domiciled in Scotland at the date of his death, and (ii) that a holograph will dated Aug. 7, 1927, was a valid will according to the law of Scotland and must receive effect as his last will and testament.

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E

The deceased, George Bowie, was born in Glasgow in 1845, where he lived with his parents. He was employed for some time as a commercial traveller in Glasgow, but there was no evidence to show that his duties took him away from Scotland. He gave up his employment in 1882 and did no work for the rest of his life. In 1892 he went to Liverpool, where a brother and sister of his were already settled, and resided there for the remaining thirty-five years of his life. During his residence there his means of existence were supplied by his brother and his sister, both of whom predeceased him. He received a legacy from the former and succeeded to the whole estate of his sister on her death in 1920. With the exception of family ties he had few, if any, ties either in Scotland or in England. The Lord Ordinary came to the conclusion that circumstances to prove a choice or intention on the part of the deceased to make a break with his Scottish connections had not been established, and granted the declaration sought. His decision having been affirmed by the First Division of the Court of Session, LORD BLACKBURN doubting, the defendant appealed.

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J. S. C. Reid, *G. R. Thomson* (both of the Scottish Bar) and *Chrussacchi* for the appellant. H

A. C. Black, K.C., *J. F. Strachan* (both of the Scottish Bar) and *O. L. Bateson* for the respondents.

Cur. adv. vult.

May 27. The following opinions were read.

LORD BUCKMASTER.—The facts in this appeal are fortunately free from controversy; the difficulty, and a serious one, is to interpret the true meaning of these facts in relation to the question of domicil. I

The law upon the matter is settled. A domicil of origin can be changed and in its place a domicil of choice acquired, but the alteration is a serious matter not to be lightly assumed, for it results in a complete change of law in relation to two of the most important facts of life, marriage and devolution of property. This is admirably expressed by LORD CURRIEHILL in *Donaldson* v. *McClure* (1) in words unnecessary to repeat which were expressly approved by LORD HALSBURY in

Marchioness of Huntly v. *Gaskell* (2). To acquire a new domicil it is essential in the words of LORD WENSLEYDALE in *Aikman* v. *Aikman* (3) (3 Macq. at p. 858) to show that the person who is said to have changed his domicil "has abandoned his former domicil animo et facto." To avoid misunderstanding it is, I think, well to point out that in some cases the animus can be established by the fact and the proof of a change of domicil does not necessarily fail because it is only from the fact that the intention can be ascertained. I agree also with the view admirably expressed by counsel for the appellant that search for independent proof of intention becomes most essential where a residence is retained in the domicil of origin. In this case no such circumstance exists.

George Bowie, whose domicil is in dispute, was born in Glasgow in 1845. He was one of a family of nine, of whom three died in childhood. He was the youngest but one of the family, the others who attained majority being in order of seniority Isabella, John, Dolina, Annie, and Alexander. All the members of the family died unmarried except John. The appellant is the only child of the said John Bowie. George Bowie was employed for some time as a commercial traveller in Glasgow, but there is no evidence to show that his duties took him away from Scotland. He ceased to work in 1882, and he never appears to have worked again. He had always resided in his father's house and he continued to reside there. His father died in 1884, but this did not produce any change in his habits, and he remained in Glasgow, first with his mother and sisters Dolina and Annie and then with these two sisters alone. About 1883 his brother Alexander and his sister Isabella went to reside in Liverpool, where Alexander had obtained some employment in a shipping office. There they were joined by the mother, and later, between 1890 and 1892, by George Bowie. It was not in search of work that George Bowie came to Liverpool; he appears to have gone partly because he was more closely attached to his mother and sister Isabella than to other members of the family, and partly because his only means of support was an allowance from his brother Alexander. In Liverpool he went into lodgings and remained in the same lodgings for over twenty years, during which time he only left Liverpool once, when he went to the United States apparently in search of work, but he was not a successful searcher after work, and he soon returned unoccupied. The mother died in 1905 and was buried in Glasgow, but he did not attend the funeral. After the mother's death Dolina and Annie gave up their house in Glasgow and also came to Liverpool, where all the family lived together at 4, Winfield Place, except George, who continued to abide in his lodgings. In 1912, first Dolina and then Alexander died, Isabella and Annie continuing in Winfield Place and George in his lodgings. In 1914 Annie died, and Isabella returned to Glasgow. George then moved into 4, Winfield Place, where he remained with Isabella until her death in 1920, and alone after her death until he too died on Nov. 5, 1927. He left a holograph will unattested, valid under Scottish but void under English law. By this will he left a number of legacies and gave the residue as to one-fourth to the Royal Infirmary at Liverpool and the remaining three-fourths to three infirmaries in Glasgow, concluding with this sentence: "These infirmary legacies (to be anamous, say a Glasgow man)." The residuary legatees on May 4, 1928, issued a summons in Edinburgh against Isabella Bowie, his sole next-of-kin, asking for a declaration that George Bowie was domiciled in Scotland at the date of his death and that his will was valid according to the law of Scotland. The Lord Ordinary declared in favour of the pursuers, and on appeal their Lordships of the First Division adhered to the interlocutor which the Lord Ordinary had pronounced. From such decision Isabella Bowie has brought this appeal.

The main facts as I have stated them are but little embellished by other evidence. It is proved that George Bowie refused to go to Scotland when his sister Isabella desired to remain there in 1915. He is also reported to have said he never wished to set foot in Glasgow again, and he arranged for his burial in Liverpool beside his brother and sisters. On the other hand he referred to himself as a Glasgow man both during his life and in his will. As evidence of definite intention upon the question of domicil this evidence is fragmentary and insufficient. The actual facts must be considered to see if from them the intention can be gathered. I find them inadequate to the purpose. George Bowie did not leave Glasgow in order to change his domicil; there can, I think, be little doubt he would have followed his family had they returned. At no time had he any real attachments to Liverpool other than the presence of his brother and sisters. The ties he ultimately established were those due to inaction. He never seems to have had or exercised any volition of his own except a disinclination to move. It is true that a long-continued residence may in certain circumstances show that the domicil is changed though such intention did not originally exist. In my opinion, however, in this case the continued residence of George Bowie in Liverpool after his brother's death appears more probably attributable to his own lack of initiative and the disinclination of a man sixty-nine years of age to change his mode of life than to an intention to change his domicil. Such conduct is inadequate to discharge the burden of proof cast upon the appellant, as LORD MACNAGHTEN said, in *Winans* v. *A.-G.* (4) ([1904] A.C. at p. 291), an intention to change a domicil of origin "is not to be inferred from an attitude of indifference or a disinclination to move increasing with increasing years." The burden lies on the appellant to show that conduct which might reasonably be referable to such circumstances as LORD MACNAGHTEN describes has in truth another explanation by which it is outbalanced, namely, an intention to change a domicil of origin and take a new one in its place. Notwithstanding the persuasive argument of the appellant's counsel, in my opinion, that burden has not been discharged.

LORD DUNEDIN.—It has again and again been laid down that a change of domicil from the domicil of origin must be made animo et facto. The factum is the bare fact of residence within the new domicil. No amount of assertion of change will be effectual if unaccompanied by actual residence. How then is the animus to be proved? It may be proved by assertion of one sort or another. It may also be inferred from the factum of residence. But in order to be so inferred the colour and characteristics of the residence as deduced from the whole story of what has happened must be taken into account. The bare fact is not sufficient. If, therefore, the residence is absolutely colourless and there is nothing else the animus remains unproved. I think in this case the animus remains unproved. I do not examine the evidence because I have had the advantage of seeing the opinion which will be delivered by LORD THANKERTON, and he has so exactly expressed the views on the evidence that I had formed that I should only be duplicating what he says. I concur in the motion made.

LORD THANKERTON.—The deceased George Bowie died in Liverpool on Nov. 5, 1927, aged eighty-two years and unmarried. Originally employed as a commercial traveller in Glasgow, he gave up that employment about 1882, and did no work for the rest of his life. About 1891 or 1892 he came to Liverpool, where a brother and sister were already settled, and resided in Liverpool for the remaining thirty-five or thirty-six years of his life. His domicil of origin was Scottish, and the question in the present appeal is whether he still retained that domicil at his death, or was then domiciled in England. George Bowie left a holograph will, which was made by him in Liverpool on Aug. 7, 1927. That will is valid according to Scottish law and invalid under English law. The appellant, as next-of-kin, maintains that George Bowie died domiciled in England and that the will is invalid. The respondents are the residuary legatees under the will, and maintain its validity on the ground that George Bowie retained his Scottish domicil. Admittedly the appellant undertakes the burden of proving that George Bowie acquired the English domicil animo et facto; his long residence establishes the factum, but there remains the question of the animus. It seems clear on the authorities that mere length of residence by itself is insufficient evidence from which to infer the animus; but the quality of the residence may afford the necessary inference. For instance, the purchase of a house or estate coupled with long residence therein and non-retention of any home in the domicil of origin, might be sufficient to prove the intention to acquire a new domicil. But the long residence of George Bowie in Liverpool is remarkably colourless and suggests little more than inanition. George Bowie went to Liverpool to live on the bounty of his brother Alexander and, during his residence there, his means of existence were supplied by that brother and his sister Isabella. He received a legacy of £1,000 from the former and succeeded to the latter's whole estate on her death in 1920. He lived in lodgings until 1914 when he went to live with his sister Isabella, then the only other surviving member of the family, in a leased house, where he lived till his death. With the exception of family ties, he appears to have had few, if indeed any, ties either in Scotland or England. Apart from residence, the evidence bearing on animus is vague and indecisive. It is not certain whether he knew that his will would be invalid in England, but he named his cousin, a Glasgow writer, as trustee, and he directed that his residuary bequests, of one-fourth each to three Glasgow infirmaries and one Liverpool infirmary, should be given anonymously as from a "Glasgow man." He told people that he was proud to be a Glasgow man, and received a Glasgow weekly newspaper. With his sister Isabella's estate he became owner of a tenement property in Glasgow, which he desired to sell, but a bad market prevented its sale, and he retained it till his death. There is some evidence of his declining on one or two occasions to move to Glasgow and to visit Glasgow, but prior to 1912 he was dependent on his brother's bounty, and after 1912 it is probable that his disinclination was owing to the inertness of age and indifferent health. He was buried in Liverpool, but that was alongside of his brother Alexander and three sisters in ground for which Alexander had paid.

I am unable to find in this case sufficient evidence of a definite intention on the part of George Bowie to abandon his domicil of origin and to acquire a new domicil. The law on this subject is well fixed; the difficulty is found in its application to oft-varying combinations of circumstances. The present case appears to me to be directly affected by the opinions (i) of LORD WESTBURY in *Bell* v. *Kennedy* (5) (L.R. 1 Sc. & Div. at p. 321), where he says:

> "Although residence may be some small primâ facie proof of domicil, it is by no means to be inferred from the fact of residence that domicil results, even although you do not find that the party had any other residence in existence or in contemplation";

(ii) of LORD CHELMSFORD in *Udny* v. *Udny* (6) (L.R. 1 Sc. & Div. at p. 455), that

> "in a competition between a domicil of origin and an alleged subsequently-acquired domicil there may be circumstances to show that however long a residence may have continued no intention of acquiring a domicil may have existed at any one moment during the whole of the continuance of such residence. The question in such a case is not whether there is evidence of an intention to retain the domicil of origin, but whether it is proved that there was an intention to acquire another domicil";

and (iii) of LORD MACNAGHTEN in *Winans* v. *A.-G.* (4) ([1904] A.C. at p. 291), where he states:

> "Such an intention, I think, is not to be inferred from an attitude of indifference or disinclination to move increasing with increasing years, least of all from the absence of any manifestation of intention one way or other."

This last opinion appears to apply exactly to the circumstances of George Bowie's residence in Liverpool. Accordingly, I am of opinion that the appellant has failed to prove the intention on the part of George Bowie to acquire an English domicil, and that the appeal fails.

LORD MACMILLAN.—The late George Bowie who died in Liverpool on Nov. 5, 1927, left a holograph will dated Aug. 7, 1927. If he was domiciled in Scotland at the date of his death that will is admittedly valid, but if he was then domiciled in England it is admittedly invalid. To determine the question of the deceased's domicil the residuary legatees under his holograph will, who are the present respondents, brought this action in the Court of Session against his niece and sole next-of-kin, the present appellant, concluding for declarator that the deceased was at the date of his death domiciled in Scotland. The Lord Ordinary, and on a reclaiming note the First Division of the court, have so found, LORD BLACKBURN more than doubting, but not dissenting. In the defences to the action it was admitted that the deceased was born in Glasgow in 1845 and had a Scottish domicil of origin. The burden of proving that his Scottish domicil of origin had at his death been displaced by an English domicil of choice lay, accordingly, on the defender. A B

The acquisition of a domicil of choice is a legal inference which is drawn from the concurrence of evidence of the physical fact of residence with evidence of the mental fact of intention that such residence shall be permanent. So far as physical residence is concerned the evidence in the present case is amply sufficient. The deceased left Scotland between thirty and forty years before his death and never again set foot on his native soil. During all these years with the exception of a short visit to the United States and a holiday trip to the Isle of Man he lived continuously in Liverpool where he ultimately died. But residence alone is not enough. The real question in the case is whether this prolonged residence in England was accompanied by an intention on the part of the deceased to choose England as his permanent home in preference to the country of his birth. The law requires evidence of volition to change. Prolonged actual residence is an important item of evidence of such volition, but it must be supplemented by other facts and circumstances indicative of intention. The residence must answer a qualitative as well as a quantitative test. I doubt if there was ever a case in which the court has been asked to infer the acquisition of a domicil of choice from such slender evidence of intention as is relied on in this case. The meagre facts of the deceased's life have been analysed by the Lord Ordinary with exhaustive care and I do not think it necessary to repeat the process which has yielded little reward. Where matters are left so inconclusive I think that the description by the deceased of himself as a "Glasgow man" in his holograph will three months before his death may be accepted as the best evidence of his state of mind. But I prefer to rest my judgment on the failure, in my opinion, of the appellant to discharge the burden of proof incumbent upon her. C D E F

Appeal dismissed.

Solicitors: *Thomas Cooper & Co.*, for *Russell & Duncan*, writers, Glasgow, and *Patrick & James*, S.S.C., Edinburgh; *Alfred Bright & Sons*, for *Moncrieff*, *Warren*, *Paterson & Co.*, writers, Glasgow, and *Webster*, *Will & Co.*, W.S. Edinburgh. G

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

SPIVACK *v.* SPIVACK

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P., and Bateson, J.), January 16, 1930]

[Reported 99 L.J.P. 52; 142 L.T. 492; 94 J.P. 91; 46 T.L.R. 243; 74 Sol. Jo. 155; 28 L.G.R. 188; 29 Cox, C.C. 91]

Marriage—Presumption of marriage—Ceremony followed by cohabitation.

The proper principle as to proof of marriage in civil suits, where the customary evidence of a valid marriage is not forthcoming or is not readily available, is that set out in 19 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) 813, namely: "Where there is evidence of a ceremony of marriage having been gone through, followed by the cohabitation of the parties, everything necessary for the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary." When this is done, the burden of disproof is on those denying the validity of the marriage.

The detail and strictness of proof of a marriage which are required in a prosecution for bigamy provide a totally different standard of proof from that which is required in a civil case, e.g., a case before a magistrate when he is dealing with the question of the maintenance of a wife who is alleged to have been deserted.

Notes. *Nachimson* v. *Nachimson* (4), which is referred to in the judgment of LORD MERRIVALE, P. (infra), went to the Court of Appeal where the decision of HILL, J., was reversed. The proceedings in the Court of Appeal are reported ante, p. 114.

Explained and Distinguished: *Re Peete, Peete* v. *Crompton*, [1952] 2 All E.R. 599. Referred to: *Har-Shefi* (*otherwise Cohen-Laske*) v. *Har-Shefi*, [1953] 2 All E.R. 373.

As to presumption of marriage, see 19 HALSBURY'S LAWS (3rd Edn.) 812, 813; and for cases see 27 DIGEST (Repl.) 69 et seq.

Cases referred to:

(1) *R.* v. *Naguib*, [1917] 1 K.B. 359; 86 L.J.K.B. 709; 116 L.T. 640; 81 J.P. 116; 25 Cox, C.C. 712; 12 Cr. App. Rep. 187, C.C.A.; 11 Digest (Repl.) 456, *908*.

(2) *R.* v. *Savage* (1876), 13 Cox, C.C. 178; 15 Digest (Repl.) 882, *8504*.

(3) *R.* v. *Moscovitch* (1927), 138 L.T. 183; 44 T.L.R. 4; 28 Cox, C.C. 442; 20 Cr. App. Rep. 121, C.C.A.; 15 Digest (Repl.) 884, *8536*.

(4) *Nachimson* v. *Nachimson*, [1930] P. 85; 99 L.J.P. 41; 142 L.T. 329; 46 T.L.R. 146; reversed, ante, p. 114; [1930] P. 217; 99 L.J.P. 104; 143 L.T. 254; 94 J.P. 211; 46 T.L.R. 444; 74 Sol. Jo. 370; 28 L.G.R. 617, C.A.; 11 Digest (Repl.) 456, *911*.

(5) *R.* v. *Hammer*, [1923] 2 K.B. 787; 92 L.J.K.B. 1045; 129 L.T. 479; 87 J.P. 194; 39 T.L.R. 670; 68 Sol. Jo. 120; 27 Cox, C.C. 458; 17 Cr. App. Rep. 142, C.C.A.; 27 Digest (Repl.) 66, *452*.

(6) *Mondschein* v. *Mondschein* (1921), 37 T.L.R. 665; 22 Digest (Repl.) 334, *3554*.

(7) *Carlin* v. *Carlin* (1906), 70 J.P. 143; 27 Digest (Repl.) 70, *481*.

(8) *Piers* v. *Piers* (1849), 2 H.L.Cas. 331; 13 L.T.O.S. 41; 13 Jur. 569; 9 E.R. 1118, H.L.; 27 Digest (Repl.) 75, *555*.

Appeal from a maintenance order made by the Leeds stipendiary magistrate.

The wife, Mrs. Haya Brucha Spivack, of Brunswick Place, Leeds, summoned, on the ground of desertion, her husband, Mr. George Spivack, who was engaged in business at Middlesbrough. She gave evidence that on Nov. 13, 1890, she, being a Jewess, went through a form of marriage with Mr. Spivack at a synagogue at Kalushin, near Warsaw, then the capital of Russian Poland. It was the usual form of Jewish marriage before a rabbi, with the canopy and book hung up, the drinking A of wine, and the breaking of the wine glass. She was then twenty years old, and her husband eighteen. In 1897 her husband came to England. He sent her money for some two years, and since then had not maintained her. She came to England early in November, 1929, for the purpose of these proceedings, and took out the summons forthwith. She had not seen her husband for about thirty-two years. She denied that in 1905 she was served with a "ghet" (Jewish bill of divorcement) B on behalf of her husband. Evidence was given by a Leeds rabbi that the description given of the marriage at Kalushin was that of an ordinary marriage according to Jewish rites, and that a document produced was a court declaration of the marriage made in November, 1890. It would be a valid marriage according to the then law of Russian Poland. As regards the "ghet," a Jew living in England while his wife was abroad who wanted a divorce would tell a rabbi the reasons why C he wanted a divorce and the rabbi would submit a long formula of questions laid down in the Hebrew textbooks on divorce. If he were satisfied, he would communicate with the rabbi in the town abroad in which the wife resided. That rabbi would read through to her all that appertained to the Jewish form of divorce, and, if he were satisfied that she wanted and understood what it all implied, he would write to the rabbi in England and state that it was quite all right. Then the D husband could proceed with the "ghet," or Jewish divorce, a document especially written in Hebrew by a scribe, and he would have it sent by messenger, or through the post if the wife's residence were a long way off, to the rabbi in the town where she lived. That rabbi would put her through another series of questions, and if he was satisfied he would then give her a document to the effect that she was divorced and free to re-marry. The husband would be given a copy of the docu- E ment, which in Jewish law constituted a valid decree of divorce. Evidence was given by a native of Russia that another document dated 1923 produced was a valid certificate issued by the proper Polish authority of a civil marriage in 1890, and the magistrate received it in evidence as such. Another witness said that in 1927 the husband told her that his wife was no more his wife, according to the law of England, after an absence of seven years. The Chief Constable of Middlesbrough F gave evidence of a ceremony of marriage at Leeds on Aug. 28, 1913, between the husband and an Englishwoman, and evidence of the defendant's means was also given. The learned magistrate, in his judgment, said:

> "I think there is evidence upon which I am forced to come to the conclusion that the parties were legally married in Poland, and upon which I can come to the conclusion, and do, that many years ago the husband deserted his wife in G Poland. If he deserted her many years ago in Poland, he deserts her also to-day. Therefore, I think the summons has been properly framed, desertion being a continuing offence."

The learned magistrate made an order that the husband should pay the wife 12s. 6d. a week. The husband appealed.

H

Percival Clarke, for the husband, referred to *R.* v. *Naguib* (1); *R.* v. *Savage* (2); *R.* v. *Moscovitch* (3); and *Nachimson* v. *Nachimson* (4).

Bertram Long, for the wife, referred to *R.* v. *Hammer* (5); *Mondschein* v. *Mondschein* (6); and *Carlin* v. *Carlin* (7).

Expert evidence was given by a Russian lawyer that one of the documents produced before the magistrate certified that a Jewish religious marriage had been I solemnised in due form, and another was an authentication of such marriage by a Polish tribunal since the war.

LORD MERRIVALE, P.—The husband brings his appeal under the name of George Spivack against an order of the learned stipendiary magistrate of Leeds, Mr. Horace Marshall, whereby he, the husband, was found to have deserted his wife, Haya Brucha Spivack, and was ordered to provide her with 12s. 6d. weekly towards her maintenance. The learned magistrate made a clear and concise statement of the grounds upon which after a prolonged hearing he decided the case in favour of the wife. I confess I myself do not feel the weight of the suggestion that the wife might have come to the court a good many years before she did. She was a native of a province of Poland, an elderly woman, apparently with very little available means, and lived in Poland. The position of the husband with regard to the woman whom he had married in this country was taken by the learned magistrate into consideration, and on that footing he made the order for a very small amount which he has made.

The case for the wife was that, in 1890, she, being the daughter of a prosperous man and a young woman under age, and the husband being a young man in her own station of life, and she being the granddaughter of a rabbi in the district in which they lived in Poland, went through the Jewish ceremony of marriage on Nov. 13, 1890. They lived together for some time. He was a very young man and they lived in her father's house. The father had some property in wooded land in the neighbourhood, about thirty miles from Warsaw, at a place called Kalushin. Her father died and they lived in the wife's father's house, and then, after some further time, apparently somewhere in the neighbourhood of 1895, the husband came to this country, and for some time kept in communication with the wife and sent her sums of money. Ultimately the communications ceased and a long time elapsed before she became aware of the whereabouts of the man whom she claimed to be her husband. She had friends who helped her to right the wrong which has been done her by the husband. She brought up two of the children who were born to her. There had been three. She brought up the two who survived and are now in the early thirties. Three or four years ago she came into contact with people in Paris and in London, who gave her information, and she found, as she says, that the husband who had deserted her was engaged in business in Leeds. Having come to this country in the early part of November, 1929, under leave to be in this country for four weeks, she found herself in Leeds and identified the husband. She thereupon took steps to get a hearing at Leeds before her four weeks' leave of residence here expired, and this summons was brought to hearing before the learned stipendiary magistrate who made the order which I have mentioned.

The order is appealed against upon a dozen grounds, each of them stated with particularity and precision. There is one general ground embodied in a plea of "Not Guilty," which puts the burden upon the wife, as is thought, and then there are a great variety of grounds, namely, that there was no evidence that the husband was lawfully married to the wife; no evidence that the ceremony described by her before the magistrate amounted to a legal marriage either by Jewish law or by the law of the place where it was alleged to have been performed; no evidence of desertion within the jurisdiction of the court; no evidence as to the domicil of the parties, and nothing to show that these people could be married according to Jewish law or Russian law, where they were then, or by the law of the domicil that it was a good marriage. It is a complex plea, but prepared with precision. Further grounds are that the application for the summons was a misuse of the process of the court; that a document alleged to be a translation of the certificate was wrongly admitted in evidence; that no evidence was given as to the source or custody from which the documents came; that evidence as to the nature and effect of them was wrongly admitted; and that hearsay evidence of what the applicant had said to the Jewish rabbi was wrongly admitted. It must be said that, so far as it appears from the notes, it was admitted without any objection at the time, but objection was taken that the evidence was insufficient to justify the making of the order, that is, that the order was against the weight of the evidence. So, as I have said, care has been taken to cover the whole ground.

With regard to the document which the learned magistrate evidently received with some misgivings as a marriage certificate and which was produced by the wife to her solicitor, it seemed to us advisable that with the superior advantages that there are in London, there should be some certainty whether the document amounted to anything. The case before the learned magistrate did not depend in

any way upon the production of the document, or upon the validity of the document A
as a certificate. It was necessary to adjourn the case for inquiry, and a gentleman who was Russian Consul in London under the Imperial régime, has full knowledge of the relevant matters here, and is familiar with everything that is to be known with regard to this transaction, comes here and says that this document, so scouted in the notice of appeal, is the lawful certificate of a marriage such as the wife declares upon her oath to have taken place between her and the husband, and that B
it was duly registered by the officiating rabbi on the day after the day on which the wife states this marriage to have taken place. So it proves to be a document of the utmost value.

For reasons which I may mention it is probably not material to know what the law in Russian Poland was under the Imperial régime, to what extent it had been varied under the national régime in Poland, and to what extent a certificate of a C
civil authority of a marriage celebrated between Jews according to their own rites was essential in Russian Poland, as it then was, to establish the fact of marriage to give validity to the marriage. All of those are exceedingly interesting and important questions which, if need be, we must have considered. All difficulty on that subject has passed away. What appears is that the Russian authorities, who were then the lawful government of the district in which the alleged marriage was D
said to have been celebrated, accepted a certificate of its registration and vouched it by their proper official procedure to be upon the face of it a valid marriage. It was said that upon the evidence of the rabbi, who was called to testify to the validity among Jews of such a marriage as was alleged by the respondent, it appeared that the marriage was dissoluble by a process which he stated. Counsel for the husband seized upon that evidence, he himself having been the provoking E
cause of its presence in the case by having suggested that Jewish marriage is dissoluble as he suggested here, at the outset of the case yesterday, by delivery of what is called I think in Yiddish a "ghet"—I do not know if it is a Hebrew word—meaning, I suppose, primâ facie, a letter of divorce. Having heard what was said by the rabbi with regard to the process of divorce under Jewish law, and having found that according to the view of the rabbi under Jewish law this marriage was F
dissoluble, counsel presented to the court a recent case—*Nachimson* v. *Nachimson* (4)—in which HILL, J., determined that a contract entered into by persons in Soviet Russia, which may be put an end to at the will of either party by notice given in a registry, was not a marriage which was cognisable in this jurisdiction: (see, however, note supra). If there is a fact conspicuous in the developments in the last 200 years of the law of marriage in this country, it is that the legislature G
and the courts have known all the time of Jewish marriage, and put Jewish marriages outside the ambit of the enactments providing for the methods of the ceremony of marriage in this country, and left them where they stood before the various Marriage Acts, and it is merely required by an enactment in the course of the last century that there shall be a representative of a registrar present who shall see that the marriage is registered. The legislature has provided in respect of H
Jewish marriages in a mode which leaves their validity beyond all question and, I should have thought, unimpeachable and unassailable. In the ecclesiastical courts in this jurisdiction the subject has arisen, and nobody until now has ever suggested in my hearing any doubt whether a Jewish marriage was a marriage of which the court must take account.

Here the certificate of marriage shows that the marriage was a Jewish marriage I
celebrated according to Jewish procedure, and an officer of the registry was present in accordance with the local marriage regulations. There the matter stands as to the validity of the Jewish marriage as such. The effect of the ceremony was to be determined according to what I may call the Jewish communal law. I do not know what better evidence there could have been than that of one of the participants in the ceremony. She was a young Hebrew woman, daughter of a Hebrew physician living in a Hebrew community and the granddaughter of a rabbi. She stated that she was married, as everybody in the Jewish community would be

married in that district at that time. She said: "We were married in a synagogue," and she described the ceremony in terms familiar to those who understand this kind of matter or who have become acquainted with it. She described what was primâ facie undoubtedly a Jewish ceremony of marriage. This young woman, according to the custom of her people, contracted matrimony in a mode familiar to her, and she cohabited with the husband, and children were born to them. Assume she could not have verified the marriage certificate, that she could not have found a witness, and could not have given satisfaction to the court that it was a certificate of the marriage which she alleged took place. The husband's counsel submitted to the magistrate: "Relying in a civil action on a form of marriage, she must give proof of the same character as that which would establish an English marriage. She must show the law of the country, and that in all particulars it has been complied with, and if she fails in any item in that respect she fails altogether." The submission was supported by reference to a considerable number of cases in the Court of Criminal Appeal where in prosecutions in this country for bigamy a prosecution had failed, on a defence of a marriage prior to the first marriage alleged by the prosecution had failed, for want of proof of the marriage.

The detail and strictness of proof, however, which are required in a prosecution for bigamy provide a totally different standard of proof from that which is required before a magistrate when he is dealing with the question of maintenance of a wife alleged to have been deserted. Counsel for the husband reproduced the following observation from LORD READING, C.J., in *R.* v. *Naguib* (1) in the Court of Criminal Appeal ([1917] 1 K.B. at p. 362):

> "We are clearly of opinion that a claimant relying on a foreign marriage, or the Crown in a prosecution for bigamy alleging an earlier marriage in a foreign country, must adduce evidence to prove the validity of the marriage according to the law of the foreign country."

That was the root of counsel's argument. If that had been a decision of the court dealing with any case of the kind which is here in question, it must have been examined with the utmost care to see on what footing it rested. It rested in fact upon the requirements of the criminal law to establish the offence of bigamy, and when the case is examined it is seen that it is an obiter dictum. No civil claim came into question, and, considering it with the utmost respect, the court has to determine whether the dictum does represent the law. It is quite contrary to familiar knowledge and everyday experience in this jurisdiction, and it would be a grave matter, in magisterial proceedings in particular, if it were accepted as an authoritative declaration of what must be established in a case of this kind. To find a simple statement of the case I referred to the following contribution which BARGRAVE DEANE, J., made to the original edition of HALSBURY'S LAWS OF ENGLAND when LORD HALSBURY was himself the editor-in-chief (see now 3rd Edn., vol. 19, p. 813, para. 1324):

> "Where there is evidence of a ceremony of marriage having been gone through, followed by the cohabitation of the parties, everything necessary for the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary, even though it may be necessary to presume the grant of a special licence."

That was a concise statement of the law on this subject by a man who had a life-long experience of practice in this Division.

One of the leading cases is *Piers* v. *Piers* (8), when there was no proof of the special licence without which a marriage could not effectually have taken place. The marriage was impeached and it was upheld in the House of Lords. Counsel for the party alleging the marriage was Mr. Bethell, afterwards LORD WESTBURY, and three submissions at least in the outline of the case which he submitted were accepted by the House of Lords in a judgment in which LORD LYNDHURST, L.C., and LORD BROUGHAM delivered concurring speeches. The submission of Mr. Bethell A was that upon which DEANE, J.'s statement rests. He said that the marriage in question, as to which the existence of a special licence was left in doubt, was valid in law on the ground of legal presumption. He said:

> "There are three submissions of law, all of which are in favour of the appellants. The first is semper præsumitur pro matrimonio: this is a presumption of law. The next is that every intendment shall be made in favour B of a marriage de facto, so that if any clergyman was present performing the ceremony the law would presume that he was a clergyman properly authorised. The third is that where an act appears to have been performed by proper persons, the law will intend that everything was done in a proper manner. The burden of impeaching this marriage lies therefore on the respondent."

C Every word of it seems to ring true, and at any rate it was accepted by the House of Lords as the basis of the judgments which were given. Requirements of the criminal courts in this country in prosecutions for bigamy are wholly outside the mark.

There is no room for doubt that there was evidence which the magistrate ought to have accepted that a ceremony of marriage had taken place between the parties, D as was alleged, in Poland. Not only did the wife state it, but the husband, when he was questioned by a police officer, made a statement which corroborated the evidence of the wife, now impeached, in an absolute degree. It showed that he had been married, had come to this country, had been approached by his son and by other people, and that, so far as he knew, the wife was the woman to whom he had been married. The magistrate was perfectly satisfied of the identification. I E think this was the only possible decision in the circumstances. You have the marriage de facto, according to a process absolutely familiar, the everyday process among Hebrews, performed by proper persons. This granddaughter of a rabbi was not going through a farce of matrimony. She and her relations hoped that she was being settled for life. The presumption, therefore, is that the marriage was a valid marriage. That is why I say that it was not necessary, in my judgment, that the F wife should prove that certificate. Then the burden of impeaching the marriage lies on the party impeaching it. It is valid unless it can be displaced. It has been necessary to deal with these various matters because the community of which these are members is a great community and their marriage is an exceptional system of marriage. In the state of things which has arisen in recent years great difficulties have frequently been thrown upon poor people who fled for refuge to G this country, and, this matter being of the essence of their lives, it is an unthinkable thing that their position should be purposely left in doubt or, when it is impeached, fail to be cleared. I am satisfied beyond all question that the magistrate came to the consideration of this case with the light of his professional knowledge and was right in the decision at which he arrived, namely, that the husband was the wedded husband of the wife. The substance of the matter is that the desertion had been H of long standing, evidenced by unmistakable conduct of the husband, who, on being challenged where he was resident to put an end to it, refused to do so. Proof of desertion was established. The marriage and its validity are made out, and the desertion is made out. The magistrate on grounds which seemed to him sufficient made a very moderate order in favour of the wife. If the means of the parties admit, it can be increased, if she is resident in this country. I have no doubt that I the decision of the magistrate, expressed with an enviable conciseness, was absolutely correct. This appeal fails and must be dismissed, with costs.

BATESON, J.—I agree.

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A

Re GARRETT. OFFICIAL RECEIVER AND TRUSTEE *v.* THE BANKRUPT

[Chancery Division (Farwell, J.), May 27, 28, 1930]

B [Reported [1930] 2 Ch. 137; 46 T.L.R. 464; 99 L.J.Ch. 341; 143 L.T. 402; [1929] B. & C.R. 177]

Bankruptcy—Property available for distribution—Pension—Police pension—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 51 (2)—*Police Pensions Act*, 1921 (11 *&* 12 *Geo.* 5, *c.* 31), *s.* 14 (1).

C Although by s. 14 (1) of the Police Pensions Act, 1921, a pension shall not on the bankruptcy of the pensioner "pass to any trustee or other person acting on behalf of the creditors," the court has jurisdiction under s. 51 (2) of the Bankruptcy Act, 1914, to make an order for the payment of the pension, or any part of it, to the trustee for the benefit of the creditors.

Notes. Section 14 (1) of the Police Pensions Act, 1921, has been replaced by D s. 7 (1) of the Police Pensions Act, 1948.

Approved: *Re Landau*, *Ex parte Trustee*, [1934] All E.R.Rep. 130; *Re Debtor* (*No. 6 of 1934*), *Ex parte Official Receiver*, [1941] 3 All E.R. 289. Referred to: *Re Tennant's Application*, [1956] 2 All E.R. 753.

As to the availability for the benefit of creditors of salaries and pensions, see 2 Halsbury's Laws (3rd Edn.) 456, 457; and as to police pensions, see 25 Halsbury's Laws (2nd Edn.) 344 et seq. E For cases see 20 Digest 927–930 and 37 Digest 192–195. For Bankruptcy Act, 1914, see 2 Halsbury's Statutes (2nd Edn.) 321; and for Police Pensions Act, 1948, see ibid., vol. 18, p. 186.

Cases referred to:

(1) *Re Huggins*, *Ex parte Huggins* (1882), 21 Ch.D. 85; 51 L.J.Ch. 935; 47 L.T. 559; 30 W.R. 878, C.A.; 5 Digest 725, *6296*.

F (2) *Re Shine*, *Ex parte Shine*, [1892] 1 Q.B. 522; 61 L.J.Q.B. 253; 66 L.T. 146; 40 W.R. 386; 8 T.L.R. 279; 36 Sol. Jo. 295; 9 Morr. 40, C.A.; 5 Digest 929, *7612*.

(3) *Re Saunders*, *Ex parte Saunders*, [1895] 2 Q.B. 424; 64 L.J.Q.B. 739; 73 L.T. 172; 59 J.P. 740; 44 W.R. 30; 11 T.L.R. 505; 39 Sol. Jo. 640; 2 Mans. 361; 14 R. 567, C.A.; 5 Digest 929, *7607*.

G (4) *Hollinshead* v. *Hazleton*, [1916] 1 A.C. 428; 85 L.J. P.C. 60; 114 L.T. 292; 32 T.L.R. 177; 60 Sol. Jo. 139; [1916] H.B.R. 85, H.L.; 5 Digest 928, *7599*.

Special Case stated by the county court judge sitting at Southend, in pursuance of s. 100 (3) of the Bankruptcy Act, 1914, for the determination of the question H whether the court had power to make an order for the payment of the pension of a retired police officer, or any part thereof, to his trustee in bankruptcy for the benefit of his creditors, notwithstanding the provisions of the Police Pensions Act, 1921, s. 14 (1).

The bankrupt was a retired detective inspector of the City of London Police Force, and was in receipt of a pension of about £280 per annum. On May 7, 1929, I a receiving order was made against him and he was adjudged bankrupt on May 15. On June 19 an order was made for the bankrupt's estate to be administered in a summary manner, and thereupon the Official Receiver became trustee. The bankrupt's assets were £83 and the unsecured liabilities £1,275. His only dependant was his wife. On Jan. 13, 1930, the Official Receiver filed an application under s. 51 (2) of the Bankruptcy Act, 1914, for an order setting aside for the benefit of the creditors such part of the bankrupt's pension as the court should think right, and for payment thereof to the Official Receiver. The application came on for hearing on Feb. 7, 1930, and, the question of the jurisdiction of the court having been raised, this Special Case was stated for the decision of the High Court. A

Roland Burrows, for the official receiver, referred to *Re Huggins* (1); *Re Shine* (2); *Re Saunders* (3); *Hollinshead* v. *Hazelton* (4).

Victor Ruston for the debtor.

By Bankruptcy Act, 1914, s. 18 (1): B

> "Where a receiving order is made against a debtor, then, if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not approved in pursuance of this Act within fourteen days after the conclusion of the examination of the debtor or such further time as the court may allow, the court shall adjudge the debtor C bankrupt; and thereupon the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee."

By s. 51 (2):

> "Where a bankrupt is in receipt of a salary or income . . . or is entitled to any half-pay, or pension, or to any compensation granted by the Treasury, the court, on the application of the trustee, shall from time to time make such D order as it thinks just for the payment of the salary, income, half-pay, pension, or compensation, or of any part thereof, to the trustee, to be applied by him in such manner as the court may direct."

By Police Pensions Act, 1921, s. 14:

> "The following provisions shall have effect with respect to every pension, E allowance, and gratuity (in this section referred to as a grant) payable by the police authority to any person (in this section referred to as the pensioner). (1) Every assignment of and charge on a grant, and every agreement to assign or charge a grant, shall, except so far as made for the benefit of the pensioner, be void, and on the bankruptcy of the pensioner the grant shall not pass to any trustee or other person acting on behalf of the creditors. . . ." F

FARWELL, J., stated the facts and continued: The whole question which I have to decide is the legal question. I am in no way concerned with the question how, if the court has any discretion under s. 51 of the Bankruptcy Act, 1914, it should be exercised in this particular case. That will be a matter for the County Court judge.

G The whole question which I have to determine turns upon two sections of the Bankruptcy Act, 1914, and one section of the Police Pensions Act, 1921. The latter Act makes provision for the payment of pensions to ex-police officers, to which I need not refer in detail. There are provisions in regard to the amount of the pensions, the date of payment, allowances and gratuities, forfeiture, and other matters. Section 14 (1) is the relevant section of the Act in the present case, H and the relevant sections of the Bankruptcy Act, 1914, are ss. 18 and 51. By s. 167 of the Act of 1914, "property" is defined in the widest possible terms, and, having regard to the decision of the court in *Re Huggins* (1), in my judgment, a pension granted to a police officer, would, apart from the provisions of s. 14 (1) of the Act of 1921, be "property" which would vest in the trustee upon the bankruptcy of the police officer. But, in my judgment, s. 14 (1) prevents that happening. I I think it is plain that the effect of that subsection is to exclude from the "property" which passes to the trustee in bankruptcy the pension which is granted to the bankrupt under the Police Pensions Act, 1921. That seems to me to be the effect of the last words of that subsection

> "on the bankruptcy of the pensioner the grant shall not pass to any trustee or other person acting on behalf of the creditors."

The legislature has thought fit to provide expressly that a pension which is granted to a police officer is to remain for his benefit and the benefit of his family, no doubt for their support and maintenance, and that it is not to vest in anyone else, not even in the trustee in bankruptcy in the event of the police officer becoming a bankrupt, and, in my judgment, it is plain that a pension is excluded by that subsection from being included as "property" under the Bankruptcy Act. It does not pass to the trustee in bankruptcy at all. The effect of that is, that when a police officer becomes bankrupt his pension is not affected, but it remains payable to and receivable by him, and he continues—subject to something I will say in a moment—to be entitled to enjoy that pension, without regard to the fact that he is a bankrupt, and that the rest of his property has vested in the trustee in bankruptcy and is available for his creditors. So far as the pension itself is concerned, it seems to me that there can be no doubt at all that it is excluded from s. 18.

When, however, I come to s. 51 (2) of the Bankruptcy Act, 1914, it appears to me that different considerations apply. Section 51 (2) gives a court power to direct that the whole of a pension, or a portion of a pension, if it thinks fit, shall be applied for the benefit of the bankrupt's creditors. In my judgment, that subsection applies both to property which vests in the trustee in bankruptcy under s. 18, and to property which does not vest in the trustee in bankruptcy. In my view, the decision in *Re Shine* (2) shows quite clearly that, although the salary or pension, as the case may be, is a salary or pension that does not vest in the trustee in bankruptcy under what is now s. 18 of the Bankruptcy Act, 1914, nevertheless the court has power under s. 51 (2) to make an order. Is there anything in s. 14 (1) of the Police Pensions Act which renders it impossible to give effect to, or renders it impossible for that subsection to stand with, s. 51 (2) of the Bankruptcy Act, 1914? In my judgment, there is not. There is nothing inconsistent in the two sections. The effect, as I have already said, of s. 14 (1) of the Police Pensions Act is to prevent the pension vesting in the trustee; but there is nothing in the subsection which prevents the trustee from making an application under s. 51 (2) of the Bankruptcy Act, nor is there anything in the language of the subsection which prevents the court, if it thinks fit, from acceding to such an application. What s. 14 (1) of the Police Pensions Act provides against is the pension passing to any trustee or person acting on behalf of the creditors, but, if the court makes an order under s. 51 (2) of the Bankruptcy Act, such an order does not have the effect of passing the pension, or any part of the pension to the trustee in the sense of vesting it in the trustee. The only result of an order of that kind is that the court directs that such portion of the pension as the court thinks fit shall be applied in paying the debts of the bankrupt. That appears to me to be a power which is quite inconsistent with the provisions of s. 14 (1) of the Police Pensions Act, there being nothing in that sub-section which can be said to exclude the operation of s. 51 (2) of the Bankruptcy Act.

It appears to me that that is a perfectly reasonable result to arrive at, because, no doubt, the intention of the legislature in providing for a pension for a police officer is that he shall have means for his support and the support of his family and that he shall not be deprived of that support merely because he becomes bankrupt, but that is not inconsistent with the court having power in a proper case to say: "The pension which you, the bankrupt, receive is a greater amount than you require for your support and the support of your family, and to the extent to which it is in excess of that amount it shall be applied, and ought to be applied, in payment of your just debts." If that is the true effect, and I think it is, of s. 14 (1) read in conjunction with s. 51 (2) of the Bankruptcy Act, it appears to me that there is nothing whatever inconsistent in the two subsections. In those circumstances, I propose to answer the question which is raised by the Special Case, by declaring that the court has power under s. 51 (2) of the Bankruptcy Act, 1914, to make an order for the payment of the pension of a police officer or any part thereof to the trustee in bankruptcy of such police officer.

Solicitors: *Solicitor to the Board of Trade*; *Carter & Carter*.

[*Reported by* E. K. CORRIE, ESQ., *Barrister-at-Law.*]

CHATSWORTH ESTATES CO. v. FEWELL

[CHANCERY DIVISION (Farwell, J.), November 17, 18, 19, 1930]

[Reported [1931] 1 Ch. 224; 100 L.J.Ch. 52; 144 L.T. 302]

Sale of Land—Restrictive covenant—Use of house as private dwelling-house only—Use as boarding-house—Defence—Change of character of neighbourhood—Acts and omissions of plaintiff—Injunction—"Residential area"—Application for discharge or modification of covenant—Need to be made promptly—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 84 (1).

By a conveyance dated Nov. 2, 1897, the predecessor in title of the plaintiffs conveyed to the predecessor in title of the defendant a house, Bella Vista, situate on the vendor's C. property, the purchaser covenanting that he would not without licence use the house for any trade or business or otherwise than as a private dwelling-house "and also will not do or permit to be done upon the said premises any act or thing whatsoever which may be or become a nuisance annoyance or injury to any land of" the vendor "adjoining or near to the said premises or to the tenants of such land or any act or thing which may tend to deteriorate the value of such land." By licence of the owner, a number of schools had been erected on the C. property, also blocks of flats and an hotel, and the owner had also licensed a few houses to be used as boarding-houses, and acquiesced in other houses being so used without licence. The defendant used Bella Vista as a boarding-house, and the plaintiffs brought this action for an injunction to restrain such use.

Held: (i) where the court was asked to refuse a plaintiff relief for the breach of a covenant of that kind on the ground that there had been a change in the character of the neighbourhood without relying on any acts or omissions of the plaintiff himself, it was incumbent on the defendant to show that there had been so complete a change in the character that there was no longer any value left in the covenant, and that had not been established in the present case; (ii) in considering whether the conduct of the plaintiff had been such that it would be inequitable to grant him relief, the test was whether, by his acts or omissions, he had represented to the defendant that the covenant was no longer enforceable so that he (the defendant) was entitled to do what he was doing with the house, and that the plaintiff had not done; and, therefore, as the defendant had persisted in committing a breach of covenant to which he knew the plaintiff objected, and as he had pleaded the above defences, the plaintiff was entitled to an injunction although there was no evidence of substantial damage and only equitable rights were being enforced.

Per **Curiam:** (i) In considering whether an area is residential or not there is a very clear distinction between the existence of residential flats and that of boarding-houses, for a "residential area" means one in which persons reside more or less permanently.

(ii) An application under s. 84 (1) of the Law of Property Act, 1925, that an arbitrator should consider whether the restrictive covenants should be discharged or modified should not be deferred until the person interested in the land affected by the restriction has ascertained that the other party does in fact intend to enforce his rights by action and has brought his action to a successful conclusion, but should be made promptly.

Notes. The jurisdiction under s. 84 of the Law of Property Act, 1925, is now exercised by the Lands Tribunal: Lands Tribunal Act, 1949, s. 1 (4) (a), s. 10, Sched. II; and see Lands Tribunal Rules, 1956 (S.I. 1956, No. 1734).

Considered: *Westripp* v. *Baldock*, [1939] 1 All E.R. 279; *Re Truman Hanbury, Buxton & Co.'s Application*, [1955] 3 All E.R. 559.

As to restrictive covenants, see 29 HALSBURY'S LAWS (2nd Edn.) 441 et seq.; and for cases see 40 DIGEST (Repl.) 337 et seq. For Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427.

Cases referred to:

(1) *Feilden* v. *Byrne*, [1926] Ch. 620; 95 L.J.Ch. 445; 135 L.T. 107; 40 Digest (Repl.) 364, *2925*.

(2) *Duke of Bedford* v. *British Museum Trustees* (1822), 2 My. & K. 552; 1 Coop. Kemp Cott. 90, n., 2 L.J.Ch. 129; 39 E.R. 1055, L.C.; 40 Digest (Repl.) 360, *2887*.

(3) *Roper* v. *Williams* (1822), Turn. & R. 18; 37 E.R. 999, L.C.; 31 Digest (Repl.) 188, *3196*.

(4) *Peek* v. *Matthews* (1867), L.R. 3 Eq. 515; 16 L.T. 199; 15 W.R. 689; 40 Digest (Repl). 361, *3889*.

(5) *Sayers* v. *Collyer* (1884), 28 Ch.D. 103; 54 L.J.Ch. 1; 51 L.T. 723; 49 J.P. 244; 33 W.R. 91; 1 T.L.R. 45, C.A.; 40 Digest (Repl.) 361, *2893*.

(6) *Knight* v. *Simmonds*, [1896] 2 Ch. 294; 65 L.J.Ch. 583; 74 L.T. 563; 44 W.R. 580; 12 T.L.R. 401; 40 Sol. Jo. 531, C.A.; 40 Digest (Repl.) 362, *2896*.

(7) *Osborne* v. *Bradley*, [1903] 2 Ch. 446; 73 L.J.Ch. 49; 89 L.T. 11; 40 Digest (Repl.) 362, *2897*.

(8) *Sobey* v. *Sainsbury*, [1913] 2 Ch. 513; 83 L.J.Ch. 103; 109 L.T. 393; 57 Sol. Jo. 836; 40 Digest (Repl.) 363, *2908*.

(9) *Kelly* v. *Barrett*, [1924] 2 Ch. 379; 94 L.J.Ch. 1; 132 L.T. 117; 40 T.L.R. 650; 68 Sol. Jo. 664, C.A.; 40 Digest (Repl.) 329, *2703*.

(10) *Elliston* v. *Reacher*, [1908] 2 Ch. 665; 78 L.J.Ch. 87; 99 L.T. 701, C.A.; 40 Digest (Repl.) 337, *2749*.

Witness Action.

The plaintiffs, the Chatsworth Estates Co., and the Marquess of Hartington, claimed from the defendant, John William Fewell, the owner of Bella Vista, Silverdale Road, Eastbourne, a house situate on an estate and called Compton Place owned by the plaintiffs, an injunction to restrain the defendant from using Bella Vista otherwise than as a private dwelling-house in breach of a covenant contained in a conveyance of Nov. 2, 1897, to the defendant's predecessor in title, and for damages. The defendant, in his defence, admitted that he was using Bella Vista otherwise than as a private house in breach of the covenant, but pleaded that he was entitled to do so owing to the change in the character of the neighbourhood, and to the acts and omissions of the plaintiffs in granting licences for the use of houses otherwise than as private houses and permitting houses in the neighbourhood to be used otherwise than as private houses without licences and without taking action, and also that no damage or nuisance had been caused by the user of Bella Vista. It was agreed that, as the defendant had admitted the breach of the covenant, the onus fell upon him of proving that in the circumstances he was entitled to commit such breach.

J. Leonard Stone, for the defendant, referred to *Feilden* v. *Byrne* (1); *Duke of Bedford* v. *British Museum Trustees* (2); *Roper* v. *Williams* (3); *Peek* v. *Matthews* (4); *Sayers* v. *Collyer* (5); *Knight* v. *Simmonds* (6); *Osborne* v. *Bradley* (7); *Sobey* v. *Sainsbury* (8); and *Kelly* v. *Barrett* (9).

Gavin Simonds, K.C., and *Cecil Turner* for the plaintiffs.

Jolly for a party interested.

On behalf of the defendant a number of witnesses resident in the neighbourhood were called who had boarding-houses, licensed or unlicensed, to the knowledge of the estate agent of the Compton Place Estate and also four estate agents and surveyors and the defendant's solicitor to prove the change of character of the neighbourhood, and that there was nothing to show the user of Bella Vista, or in any way objectionable, in the appearance of the house. On behalf of the plaintiffs Mr. Allix, the estate agents of the Compton Place Estate, and an auctioneer and valuer who had reported to him on the user of Bella Vista were called.

FARWELL, J.—In this action the plaintiffs are an unlimited company known as the Chatsworth Estates Co., and the Marquess of Hartington who together are the owners of a property known as Compton Place, which is a large property at Eastbourne, in Sussex. They, or their predecessors in title, owned in addition a very large portion of what is now the town of Eastbourne. The property has been in the possession of the plaintiffs and their predecessors, the Dukes of Devonshire, for many years. At the present time, in addition to Compton Place, the plaintiffs still own considerable portions of Eastbourne, but large portions have been sold off.

By an indenture dated Nov. 2, 1897, and made between the then Duke of Devonshire, of the one part, and General Hugh Rose, of the other part, certain freehold property known as Bella Vista was conveyed in fee simple to General Rose. The conveyance contains a covenant in the following terms:

> "The said Hugh Rose doth hereby for himself and the persons for the time being entitled to the hereditaments hereby conveyed or any part thereof covenant with the Duke and the owner or owners for the time being of Compton Place at Eastbourne aforesaid now belonging to the Duke that he the said Hugh Rose or such person or persons entitled as aforesaid will not alter the exterior portion of the said buildings in any manner nor erect upon the said piece of land firstly herein before described any additional building whatsoever without the consent in writing of the Duke or the owner or owners for the time being of Compton Place aforesaid or his or their agent first had and obtained, and also will not without such consent as aforesaid use the said premises firstly hereinbefore described as a school or for any educational purposes nor as a public-house or beer-shop or for any trade or business or otherwise than as a private dwelling-house . . ."

Then follows a further covenant that any buildings which may be erected upon the said premises shall not be used as a public-house or beer-shop, or for any trade or business, and then:

> "and also will not do or permit to be done upon the said premises any act or thing whatsoever which may be or become a nuisance annoyance or injury to any land of the Duke adjoining or near to the said premises or to the tenants of such land or any act or thing which may tend to deteriorate the value of such land."

Pausing there for the moment, I think counsel for the defendant is right when he says that the first part of the covenant is a covenant relating to the vendor as owner of Compton Place. I think that the latter part of the covenant relates to the vendor as owner not only of Compton Place but of other land in the vicinity.

The property called Bella Vista was sold by the purchaser from the Duke to the defendant some years ago. It is not suggested that the defendant, when he purchased Bella Vista, was not aware, or had not notice, of the covenants contained in the conveyance, and, therefore, it must be taken that he bought the property with notice of such covenants. The defendant some three or four years ago commenced to use Bella Vista for the purpose of taking in paying guests. I think the evidence is plain that the house is used for that purpose, but is used in a very high class way. It is a biggish house, well found, extremely well managed, and the reception of guests who pay is done in a way which is unobtrusive, in the sense that there is no advertisement on the house or outside the house, and nothing to indicate that the house is being used other than for a private dwelling-house. None the less, it is being used in fact for the purpose of taking in guests who do pay. That circumstance came to the notice of the agent of the plaintiffs in or about the month of June, 1928, and thereupon the defendant was communicated with by letter, and was invited to state whether it was the fact that he was using the property for the purpose of receiving paying guests. I do not propose to read the letters; it will be enough to say that the defendant did not deny that the house was being so used, but he took the view that he was not doing anything which he

A was not entitled to do in the circumstances, having regard, as he says, to the change of the whole character of the neighbourhood. He asked for a licence from the plaintiffs; the plaintiffs were not willing to give him a licence to use the house for the purpose for which he was using it; and he thereupon said that he was not going to take more paying guests for the moment, and that he would let the plaintiffs know before he used the house again for that purpose. The plaintiffs B requested him to give them an undertaking in writing not to infringe the covenant. That he was not prepared to do, and in fact he has, I think, proceeded to use the house for the purpose of taking in paying guests ever since and down to the present time. I should, perhaps, say this: It was suggested before the action was brought that an application might be made to the court under s. 84 of the Law of Property Act, 1925, for an order that the covenants be discharged, and the plaintiffs C expressed their willingness that that course should be adopted, but, although he considered that it would be likely to be successful, the defendant did not take that course. On the contrary, he did nothing further, beyond proceeding with the business which he had been previously carrying on, and, this coming to the notice of the plaintiffs, the plaintiffs on June 4, 1929, issued the writ in this action, claiming an injunction, or alternatively damages for breach of the covenants.

D The defendant, by his defence, does not seek to deny, as in fact it would be impossible for him to deny, that the property is being used, and has been used, for the purpose I have mentioned, and counsel very properly did not seek to contest that technically the carrying on the house in that way was a breach of the covenant. The defences upon which he relied were really based on two grounds. He says, first of all, that the character of the neighbourhood in the vicinity of the E house in question has so altered that it would now be inequitable to prevent the defendant from carrying on the business which he is carrying on; and secondly, he says, that even if the character of the neighbourhood has not so changed as to entitle him successfully to resist this action, the plaintiffs have, by their own conduct, by their omissions and commissions, acted in such a way that it would be inequitable for them to enforce the covenant. That is the way the case with F which I have to deal is put. There is no doubt that in a case of this kind the onus of proof is on the defendant, once the plaintiff's title is admitted, the covenant being in the conveyance which is admitted; and, once the technical breach of covenant is admitted, then primâ facie the plaintiff is entitled to relief, and it is for the defendant to satisfy the court that there is some good ground why the plaintiff should not be given the relief to which he is primâ facie entitled. Counsel G recognised that, and has endeavoured to discharge the onus which rests upon him, and it is now my duty to see whether he has satisfied that obligation or not.

Before I deal with the law, I must say one more word about the facts. The house Bella Vista is in a portion of the town of Eastbourne which is in proximity to Compton Place itself. Between Compton Place and the portion of the Front on which is the Grand Hotel there is an area which I think undoubtedly was originally H intended to be preserved as a purely residential quarter, and a residential quarter of a good class of house. I think there can be no doubt that that was what was originally intended, the property immediately in the vicinity of Compton Place being developed by the building thereon of comparatively big houses and houses of a good character. I understand that in the various conveyances of the properties which were sold by the plaintiffs and the plaintiffs' predecessors in title, covenants I were taken—not all in the same form—with the object of preserving the area as an area of houses used as single dwelling-houses. Bella Vista itself is at the corner of a road called Silverdale Road and a road called Granville Road. It is a comparatively big house, with very considerable grounds: it is not the biggest house in the area, but it is one of the big houses in the area. I have seen photographs of it, and it is obviously a well-built, commodious house. To the south of Bella Vista there is a road called St. John's Road, and then to the south of that again there is a three-cornered piece of ground which runs down to the Front, which is now largely occupied by private schools of good class. There is also at the present time on that three-cornered piece an hotel, the Hydro Hotel, which is a biggish establishment, and which is, I think, the only hotel—I am not including boarding-houses—in the area with which I have to deal. Besides the hotel and the schools there are some private houses in that quarter, there is a block of flats, and there is also a place called Granville Crest, which is used partly for charitable purposes, as a home for missioners, and partly for the entertainment of paying guests. Granville Crest is, no doubt, one of the houses in the area in question which is used, to some extent at any rate, as a boarding-house. I must now consider the extent of the area which it appears to me to be right to take into consideration. I cannot accept the view that I should take into consideration in the area what has been known as the Jevington Gardens area. It seems to me that the Grand Hotel, which is close to Jevington Gardens, and Jevington Gardens at the back of it, form rather a different class of area from that which I have to deal with, and I think the right area to take into consideration is that which is defined on the small ordnance sheet which the defendant has put in, and which is marked by the inner red line, and shown very plainly on the bigger scale ordnance sheet which the plaintiffs put in, that is to say, excluding the Jevington Gardens area, and taking the line as the red line which is shown on the two ordnance sheets. Going north from St. John's Road, one finds that the area—which was, no doubt, as I have said, originally intended to be used purely for single dwelling-houses, has altered to some extent. In a considerable number of cases houses have been converted into flats; in some cases that has been done with the express permission of the plaintiffs, and I think there are some cases where it has been done without any express licence from the plaintiffs. In the immediate neighbourhood of this area there are four or five blocks of flats, and there is immediately opposite Bella Vista, on the other side of Granville Road, a block of flats. There is not a triangular piece, but a piece, which is not quite triangular, of which Bella Vista is at the corner, which is made up largely of houses of considerable size and of very good character. In that particular area there is a girls' school, and there is also a house, Avonmore, which is being used for the purpose of a boarding-house or a guest-house, but in this case the fact that it was being so used was not known to the plaintiffs until after this action had been commenced. Going north again, I am not going through it in great detail, but it appears that in the area I have mentioned there are blocks of flats which in themselves are technical breaches of the covenant, there are playing fields, there is more than one school, and there are several houses which are being used as boarding-houses, in three cases, I think, with the permission and express licence of the plaintiffs, and in the other cases without the licence of the plaintiffs. I understand that since this dispute arose between the plaintiffs and the defendant, the facts as to these other houses being ascertained, the plaintiffs have very wisely held their hands and taken no further step pending the trial of this action.

The result of the evidence, as it seems to me, putting it quite widely, is this. The area in question still remains, in my view, mainly a residential area. I am not for the moment considering the exact terms of the covenant, but, in my judgment, when one is considering whether an area is residential or not, there is a very clear distinction between the existence of residential flats and that of boarding-houses. Counsel for the defendant has impressed upon me that there is, for this purpose, no distinction, that a really well-conducted house which takes paying guests cannot be any more or any less residential in its character than a block of flats. I cannot accept that view. I think that when one talks about a residential area one means an area in which persons reside more or less permanently, and it is quite a different thing to talk about an area of hotels or boarding-houses. Therefore, I think I am entitled to take the view that the area remains a mainly residential area, notwithstanding that there are, as I have said, a considerable number of flats, and there are some few boarding-houses, schools, and things of that sort. So that one starts with this, that although the area is no longer confined to single dwelling-houses, and there has been some relaxation of the covenants in the sense that some boarding-houses or guest-houses have been permitted, and some other use has been made of some of the other houses in the area which is not strictly within the covenant, nevertheless, taking it as a whole, and looking at it broadly, the area retains its character of being a residential area.

That, however, does not in the least settle the question which I have to determine, because, as I have said, although a block of flats does not, in my view, render a residential area not residential, nevertheless the erection of a block of flats, or the conversion of a house into a block of flats, is undoubtedly a technical breach of the covenant. In those circumstances, what I have to consider is: Would it be equitable, having regard to all the circumstances, that I should give the plaintiffs any relief in this action, either by way of injunction or by way of damages, or both, or is it a case in which I must refuse the plaintiffs all relief? The evidence is clear that nothing can be said against the defendant so far as the conduct of this establishment is concerned, except that it is a breach of the covenant. The fact that it is a breach of the covenant does not spring from any failure in him to preserve the good character of the house as a boarding-house, or anything of that sort, but it is undoubtedly a breach of covenant for him to carry on this business there at all. That being so, ought I to refuse the plaintiffs relief?

The first ground on which counsel for the defendant has put his case is that there has been such a complete change in the neighbourhood, apart from anything the plaintiffs have done, that that alone is sufficient to defeat the plaintiffs' claim. In my judgment, where the court is asked to refuse a plaintiff relief for the breach of a covenant of this kind, and in an action of this kind, and the ground for that is put upon the change of character of the neighbourhood, without relying upon any acts or omissions of the plaintiff himself, it appears to me that it is incumbent on the defendant to show that there has been so complete a change in the character that there is no longer any value left in the covenant at all. I cannot accept the view that a man who has a covenant for the protection of property belonging to him can be deprived of the rights which he has under such a covenant merely by the acts and omissions of other persons, unless those acts and omissions do bring about a state of affairs which renders the covenant by the defendant of no value whatever, so that an action by him to enforce the covenant would be really an unmeritorious action, and not a bona fide action at all—one brought for some other purpose than simply enforcing the covenant, because, the covenant being worthless, that relief would not in fact assist the plaintiff. It is quite impossible in this case, in my view, to say that there has been so complete a change in the character of the neighbourhood as to deprive the covenant which the plaintiffs have of all value. I am satisfied that the plaintiffs, in bringing this action, are acting perfectly bona fide and that, whether they are right or whether they are wrong, they are bringing this action for the purpose of protecting the property to which they are entitled, and it would be hopeless, in my view, to contend that the change is so complete that it would be useless for me to give the plaintiffs any relief. I do not think that counsel really based his main defence on that ground at all. His main argument rested on the second branch of his case, namely, that by reason of the acts and omissions of the plaintiffs, they are now precluded from obtaining relief from this court because it would be, in the circumstances, inequitable to grant it.

The evidence is that the plaintiffs are not unduly insistent upon observance of the covenants in this sense, that they do not conduct inquisitorial examinations into the lives of the persons who live in the neighbourhood, and that they do not make it their business to find out very carefully exactly what is being done, unless the matter is brought to their notice in some way, either by complaints from some of the other inhabitants or from someone in the office actually seeing some board or advertisement which calls attention to the fact that there is a breach of covenant being carried on, and I cannot think that a plaintiff loses his rights merely because he treats the persons who live in the neighbourhood with considerable consideration. I am satisfied that the plaintiffs are doing what they think is sufficient to preserve the character of this particular neighbourhood; whether they are doing sufficient or not is another matter, but I am quite satisfied that they are not intending, by anything which they have done, to permit this area to be turned into anything other than a mainly residential area. But there is no doubt whatever that they have permitted breaches of covenant in several cases where houses have been converted into flats, they have permitted at least four premises to be carried on as boarding-houses or hotels, and they have not prevented—in some cases, I think, because they did not know, but, at any rate, they have not prevented—in some half a dozen other cases houses in the area being used as boarding-houses or guest-houses. There remains in the area up to this day a very large number of private dwelling-houses. Of that I think there is no doubt, and I am satisfied on the evidence, that, while the use of Bella Vista as a guest house or boarding-house, whatever it may be called, may not at the moment cause any actual damage to Compton Place and the owners of Compton Place, there is a prospect of damage in the future if the defendant is entitled to continue to use the house in that way, because, in my judgment, it might well lead to many other houses in the neighbourhood being so used, and that would undoubtedly damnify the owner of Compton Place, especially if in the future he did what has been contemplated already, namely, develop the park and grounds of Compton Place. I cannot doubt that it would be detrimental to the plaintiffs to permit Bella Vista to be used as a guest-house, but, whether that be so or not, it does not determine whether the plaintiffs are entitled to relief. That must depend upon what exactly is the effect of what they have done or omitted to do in the past.

It has been said in many of the cases to which I have been referred that the principle upon which this doctrine lies—which is a purely equitable doctrine in this case, because I am dealing, not with the original covenantor and covenantee, but with a case where there is no privity of contract between the plaintiffs and the defendant, and therefore no action can in law lie, a case where there is purely equitable relief being sought—is that the plaintiff is not entitled to relief if it would be inequitable to the defendant to grant such relief. In some of the cases it is said that the plaintiff has waived the performance of the covenant, or has impliedly waived it by his acts and omissions. In other cases it is said that the plaintiff, having acquiesced in the breaches in the past, cannot now enforce the covenant. In all these cases it is, of course, a question of degree. But I think the question is in many ways really analogous to the doctrine of estoppel. It appears to me that a fair test in a case of this kind is to treat it as though it were estoppel, in this sense, that I may ask myself this question: Have the plaintiffs, by their acts and omissions, represented to the defendant that the covenant in the defendant's conveyance is no longer enforceable, and that he is, therefore, entitled to do what he is doing with this house? Putting it in that way, and as a test to be applied, it seems to me to solve what I thought was a difficulty when I was considering the authorities with the assistance of counsel. The difficulty which pressed me was this. In a case where there was a particular breach of a covenant, would it be right for the court to refuse the plaintiff relief because he had in the past acquiesced in or permitted breaches of covenant of another nature? Let me illustrate what I mean. Take the present case. Supposing the defendant, instead of using his house as a boarding-house, was proposing to turn it into a butcher's shop, would it be open to him to say: "Because the plaintiff has permitted residential flats to be built in the area, he is, therefore, not entitled to insist upon the observance by me of any of the covenants in my conveyance?" To my mind, the answer to that must be in the negative, and for this reason, that if the test which I have suggested is a really applicable one, it would be folly to suggest that a plaintiff, by permitting houses to be turned into flats, had represented to the defendant that the defendant was free to use his house as a butcher's shop.

It seems to me that that would be quite a hopeless contention, and, in my judgment, I have to consider the matter from this point of view: What is it fair to say the defendant was entitled to assume with regard to his use of his own house, from the acts and from the conduct of the plaintiffs? Has the conduct of the plaintiffs been such that it is reasonable for the defendant to say: "Having regard to what the plaintiffs have done, obviously they could not reasonably object to my using my house in the way I am using it?" In my judgment, in this case the answer to the question which I have asked myself must be in the negative. I do not think the plaintiffs' conduct, either by omission or commission, in the past has been such as to justify the defendant in thinking that he was entitled to commit breaches of the covenant by using his home for the purpose of a boarding-house. It is quite true that the plaintiffs have permitted, both actively and passively, other breaches of the covenant. So far as the flats are concerned, that, in my judgment, stands on quite a different footing from the other breaches. As I have already said, in my judgment, turning a house into flats does not make an area any less a residential area, and, although it is technically a breach of the covenant, I do not think that anyone would be entitled to think, or justified in thinking, that he was permitted to use his house for a business purpose merely because the plaintiffs had permitted, in technical breach of the covenant, another portion of the property to be converted into flats, if one starts, as I do in this case, on the footing that the site was intended to be originally a residential area. Therefore, so far as the flats are concerned, I think they must be discounted for the purpose of seeing whether the defendant is justified in what he has done.

If the flats are discounted, there is really very little left. There are, undoubtedly, some boarding-houses, I think four—one hotel and three boarding-houses—in the area where the plaintiffs have permitted a breach of covenant. One case, Rosemullion, was, I think, an exceptional case, and was a personal licence granted to the particular person to have friends in the house who were going to pay in exceptional circumstances, and that user has in fact been given up, and I understand that the successor in title of that lady has been refused a licence to use it as a boarding-house. With regard to Granville Crest, that again is, I think, in rather a different position. It is to some extent a charitable institution, although in some portions of the year it is undoubtedly used as a boarding-house. Mindon is, perhaps, rather more difficult, because it is close to Bella Vista, and the plaintiffs have expressly permitted it to be used as a boarding-house. With regard to the other houses which are being so used, as I have said, in some cases, at any rate, it is being done, or has been done, without the knowledge of the plaintiffs, and since it came to the knowledge of the plaintiffs they have only stayed their hand because of this action.

Looking at the matter as a whole, I have come to the conclusion that it would be a denial of justice to the plaintiffs if I were to hold that they have so acted in the past as to disentitle themselves to relief in this court for what is beyond all question a breach of the covenant. If I were so to hold it seems to me that it would be extremely difficult for the plaintiffs in the future to prevent other persons carrying on in the neighbourhood houses which they would dignify, no doubt, with the name of "guest-houses," but which might be little different in practice from what I understand to be a boarding-house. I think if I applied the test which I have ventured to apply, and refused the plaintiffs relief in this action, somebody else were to start a boarding-house close to Bella Vista, and the plaintiffs sought to restrain him, they would be met at once with the answer: "Having regard to what the court said the defendant could do at Bella Vista, it is hopeless to suggest that we are not entitled to carry on a similar sort of business on the property which we own." I cannot believe that it is the business of the court, in considering a question of this kind, to make a close inquiry as to the exact way in which a particular business is carried on, and to discriminate between a boarding-house which is so-called "boarding-house" and a house which is dignified by the name of "guest-house." It seems to me that the two things are the same for this purpose, and that if I were to refuse the plaintiffs relief there would be no means

of preventing the area being converted into what it certainly is not now, and that A
is a boarding-house area. In those circumstances I think I am bound to give the plaintiffs relief, the defendant having failed to satisfy the onus.

The only other question I have to consider is, What is the form of relief? I am satisfied that in this case I should grant an injunction. No doubt in a case of this kind, where the relief sought is purely equitable, I have to consider the equities
in considering whether the relief should be in the form of an injunction, but I B
cannot accept the view which counsel pressed upon me, that I ought not to grant an injunction because there is no evidence of any substantial damage. I think that would be directly contrary to what PARKER, J., said in *Elliston* v. *Reacher* (10). It is unnecessary to read it, because it is very familiar to all of us, but I think that quite clearly establishes what FARWELL, J., and LORD CAIRNS both said—that the
plaintiff is entitled primâ facie to an injunction although only equitable rights are C
being enforced, and although there is not any proof of immediate and substantial damage, unless the plaintiff himself has done something which would disentitle him to that form of relief. I think this case is very much a case where I ought to grant that form of relief, and for the reason that the defendant quite clearly, whatever his knowledge was when he bought this house, knew when he received
the writ on June 4, 1929, that he was committing a breach of covenant, and that D
the plaintiffs objected, and, in face of that, he elected to go on doing what I have held to be a breach of covenant, and has done it in assertion of what he thought was his legal right. In those circumstances, having elected to take that course, and having chosen to put in issue this question of law, and the question of equity, and setting up the right to which I have come to the conclusion he is not entitled,
it seems to me that it is a case in which I ought to give the plaintiffs the only really E
substantial relief I can give to them, by way of injunction. To give them damages would be to give them nothing, really, because the whole object of the covenant—which is still enforceable—is not to make persons pay for committing breaches of covenant but to prevent them committing them. Therefore, it seems to me that I ought clearly in this case to grant an injunction.

Counsel for the defendant has suggested that I ought to suspend the operation F
of the injunction until the defendant has had time to make an application under s. 84 of the Law of Property Act, 1925. In my judgment, I cannot accede to that suggestion, having regard to the fact that before this action was brought the suggestion of making such an application was made, and the plaintiffs said they were quite willing that such an application should be made. The defendant had this
opportunity then. He could have taken steps to have the matter determined in G
that way, and the plaintiffs were not in the least attempting to obstruct him from so doing. He elected not to do so, and this action was commenced. Having elected not to do so, and finding that the plaintiffs were insisting upon their rights, he then suggested that that form of application should be made, and I am not surprised that the plaintiffs should have refused. It seems to me that where a
defendant has had an opportunity of considering and deciding what course he will H
take and he decides not to make that particular form of application, but to wait and see whether the plaintiffs really will bring an action to enforce their rights, the court ought not to deprive the plaintiffs of the fruits of the victory which they have achieved by postponing it for possibly a considerable period. I am, however, quite willing to listen to any application that may be made to suspend the
operation of the injunction for a short period to enable the defendant to make proper I
arrangements for putting an end to the business which he is carrying on. Such a suspension must only be for a reasonable time, and I am quite willing to hear what counsel for the defendant has to say on that point, and I think it would be right that the defendant should have an opportunity of giving notice to those still in the house and letting them go in the ordinary way. I do not want to involve him in any contempt of court, on the one hand, or any action for breach of contract by his inmates, on the other. I think to that extent I am bound to protect him,

but, subject to that, I think the plaintiffs are entitled to the injunction for which they ask, and the defendant must pay the costs of the action.

Solicitors: *Trollope, Winckworth, Crump & Sprott*, for *Currey & Co.*; *Field, Roscoe & Co.*, for *Stapley & Hurst*, Eastbourne; *Sir Robert Gower*, Tunbridge Wells.

[*Reported by* E. K. CORRIE, ESQ., *Barrister-at-Law.*]

Re LITTLEWOOD. CLARK *v.* LITTLEWOOD

[CHANCERY DIVISION (Maugham, J.), October 21, 22, 23, 1930]

[Reported [1931] 1 Ch. 443; 100 L.J.Ch. 243; 144 L.T. 718; 47 T.L.R. 79]

Administration of Estates—Application of assets—Will executed before 1926—Death of testatrix after 1926—Variation of statutory order of application—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *Sched. I, Part II, para.* 8.

By a will made before 1926 a bequest to G.L. and F.L. of farm stock, &c., was charged with payment of debts and funeral and testamentary expenses and certain legacies, and there was a gift of residue to F.L. On a summons to ascertain out of what fund these debts, &c., were primarily payable,

Held: although the testatrix died after the coming into force of the Administration of Estates Act, 1925, the will was made before that date and in construing it regard must be had to the law in force when it was executed, that was, before the alterations made by the Act; on the construction of the will the testatrix intended to give to G.L. and F.L. the property specified after payment thereout of the debts, &c., mentioned and to give to G.L., the residuary legatee, the whole of the rest of the property discharged from the payment of the debts, &c., provided that the specific gift was of sufficient value to discharge the liabilities; in view of para. 8 (a) of Sched. II to the Act of 1925, the other paragraphs of the Part were to have effect subject to the provisions of the will; and, therefore, the property comprised in the specific gift was primarily applicable for the payment of the debts, &c.

Notes. Applied: *Re James, Lloyds Bank, Ltd.* v. *Atkins*, [1947] 1 All E.R. 402; *Re Meldrum's Will Trusts, Swinson* v. *Meldrum*, [1952] 1 All E.R. 274.

As to the order of application of assets in administering a testator's estate, see 16 HALSBURY'S LAWS (3rd Edn.) 342 et seq.; and for cases see 23 DIGEST (Repl.) 480 et seq. For Administration of Estates Act, 1925, see 9 HALSBURY'S STATUTES (2nd Edn.) 718.

Cases referred to:

(1) *Re Atkinson, Webster* v. *Walter*, [1930] 1 Ch. 47; 99 L.J.Ch. 35; 142 L.T. 129; 23 Digest (Repl.) 541, *6052*.

(2) *Re Kempthorne, Charles* v. *Kempthorne*, [1930] 1 Ch. 268; 99 L.J.Ch. 107; 142 L.T. 111; 46 T.L.R. 15, C.A.; 23 Digest (Repl.) 545, *6074*.

(3) *Re Smith, Smith* v. *Smith*, [1913] 2 Ch. 216; 83 L.J.Ch. 13; 108 L.T. 952; 23 Digest (Repl.) 506, *5702*.

Adjourned Summons.

By her will, dated Dec. 7, 1925, the testatrix, Hannah Littlewood, gave

"all my farm stock, implements, and tenant right, but charged with the payment of all my just debts and funeral and testamentary expenses, and also

> with the payment thereout of the legacies mentioned in the will of my late husband, William Littlewood, and an additional legacy of £50 which I bequeath to my stepdaughter, Eleanor Booth, unto and equally between my stepson, George Littlewood, and my son, Fred Littlewood."

The residue was given to the said F. Littlewood absolutely. The testatrix died in 1929. This summons was taken out asking whether the debts and funeral and testamentary expenses were payable primarily out of the moneys representing the farm stock, implements, and tenant right or out of the residuary estate.

Wilfrid Hunt for the summons.

Guest Mathews, for the defendant, F. Littlewood, referred to *Re Atkinson, Webster* v. *Walter* (1) and the Administration of Estates Act, 1925, s. 34.

J. V. Nesbitt, for the defendant, G. Littlewood, referred to Sched. I, Part II, paras. 2, 3, 4, and *Re Kempthorne, Charles* v. *Kempthorne* (2).

N. Daynes for the other defendants.

By the Administration of Estates Act, 1925, the real and personal estate subject to the provisions contained in the will will be applicable towards the discharge of funeral, testamentary, and administration expenses, debts, and liabilities, as in Sched. I, Part II, namely:

> "Paragraph 2: Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies so far as not provided for as aforesaid. Paragraph 3: Property of the deceased specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts.
>
> Paragraph 4: Property of the deceased charged with or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts.
>
> Paragraph 8: The following provision shall also apply: (a) The orders of application may be varied by the will of the deceased."

MAUGHAM, J.—This is a puzzling case, and I must endeavour to express my view, regard being had to the judgment of the Court of Appeal in *Re Kempthorne* (2) and to that of CLAUSON, J., in *Re Atkinson* (1). The point arises under the will of Hannah Littlewood, who died on Feb. 8, 1929, leaving a will dated Dec. 7, 1925, and, therefore, made before the coming into force of the Administration of Estates Act, 1925. I think that I may, therefore, follow the view expressed in *Re Atkinson* (1) of CLAUSON, J., who began by saying that although the testator in that case

> "died after the commencement of the Administration of Estates Act, 1925, with the consequence that in administering his estate the provisions of that Act relating to the order of the application of his assets must be applied, yet in construing the will regard must be had to the law in force at the time of its execution, that is, before the alterations in the existing law were made by the new Act."

The true construction of the will in the present case and the order in which the assets of the testatrix would have been applied before the coming into force of the Administration of Estates Act, 1925, are admittedly not in doubt. There are a number of authorities showing that when there is a charge of debts created by a will on real estate and on a residuary gift contained in the will, the provision as to the charge on real estate does not discharge the personalty, but that in order to exonerate the personalty the intention of the testator to do so must be shown to arise from "necessary implication" or "evident demonstration." But if a testator chooses to charge debts by his will on certain specific items of personal estate, and then gives his residue to some person other than the legatee of the specific property, there can be no doubt on the construction of his will that he intends the specific property to be primarily applied in payment of the debts to the exoneration of the person to whom the residue is given: *Re Smith* (3). Accordingly, in my view, the testatrix in this case intended to give to George Littlewood and Frederick Littlewood her farm stock, implements, and tenant right after payment thereout of all just debts and funeral and testamentary expenses and the legacies therein mentioned and therein bequeathed, and to the residuary legatee Frederick Littlewood she intended to give the whole of the rest of the real estate discharged from the payment of debts and legacies, provided that the specific gift of farm stock, implements, and tenant right was of sufficient value to discharge the liabilities.

I have now to consider the effect of Part II of Sched. I to the Administration of Estates Act, 1925, having regard to the authorities and also to the provisions of s. 34 (3) of the Act and para. 8 (a) of Part II which provides; "The order of application may be varied by the will of the deceased." In *Re Kempthorne* (2) I endeavoured to explain the difficulty which I felt in giving effect to some of the provisions of that part of the schedule and I understand that the Court of Appeal, who differed from me on one point in that case, also felt some difficulty in explaining the precise effect of those provisions. I think, however, that I am justified in taking the view that primâ facie the paragraphs of the schedule are to have effect subject to the provisions of the will of the deceased in cases where there is a reasonably clear indication of the intention of the deceased; and a fortiori, I think, is that the case where the will was executed before the coming into force of the Administration of Estates Act, 1925.

In the present case I have come to the conclusion that the testatrix has definitely expressed a desire that the debts and funeral and testamentary expenses and legacies shall be paid out of or charged upon the farm stock, implements, and tenant right of which she has disposed; and, following the principle adopted by the Court of Appeal in *Re Kempthorne* (2) and by CLAUSON, J., in *Re Atkinson* (1), I hold that the order of application of assets specified in Part II of Sched. I to the Administration of Estates Act, 1925, has been varied by the provisions in the will of the testatrix and that the farm stock, implements, and tenant right are primarily applicable for the payment of debts, funeral and testamentary expenses, and legacies.

Solicitors: *Jaques & Co.*, for *E. S. Spencer*, East Retford; *Torr & Co.*, for *Oxley & Coward*, Rotherham.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

A

OSBORN *v.* THOMAS BOULTER & SON

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), May 15, 16, 1930]

[Reported [1930] 2 K.B. 226; 99 L.J.K.B. 556; 143 L.T. 460]

B

Libel—Slander—Privilege—Qualified privilege—Privileged occasion—Letter dictated by business man to typist in presence of another employee—Read out by typist.

The plaintiff was tenant of a public house to the defendants who were brewers. On Nov. 16, 1929, the plaintiff wrote a letter to the defendants complaining of the poor quality of the beer supplied by the defendants to him. C The defendants thereupon sent an employee, one X, to investigate the complaint and to see the plaintiff's premises. After X had reported the result of his investigations, a member of the defendant firm, Y, dictated to a typist the following answer to the plaintiff's letter: "In further reference to yours of the 16th inst., in which you grumble at the quality of the beer, we are sorry to say we have heard rumours that you are adding water to it, we won't say how, D and if this is so, no doubt the people would grumble about the beer. We can only tell you that if you resort to these [sic] kind of measures you are running yourself liable to heavy fines and penalties, as if Mr. C., the food and drugs inspector, were to get on your track you would catch it. Besides this, we do not countenance this in any shape or form whatever. We do not want our good beer spoilt, and if you will retail it as we send it out you should do the E best trade in the street, the same as this house has always done." Either at that point Y asked X: "Is that right?", to which X replied: "Yes," or that interchange of words took place when the typist had transcribed into longhand the shorthand in which she had taken down the letter and at the request of X had read out what she had transcribed. The letter was later sent to the plaintiff. An action was brought by the plaintiff, alleging that the defendants falsely F and maliciously wrote the letter of the plaintiff in the way of his business and published the same to certain clerks or typists in their employment.

Held: (i) the occasion on which the letter was written was privileged; (ii) the protection was not lost by the communication of the contents of the letter to X, the communication to him being to ascertain whether the letter was justified in view of his report; and (iii) the protection of the privileged occasion G was not lost by the dictation of the letter to the typist, that being a reasonable and ordinary method in commercial matters of writing letters, even though they might contain defamatory statements; and, therefore, the action failed.

Per SCRUTTON and SLESSER, L.JJ.: The communication of the words complained of to (a) the typist and (b) X was that of a slander and not of a libel.

Pulman v. *Hill & Co., Ltd.* (1), [1891] 1 Q.B. 524, distinguished. H

Edmondson v. *Birch & Co., Ltd., and Horner* (2), [1907] 1 K.B. 371, applied.

Notes. As to publication of (a) a libel, (b) a slander, see 20 HALSBURY'S LAWS (2nd Edn.) (a) 437–448, (b) 448–451; and as to qualified privilege, see ibid. 468 et seq. For cases see 32 DIGEST 76–86, 86–88, 112 et seq.

Cases referred to: I

(1) *Pullman* v. *Hill & Co., Ltd.*, [1891] 1 Q.B. 524; 60 L.J.Q.B. 299; 64 L.T. 691; 39 W.R. 263; 7 T.L.R. 173, C.A.; 9 Digest (Repl.) 693, *4573*.

(2) *Edmondson* v. *Birch & Co., Ltd., and Horner*, [1907] 1 K.B. 371; 76 L.J.K.B. 346; 96 L.T. 415; 23 T.L.R. 234; 51 Sol. Jo. 207, C.A.; 9 Digest (Repl.) 694, *4574*.

(3) *Lamb's Case* (1610), 9 Co. Rep. 59 b; Moore, K.B. 813; 77 E.R. 822; 32 Digest 87, *1168*.

(4) *Roff* v. *British and French Chemical Manufacturing Co., Ltd. and Gibson*,

[1918] 2 K.B. 677; 87 L.J.K.B. 996; 119 L.T. 436; 34 T.L.R. 485; 62 Sol. Jo. 620, C.A.; 32 Digest 117, *1487*.

(5) *Boxsius* v. *Goblet Frères*, [1894] 1 Q.B. 842; 63 L.J.Q.B. 401; 70 L.T. 368; 58 J.P. 670; 42 W.R. 392; 10 T.L.R. 324; 38 Sol. Jo. 311; 9 R. 224, C.A.; 32 Digest 116, *1485*.

(6) *Toogood* v. *Spyring* (1834), 1 Cr.M. & R. 181; 4 Tyr. 582; 3 L.J.Ex. 347; 149 E.R. 1044; 32 Digest 117, *1489*.

Appeal from an order of HORRIDGE, J., in an action tried by him at Birmingham Assizes, whereby he directed the defendants to pay the plaintiff £500 damages for libel.

The plaintiff, Harold John Osborn, was the licensee of the Royal Oak Inn, Kidderminster. The defendants owned a number of licensed houses, including the house of which the plaintiff was the licensee. On Nov. 16, 1929, the plaintiff wrote the following letter to Mr. Boulter, of the defendant firm, complaining of the nature of the beer which was sent him by the defendants:

> "I would like you to pay attention to the way my beer order was dropped, which is due to the poor quality beer you have been sending me. Now, I have asked you several times to remedy it, and when Mr. Blakeway came to see it he made many promises, but I am still in the same helpless mess as before, and you know one cannot trade on promises so this is the last time I am going to write to you on this matter, as it seems very hard to do business with you."

On the receipt of that letter, Mr. Boulter directed Mr. Blakeway (whose duty it was to inspect the houses of which the defendants were the landlords) to make inquiries, and Mr. Blakeway called at the inn and saw Mr. Osborn. On Nov. 26 Mr. Blakeway reported to Mr. Boulter that he went down to the cellar of the inn and found that the temperature was too low, and that his suspicions were aroused when he saw in the cellar a bucket containing water. Mr. Boulter then wrote to Mr. Osborn the letter which was the subject-matter of the present proceedings. The letter was dictated to a typist and Mr. Blakeway was present during the dictation, and he was asked by Mr. Boulter: "Is that right?", to which he answered: "Yes." The letter was as follows:

> "In further reference to yours of the 16th inst., in which you grumble at the quality of the beer, we are sorry to say we have heard rumours that you are adding water to it, we won't say how, and if this is so, no doubt people would grumble about the beer. We can only tell you that if you resort to these kind of measures you are running yourself liable to heavy fines and penalties, as if Mr. Cowdry, the food and drugs inspector, were to get on your track you would catch it. Besides this, we do not countenance this in any shape or form whatever. We do not want our good beer spoilt, and if you will retail it as we send it out you should do the best trade in the street, the same as this house has always done."

At the close of the plaintiff's case, counsel for the defendants took the point that there was no case to answer because the publication was made on a privileged occasion, but HORRIDGE, J., ruled that the publication to Mr. Blakeway was not privileged and gave judgment for the plaintiff for £500 damages. The defendants appealed.

J. F. Eales, K.C., and *Arthur Ward* for the defendants.

Serjeant Sullivan, K.C., and *J. F. Burke* for the plaintiff.

SCRUTTON, L.J.—The plaintiff was the lessee of a public house which was supplied with beer by the defendants, who are brewers. On Nov. 16, 1929, the plaintiff wrote a letter to the defendants in these terms:

> "I would like you to pay attention to the way my beer order was dropped, which is due to the poor quality beer you have been sending me. Now, I have asked you several times to remedy it, and when Mr. Blakeway came to see it he

> made many promises, but I am still in the same hopeless mess as before, and you know one cannot trade on promises so this is the last time I am going to write to you on this matter, as it seems very hard to do business with you." A

That is an allegation that the brewers were supplying beer of poor quality. Mr. Boulter, a member of the defendant firm, after consulting Mr. Blakeway and sending him to see the plaintiff's premises, when a suggestion seems to have been made that the plaintiff was not keeping his cellars at a proper temperature, wrote the B following letter to the respondent on Nov. 27:

> "In further reference to yours of the 16th inst., in which you grumble at the quality of the beer, we are sorry to say we have heard rumours that you are adding water to it, we won't say how, and if this is so, no doubt the people would grumble about the beer. We can only tell you if you resort to these C kind of measures you are running yourself liable to heavy fines and penalties, as if Mr. Cowdry, the food and drugs inspector, were to get on your track you would catch it. Besides this, we do not countenance this in any shape or form whatever. We do not want our good beer spoilt, and if you will retail it as we send it out you should do the best trade in the street, the same as this house has always done." D

That is the letter complained of, and, unless it is privileged, it is obviously actionable, inasmuch as it alleges that the plaintiff deliberately watered the beer. It is fair to the plaintiff to say that the defendants failed to justify this allegation, so the plaintiff is free from the imputation that he watered the beer he supplied to his customers. The letter, however, can give rise to no cause of action unless it was published to some third party. The plaintiff pleaded that the letter was E written maliciously, and that it was published to certain persons in the defendants' employment. It appears that Mr. Boulter dictated the letter to a typist, who transcribed it, and then, at Mr. Boulter's request, read out the words she had transcribed, Blakeway being also then present. Mr. Boulter said to Blakeway: "Is that right?", and Blakeway said: "Yes." On that a question may arise, as to which at present I express no opinion except to say that it must not be taken that F I am clear that there was in what happened any publication of a libel. What Mr. Boulter dictated to the typist appears to be a slander, and on the question whether when the typist read out what she had written that constituted slander or libel I can only say that, notwithstanding *John Lamb's Case* (3), the text writers appear to think it a slander and not a libel. I, therefore, do not wish this to be a decision that on the state of facts with which we are concerned what happened was the G publication of a libel. To me it appears to be a slander.

At the trial, at the end of the plaintiff's case, counsel for the defendants submitted that no case had been made out, because the occasion of the publication, being a communication between the plaintiff, who alleged that bad beer had been supplied to him, and the brewers, who were protecting their own interests by repudiating the suggestion of bad beer and suggesting another cause for its inferior H quality, was privileged. There is a slight difference in the recollection of counsel as to what the judge then said. They agree that he said that he was going to hold that the presence in the room of Blakeway destroyed the privilege; they differ whether he also said that the communication of the letter to the typist destroyed the privilege. The judge went on to say to the defendants: "You must prove your justification." They tried to do so, and, in the opinion of the judge, failed, and I the judge said nothing more about privilege.

Counsel for the plaintiff has addressed us with great vigour in support of the proposition that *Pullman* v. *Hill & Co., Ltd.* (1) has decided this case, and he made that submission in spite of three subsequent decisions of the Court of Appeal. *Pullman* v. *Hill & Co., Ltd.* (1), he contends, still survives as a decision on law which governs this case. In my view, on the question whether privilege is lost by communicating to a staff of clerks the alleged defamatory matter, the rule we have to apply has been laid down by this court after a consideration of *Pullman* v. *Hill*

& Co., Ltd. (1) in *Edmondson* v. *Birch & Co., Ltd., and Horner* (2), and again adopted in this court in *Roff* v. *British and French Chemical Manufacturing Co., Ltd., and Gibson* (4). In *Edmondson* v. *Birch & Co., Ltd., and Horner* (2) a company in England wrote and cabled to a company in Japan about the character of a person whom it was proposed to employ. The letter and cable, which contained defamatory matter, were, in the ordinary course, communicated to the clerks of the company sending the letter and cable, by dictation, copying and coding. COLLINS, M.R., after considering the previous cases of *Pullman* v. *Hill & Co., Ltd.* (1) and *Boxsius* v. *Goblet Frères* (5), said ([1907] 1 K.B. at p. 380):

> "The result of the two cases to which I have alluded, taken together, appears to me to be that, where there is a duty, whether of perfect or imperfect obligation, as between two persons, which forms the ground of a privileged occasion, the person exercising the privilege is entitled to take all reasonable means of so doing, and those reasonable means may include the introduction of third persons where that is reasonable and in the ordinary course of business; and if so, it will not destroy the privilege."

COZENS-HARDY, L.J., said ([1907] 1 K.B. at p. 381):

> "I think that, if we were to accede to the argument for the plaintiff, we should in effect be destroying the defence of privilege in cases of this kind, in which limited companies and large mercantile firms are concerned; for it would be idle in such cases to suppose that such documents as those here complained of could, as a matter of business, be written by, and pass through the hands of, one partner or person only. In the ordinary course of business such a document must be copied and find its way into the copy letter-book or telegram-book of the company or firm. The authorities appear to me to show that the privilege is not lost so long as the occasion is used in a reasonable manner and in the ordinary course of business."

FLETCHER MOULTON, L.J., said ([1907] 1 K.B. at p. 382):

> "I agree. In my opinion the law on the subject, as laid down in the cases, amounts to this: If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business."

The same was said in *Roff* v. *British and French Chemical Manufacturing Co., Ltd., and Gibson* (4). If the principle is as there laid down, the decision in *Pullman* v. *Hill & Co., Ltd.* (1) is merely that in 1890 it was not a usual and reasonable thing for a member of a business firm to dictate a letter containing defamatory statements to, and have it copied by, a clerk. In the opinion of the Court of Appeal in that case, if a member of a business firm wishes to send such a letter he must write and copy it himself. That is a decision of fact. The principle laid down in *Edmondson* v. *Birch & Co., Ltd., and Horner* (2) applies, while the decision on fact is not binding on any court in 1930. I am glad to find that in SALMOND ON TORTS and in ODGERS' LIBEL AND SLANDER the same view is taken of *Pullman* v. *Hill & Co., Ltd.* (1) as an authority.

If the principle laid down in those later cases is what we have to apply, how is it to be applied to the present case? Brewers supplying beer and a licensee who receives it are quarrelling about its character. That is clearly a privileged occasion within the principle laid down in *Toogood* v. *Spyring* (6), because it is the interest of one party to defend himself and the interest of the other to receive and consider the defence. Is the privilege lost where a man defending himself and making charges against another reads a letter to his servant on whose information he is making the charges, and says: "Is that correct?" I think that it is clearly not lost in those circumstances. Then, is it lost because in 1930 a man writing such a letter dictates it to a typist who reads it out from her notes? Applying *Edmondson* v. *Birch & Co., Ltd., and Horner* (2), that appears to me to be a reasonable way of making a communication to another party, even though the letter contains defamatory statements. Acting, therefore, on the authority of that decision, and applying it to the facts of this case, it seems to me (i) that the occasion on which the letter was written was privileged; (ii) that the protection was not lost by a communication of the contents of the letter to Blakeway, the communication to him being to ascertain whether the letter was justified in view of his report; and (iii) that the protection of the privileged occasion was not lost by the dictation of the letter to the typist, that being a reasonable and ordinary method in commercial matters of writing letters, even though they may contain defamatory statements. The judge ought at the end of the plaintiff's case to have entered judgment for the defendants, and judgment must now be entered for them. The appeal will, therefore, be allowed.

GREER, L.J.—I am of the same opinion. The plaintiff in the present case was the defendants' tenant and licensee of a public house, the defendants being brewers. It was not necessary for the defendants to rely upon the occasion on which the letter in question was written being a privileged occasion as regards publication to the plaintiff himself, because that is not a publication in law of which the plaintiff can complain. But it is none the less true that the occasion on which the letter was written was one which the law regards as privileged, because it was one in which it was the interest of the defendants to write the letter, and the interest of the plaintiff to know what view the defendants were taking of the question that had arisen, namely, who was responsible for the bad quality of the beer. We approach this case, therefore, from the point of view that the occasion was privileged, and the question is whether publication of the letter to the defendants' servants in the ordinary course of business deprives the defendants of the defence of privilege.

Great reliance was placed by counsel for the plaintiff on *Pullman* v. *Hill & Co., Ltd.* (1), and I go with the argument thus far that, if that case had never been commented upon or distinguished, and if it is to be regarded as laying down the law to be applied to letters and communications written in the merchant's or business man's office, it is decisive of this case. But the general methods of business may be quite different in 1929 from what they were in 1890. Where a question arises in 1930, as regards matters which took place in 1929, the inference to be drawn by a judge as to what are the reasonable methods of conducting a business is not the same question as that which had to be decided in 1890. I am not quite clear that if I had been sitting in the Court of Appeal in 1890 I should have drawn the same inference as was drawn by the judges who decided *Pullman* v. *Hill & Co., Ltd.* (1), but the question now is what is the proper inference to be drawn in 1929, especially having regard to the views that have since been expressed by the Court of Appeal in other cases? I take it that the law to be applied is correctly stated by Cozens-Hardy, L.J., and Fletcher Moulton, L.J., in *Edmondson* v. *Birch & Co., Ltd., and Horner* (2), which was expressly approved by Swinfen Eady, M.R., in *Roff* v. *British and French Chemical Manufacturing Co., Ltd., and Gibson* (4), where he said ([1918] 2 K.B. at p. 681):

> "With regard to the authorities, it was urged on behalf of the plaintiff that the mere fact that a defamatory communication, primâ facie privileged, is communicated to a third person destroys the privilege. In my opinion, that proposition cannot be maintained. The case of *Pullman* v. *Hill & Co., Ltd.* (1) has been dealt with many times since the date of its decision. It was qualified and distinguished by Lord Esher in *Boxsius* v. *Goblet Frères* (5), and it was further dealt with by the Court of Appeal in *Edmondson* v. *Birch & Co., Ltd., and Horner* (2), where the rule was laid down in these terms by Cozens-Hardy, L.J. ([1907] 1 K.B. at p. 382):
>
> 'The authorities appear to me to show that the privilege is not lost so long as the occasion is used in a reasonable manner and in the ordinary course of business."

Fletcher Moulton, L.J., said ([1907] 1 K.B. at p. 382):

> 'If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business.' "

I take that statement of Fletcher Moulton, L.J., to be now a rule of law applicable to cases of the kind we have to consider in this case. I have come to the conclusion that no one could possibly say that at the present time or when this letter was written it was other than a reasonable and usual course of business for brewers and business people generally, instead of writing business letters in their own hand, to write them through the intermediary of a typist, and, accordingly, I hold that the dictation to the typist of the letter in question if a libel and not slander—I am inclined to think that it would be a libel—was on a privileged occasion, and cannot be complained of unless it could be shown to have been written maliciously. I am not sorry to come to this conclusion in this case, because it seems to me a very extraordinary result that a person should get a sum of £500 for an alleged libel when the only publication complained of was publication to a clerk who wrote the letter at the dictation of Mr. Boulter. The publication complained of was in the reasonable and usual course of business. For these reasons I think the appeal should be allowed and judgment entered for the defendants.

SLESSER, L.J.—I agree that the appeal should be allowed for the reasons stated by Scrutton, L.J., and I only desire to add that there is considerable doubt whether the publication was of a slander or a libel, and it may well be that the circumstance of dictation, and the dictated matter being brought back and considered by the dictator, may constitute a libel, but in this case I can see no evidence that the dictated matter was ever brought back for consideration by Mr. Boulter, while the typist was necessarily present. The evidence is that Mr. Boulter dictated the letter, Blakeway being present, and he saying, when asked by Mr. Boulter if it was all right, that it was. That looks as if the question had been asked at the time of the dictation and not after reduction to writing. It may be that the only communication between Mr. Boulter and the typist was the bare dictation of the letter. I agree with the passage in Salmond on Torts (47th Edn.), p. 530, where it is said:

> "The contents of a written document may be published either by allowing someone to read the document for himself or by reading it out to him. It is submitted, however, that this latter mode of communication amounts to slander only, and not to libel. A defamatory statement may be published by being dictated to a clerk, shorthand writer, or other reporter who reduces it to writing, but it is submitted in this case also that such a publication amounts to slander only. There are dicta to the contrary, indeed, in certain cases in which dictation to a clerk is said to be the publication of a libel to the clerk; but it is difficult to see how A can publish to B a document which is written by B himself."

In the present case I do not think there was evidence on which it can be said that there was any publication of a libel.

Appeal allowed.

Solicitors: *W. J. Pitman*, for *Arthur Hall-Wright & Son*, Birmingham; *Chandler, Boulton & Henderson*, for *Talbot & Painter*, Kidderminster.

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

A

R. *v.* SOUTHERN

[COURT OF CRIMINAL APPEAL (Talbot, Charles and Humphreys, JJ.), January 20, 1930]

[Reported 142 L.T. 383; 29 Cox, C.C. 61; 22 Cr. App. Rep. 6]

B

Criminal Law—Indictment—Joinder of offences—Direction to jury.

The appellant was charged with two distinct sexual offences, one against a boy aged thirteen, and the other against a girl aged five. The charges were included in one indictment and were tried together. In his summing-up the judge referred first to the evidence relating to one offence, and subsequently to the evidence relating to the other, but he did not warn the jury that they C must be careful to distinguish the evidence relating to one offence from the evidence relating to the other, and that they must not supplement the evidence in regard to one of the offences by looking at the evidence as a whole, nor were the jury directed to find separate verdicts on each charge.

Held: as the principles laid down in *R.* v. *Bailey* (1), [1924] 2 K.B. 300, had not been observed, the conviction must be quashed on that ground. D

Criminal Law—Evidence—Child—Corroboration—Direction to jury—Children Act, 1908 (8 *Edw.* 7, *c.* 67), *s.* 30.

With regard to the offence against the girl, corroboration was required by s. 30 of the Children Act, 1908, and there was evidence which might be regarded as corroboration of her story. The judge, in his summing-up, referred to this evidence, but made no reference either to the statute or to the necessity for E corroboration.

Held: while it was not absolutely necessary in point of law that in a case where corroboration was required by statute the provisions of the statute should be expressly brought to the minds of the jury, it was necessary that it should be impressed on the jury that one of the matters to which they must direct their attention was the question of corroboration; that matter had not been F sufficiently impressed on the jury; and, therefore, the conviction must be quashed on that ground also.

Where corroboration is not required by statute but only as a rule of practice, the jury should be directed in regard to corroboration in the terms laid down in *R.* v. *Cratchley* (2) (1913), 9 Cr. App. Rep. at p. 235, and approved in *R.* v. *Bailey* (1). G

Semble: the evidence of a young child should not be admitted unsworn under s. 30 of the Children Act, 1908, unless the judge has affirmatively satisfied himself, in the presence of the accused and jury, that the child possesses a degree of intelligence sufficient to justify the reception of its evidence and understands the duty of speaking the truth.

H

Notes. Section 30 of the Children Act, 1908, has been replaced by s. 38 of the Children and Young Persons Act, 1933.

Distinguished: *R.* v. *Gregg* (1932), 102 L.J.K.B. 126. Explained: *R.* v. *Sims*, [1946] 1 All E.R. 697. Referred to: *R.* v. *Surgenor*, [1940] 2 All E.R. 249.

As to joinder of offences in one indictment, see 10 HALSBURY'S LAWS (3rd Edn.) 391, 392; as to corroboration, see ibid. 458 et seq.; and as to the evidence of I children, see ibid. 485, 486. For cases see 14 DIGEST (Repl.) 256–263, 524–527, 533 et seq. For Children and Young Persons Act, 1933, see 12 HALSBURY'S STATUTES (2nd Edn.) 974.

Cases referred to:

(1) *R.* v. *Bailey*, [1924] 2 K.B. 300; 93 L.J.K.B. 989; 132 L.T. 349; 88 J.P. 72; 27 Cox, C.C. 692; 18 Cr. App. Rep. 42, C.C.A.; 14 Digest (Repl.) 335, *3249*.

(2) *R.* v. *Cratchley* (1913), 9 Cr. App. Rep. 232, C.C.A,; 14 Digest (Repl.) 59, *228*.

A (3) *Castro* v. *R.* (1881), 6 App. Cas. 229; 50 L.J.Q.B. 497; 44 L.T. 350; 45 J.P. 452; 29 W.R. 669; 14 Cox, C.C. 546, H.L.; 14 Digest (Repl.) 375, *3676*.

(4) *R.* v. *Schiff* (1920), 15 Cr. App. Rep. 63, C.C.A.; 14 Digest (Repl.) 525, *5097*.

(5) *R.* v. *Murray* (1913), 30 T.L.R. 196; 9 Cr. App. Rep. 248, C.C.A.; 14 Digest (Repl.) 525, *5094*.

B **Appeal** against conviction and sentence.

The appellant was convicted at Manchester Assizes before MACNAGHTEN, J., of committing, in June, 1929, an act of gross indecency with a boy aged thirteen years, and also, in November, 1929, of indecently assaulting a girl aged five years, and was sentenced to two years' imprisonment with hard labour. The two offences were charged in one indictment, and were tried together, the accused being un- C represented at the trial. There was no corroboration of the boy's evidence, though admittedly he could not be regarded as an accomplice, but there was admittedly evidence which might be regarded as corroborative of the story told by the girl. The judge, on hearing the age of the girl, decided, without questioning her, that her evidence should be admitted unsworn. In his summing-up the judge told the jury that the evidence of young children required careful consideration, but he did D not refer to the statutory requirement of corroboration in the case of a child whose evidence is admitted unsworn or to the question of corroboration at all in either case, though he dealt with the evidence that might be regarded as corroborative of the girl's story. He dealt with the two cases in different portions of his summing-up, but he did not warn the jury that they must be careful to distinguish the evidence relating to each charge from the evidence relating to the other charge, or E direct them to return separate verdicts. The jury convicted the accused without leaving the box, and he was sentenced as above stated. By s. 30 of the Children Act, 1908:

> "Where . . . [a] child of tender years who is tendered as a witness does not in the opinion of the court understand the nature of an oath, the evidence of F that child may be received, though not given upon oath, if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth . . . provided that (a) a person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused. . . ." G

E. G. Woodward for the appellant.—The two offences charged against the appellant were joined in one indictment, but no objection can be taken to this, as both offences were misdemeanours. But they were also tried together and this was prejudicial to the accused, who was not represented at the trial. They were H offences of an entirely different nature, and there was a considerable interval of time between the dates when they were alleged to have been committed, and, therefore, the judge should have ordered them to be tried separately. In *Castro* v. *R.* (3), LORD BLACKBURN, after saying that at common law any number of felonies or any number of misdemeanours might be tried together, added (6 App. Cas. at p. 244):

> I "There was no legal objection to doing this; it was frequently not fair to do it, because it might embarrass a man in the trial if he was accused of several things at once, and frequently the mere fact of accusing him of several things was supposed to tend to increase the probability of his being found guilty, as it amounted to giving evidence of bad character against him,"

and went on to say that in a proper case an application for separate trials would be granted. [He also referred to *R.* v. *Bailey* (1) and *R.* v. *Schiff* (4).]

A. E. Baucher, for the Crown, referred to *R.* v. *Murray* (5).

The judgment of the court was delivered by

TALBOT, J.—The court approaches the consideration of this case with a natural reluctance in view of the fact that both the judge who tried the case and the jury concluded without any doubt that the appellant was guilty of both the abominable offences with which he was charged. If they came to a correct conclusion, nobody could say that he has received more punishment than he richly deserved, and if, as is our conclusion, this conviction cannot stand, we feel it means that a guilty man escapes punishment. It is unnecessary to say that it is most important that the rules of the criminal law should be maintained, and for the safety of the innocent they must be maintained impartially in all cases, although the result be that in some cases a guilty man escapes punishment.

The appellant was indicted on two counts for offences of an abominable character. The first count charged an offence against a boy aged thirteen, and the second count an offence against a girl aged five, which was alleged to have been committed at or near the same place as the first offence, but at a date some four or five months later. The appellant was convicted on both counts, the two being tried together, and was sentenced to two years' imprisonment with hard labour. The appellant was not represented by counsel at the trial, and probably for that reason no application was made to the judge to try the two charges separately. There is no objection to the inclusion of the two charges in one indictment, but we think that, if an application had been made, the judge would in all probability have directed that they should be tried separately, because, although they were offences of the same class, arising from foul and filthy lust, they were not the same in law, nor were they in fact connected except by the circumstance that the same man was accused of both. If, however, an application for separate trials had been made to the judge, and the judge, after considering the application, had decided that the offences should be tried together, we do not think that we could have interfered; but, where two charges of this kind are tried together, it is obvious that special caution is necessary to prevent that fact being prejudicial and unjust to the accused. The principle was very clearly stated by LORD BLACKBURN in the House of Lords in *Castro* v. *R.* (3) in the passage cited on behalf of the appellant, and it is a principle of common sense. It is quite obvious that if two or more charges resembling one another are made against one man and are tried together, a jury can hardly help feeling more inclined to believe that the man is guilty of one charge, because there is evidence that he has been implicated in another similar offence. As LORD BLACKBURN said, the procedure, unless very carefully guarded against, may in fact amount to the giving of evidence of bad character against the accused, which is forbidden by the rules of criminal practice, though, as a matter of common sense, it is more likely, in fact, that a man should be guilty of filthy conduct on one occasion if he has been guilty of it on another. The matter was dealt with recently in *R.* v. *Bailey* (1). In that case a schoolmaster had been prosecuted for indecent offences against no less than sixteen of the boys of his school, and the question of the duty of the judge before whom such an indictment is tried was discussed in this court, and the conviction was quashed. The headnote lays down two matters, the observance of which is imperative. It is in the following terms :

> "Where an indictment for indecent assault contains a number of counts, each count charging a separate assault on a different person, the jury should be directed not to return a general verdict but to return a verdict on each count"

that is to say, it must be impressed on them, and be made abundantly clear by the fact that they have to return a separate verdict on each separate charge, that the charge against the accused is not a general charge of being a filthy man, but a charge of having done one or more of the acts alleged, and in each case there must be a separate finding by the jury that he has done that act. The headnote continues :

> ". . . and they should also be warned to draw a careful distinction between the evidence on each count and the evidence on every other count and not to

A
> supplement the evidence on any particular count by looking at the evidence as a whole."

That is to say, as far as is possible the jury, in considering whether a particular charge is proved, are to shut out altogether from their minds the fact that other charges have been made against the same man. It is quite clear that in the present B case neither of the principles laid down in *R.* v. *Bailey* (1) was followed, and it is obvious that any difficulty in which the appellant was placed on the trial of this case was greatly enhanced by the fact that the jury considered these two charges indiscriminately, except that the judge dealt with them separately in the summing-up. In our opinion, on that ground, the conviction cannot be allowed to stand.

Then arises a further point. These two charges stand on a totally different C footing in point of law. In the case of the little girl, who was five years of age, her evidence was admitted unsworn. That was an exception, introduced by the Children Act, 1908, s. 30, to the general fundamental rule of our procedure that no evidence can be given in the absence of an oath, or an affirmation in cases where a witness is allowed to affirm instead of being sworn. That statute permitted such evidence to be given in the case of children too young to appreciate D the nature of an oath, and expressly provided:

> "A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused."

E It is quite clear from the proceedings in this case that both the judge and the jury were strongly convinced that the evidence which they had heard was true, and, perhaps for that reason, the judge not only omitted to bring that statutory provision to the notice of the jury, but in fact never in terms mentioned the question of corroboration at all in his summing-up. He never used the word "corroboration," and never, either by that word or by any other words, impressed upon the jury F the importance of looking for corroboration, and, in the case of the boy, where corroboration was not required by statute, he in effect told the jury that the whole question lay between the oath of the boy and the oath of the prisoner. Though the judge did not say so, the jury may well have inferred that it was neither necessary nor important that corroboration should be found.

It is too much to say, especially in view of the decisions of this court in *R.* v. G *Murray* (5) and *R.* v. *Schiff* (4), that it is a rule of law that if, in a case where corroborative evidence is needed, the judge does not call the jury's attention to the provisions of the statute, that necessarily invalidates the conviction; but it is quite clear that the judge ought to draw attention to it, and that the jury will approach the question of corroboration more carefully if they know that it is required by an express statutory provision, and not merely by the ordinary rule of common sense H and fairness which makes it desirable that the evidence of young persons, particularly in offences of this kind, should be corroborated. It is enough to say that it is not absolutely necessary in point of law that in a case where corroboration is required by statute the provisions of the statute should be expressly brought to the minds of the jury, but it is necessary that it should be impressed upon the jury that one of the matters to which they must direct their attention is the question I of corroboration. We fear that in this summing-up that matter was not sufficiently impressed upon the jury. It is not immaterial to observe that no allusion was made to the great difference between the two charges, that in the one case corroboration was required by statute, while in the other it was not, or again, that in one case there was in fact corroboration, while in the other there was none. In our opinion, the omission of the judge to call the attention of the jury to the relevant provisions of the statute, coupled with the absence of any adequate direction on the question of corroboration at all in the case relating to the girl, makes it impossible for the conviction to be supported.

With regard to the case relating to the boy, the following passage occurs in the judgment in *R.* v. *Bailey* (1), citing the judgment of this court in *R.* v. *Cratchley* (2) (9 Cr. App. Rep. at p. 235):

> "In our view, there ought in such cases to be a warning by the judge, and it ought to be brought home to the minds of the jury that they must act on evidence of this character with extreme care. In such cases it is generally desirable, apart from any rule of law, and whether the witnesses are accomplices or not"

—in the present case the judge assumed that the boy was not an accomplice—

> "that a warning should be given to the jury as to acting on the evidence of boys of this age—twelve and under ten—who are concerned in such an offence."

In that case the age of the boys was somewhat less than in the present case. The jury were entitled, if they thought fit, to act on the evidence of this boy, though not corroborated, but undoubtedly it was the duty of the judge to point out the general importance of corroboration in charges of this kind.

There is a further point which might have arisen, but which was not taken at the Bar—whether the evidence of the little girl was properly admitted at all. As I have said, such evidence is admitted only on certain conditions, which obviously impose a very difficult task on the judge. The first condition is that the court must affirmatively be satisfied that the child does not understand the nature of an oath. Having come to that conclusion affirmatively, the judge may receive the evidence, though not given on oath,

> "if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth."

It is obvious that that provision imposes an extremely delicate task on the judge. The point has not been argued, and I say nothing further than this, that the court must not be taken as having expressed the opinion that it is legitimate to receive the evidence of a child of tender years under the provisions of the statute without some investigation by the court, in the presence of the accused and jury, whether the provisions of the statute have been satisfied.

We have come to the conclusion, not without reluctance, that this conviction must be quashed.

Conviction quashed.

Solicitors: *Registrar of the Court of Criminal Appeal*; *Director of Public Prosecutions.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

Re PHILLIPS. LAWRENCE *v.* HUXTABLE

[Chancery Division (Maugham, J.), November 5, 1930]

[Reported [1931] 1 Ch. 347; 100 L.J.Ch. 65; 144 L.T. 178]

Power of Appointment—General power—Power exercisable with consent of trustees—No duty on trustees to consider propriety of appointment—Appointed fund assets for payment of appointor's debts.

By a settlement, dated July 18, 1899, and made on the occasion of his marriage, the testator covenanted to pay to trustees the sum of £10,000. The testator was entitled to powers of appointment under, among other settlements, a settlement of April 25, 1904, by which after his death the trustees in the events which happened were to stand possessed of the premises, the income, and the accumulations in trust for the persons and purposes and generally in such manner as he should with the written consent of the trustees by deed revocable or irrevocable appoint. By deed poll dated Aug. 28, 1925, and with such consent as aforesaid, he revoked certain appointments and appointed that on the failure or determination of trusts having priority and subject to the payment of certain sums the funds were to be held on trust to accumulate for twenty-one years from his death and then upon trust for his daughter and issue with remainders over if no issue attaining a vested interest. By another deed poll of April 30, 1926, he revoked some of these appointments and settled the £10,000 upon trust as therein mentioned. He died on Sept. 4, 1928.

Held: while the trustees had a power to veto the exercise by the testator of the power no discretion was reposed in them with regard to the selection of the objects of the power and no duty was placed on them to consider the propriety of an appointment, and they were entitled, if they thought fit, to assent to the exercise of the power by the testator, leaving him the free exercise of the power, and, therefore, the equity of a creditor was as strong as if there were an unfettered general power which the testator could exercise without consent, and the sole surviving trustee of the settlement of July 18, 1899, was entitled to a declaration that the property dealt with by the exercise of the power constituted assets for the payment of the £10,000.

Re Dilke's Settlement Trusts (1), [1921] 1 Ch. 34, applied.

Notes. Distinguished: *Re Watts, Coffey* v. *Watts*, [1931] All E.R.Rep. 786. Applied: *Re Joicey, Thompson* v. *Duncan* (1932), 173 L.T.Jo. 453. Considered: *Re Churston Settled Estates, Fremantle and Another* v. *Baron Churston and Others*, [1954] 1 All E.R. 725. Referred to: *Fuller* v. *I.R. Comrs.*, [1950] 2 All E.R. 976.

As to property rendered assets by appointment, see 25 Halsbury's Laws (2nd Edn.) 563; and for cases see 37 Digest 474–476.

Cases referred to:

(1) *Re Dilke's Settlement Trusts, Verey* v. *Dilke*, [1921] 1 Ch. 34; 90 L.J.Ch. 89; 123 L.T. 386; 36 T.L.R. 574; affirmed, [1921] 1 Ch. 37; 90 L.J.Ch. 91; 124 L.T. 229; 37 T.L.R. 13, C.A.; 37 Digest 416, *256*.

(2) *O'Grady* v. *Wilmot*, [1916] 2 A.C. 231; 85 L.J.Ch. 386; 32 T.L.R. 456; 60 Sol. Jo. 456; sub nom. *Re O'Grady, O'Grady* v. *Wilmot*, 114 L.T. 1097, H.L. 21 Digest 31, *186*.

(3) *Re Fane, Fane* v. *Fane*, [1913] 1 Ch. 404; 82 L.J.Ch. 225; 108 L.T. 288; 29 T.L.R. 306; 57 Sol. Jo. 321, C.A.; 37 Digest 113, *452*.

(4) *Lord Townshend* v. *Windham* (1750), 2 Ves. Sen. 1; 28 E.R. 1, L.C.; 37 Digest 474, *724*.

(5) *Re Byron's Settlement, Williams* v. *Mitchell*, [1891] 3 Ch. 474; sub nom. *Re Reynolds, Williams* v. *Mitchell*, 60 L.J.Ch. 807; 65 L.T. 218; 40 W.R. 11; 37 Digest 437, *429*.

(6) *Re Tarrant's Trust* (1889), 58 L.J.Ch. 780; 37 Digest 445, *486*.

(7) *Eland* v. *Baker* (1861), 29 Beav. 137; 7 Jur.N.S. 956; 9 W.R. 444; 54 E.R. 579; 37 Digest 505, *986*. A

(8) *Shirley* v. *Lord Ferrers* (1733), 7 Ves. 502n.

(9) *Lord Cornwallis's Case* (1704), Freem. Ch. 279; 2 Eq. Cas. Abr. 250, 466; 22 E.R. 1210; sub nom. *Lassells* v. *Lord Cornwallis*, 2 Vern. 465; Prec. Ch. 232; 1 Eq. Cas. Abr. 242; 23 Digest (Repl.) 338, *4035*.

(10) *Phillips* v. *Cayley* (1889), 43 Ch.D. 222; 59 L.J.Ch. 177; 62 L.T. 86; 38 W.R. 241; 6 T.L.R. 128, C.A.; 37 Digest 445, *487*. B

(11) *Re Marsh, Mason* v. *Thorne* (1888), 38 Ch.D. 630; 57 L.J.Ch. 639; 59 L.T. 595; 37 W.R. 10; 37 Digest 445, *484*.

Witness Action.

The plaintiff claimed a declaration that property comprised in certain settlements constituted assets for the payment thereout of a sum of £10,000 payable to C him as sole surviving trustee of an indenture of settlement, dated July 18, 1899, together with interest thereon. The testator had executed a number of settlements, the principal of which was the first, dated July 18, 1899. By that settlement he covenanted with the trustees to pay to them within ten years from the date of the settlement the sum of £10,000, and, in case he should die D before the payment should have been made, that his heirs, executors or administrators should then within three calendar months after his death pay to them the sum of £10,000 and interest thereon at the rate of £4 per cent. per annum computed from the day of his death. This settlement was made in contemplation of a marriage between the testator and Adelina Florence Hodder. The marriage was duly solemnised on July 19, 1899, and there was issue, one E daughter, who was born on April 10, 1900. The testator was entitled under an indenture dated April 25, 1904, and a number of other indentures of settlement, to certain powers of appointment. By the settlement of April 25, 1904, it was provided that the trustees thereof should stand possessed of the settled premises and of the income thereof and of all accumulations thereof in trust for the person or persons and for the purposes and generally in such manner as the testator F should, with the written consent of the trustees or trustee, by any deed or deeds revocable or irrevocable direct or appoint. There were a number of similar powers, not differing in any material effect, but relating to different items of property, contained in a number of subsequent settlements. By a deed poll, dated Aug. 28, 1925, the testator, with the consent in writing of the trustees for the time being of the settlement of April 25, 1904, after revoking certain revocable appointments, G appointed that after the failure or determination of the trusts declared by the settlement having priority to the power of appointment, the trust funds and property subject to the trusts of the settlement should be held by the trustees upon trust to pay certain pecuniary sums, including a certain annuity, and subject as aforesaid upon trust for accumulation for a period of twenty-one years from the death of the testator, and then upon certain trusts in favour of the testator's H daughter and her issue with certain gifts over in the event of there being no child or other issue of his daughter who should attain a vested interest. By a deed poll, dated April 30, 1926, the testator revoked some of the appointments of pecuniary sums made by the deed poll of Aug. 28, 1925, and appointed in effect the whole of the sum of £10,000 in varying amounts to the persons therein mentioned. The testator died on Sept. 4, 1928. Shortly after his death notice was given by the I plaintiff to the defendants' solicitors of his claim against the estate of the testator for the sum of £10,000 and interest payable under the covenant contained in the settlement. The defendants were the surviving trustees of the various settlements, beginning with the settlement of April 25, 1904, and they were the executors of the will of the testator. The defendants' solicitors informed the plaintiff's solicitors that the free property of the testator would not amount to more than £1,000, and, therefore, after a short period the plaintiff's solicitors gave notice to the defendants that they claimed a sum of £10,000 and interest and required them to make due provision for the same.

By s. 27 of the Wills Act, 1837:

> "And be it further enacted, that a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as in execution of such power unless a contrary intention shall appear by the will."

Archer, K.C., and *Danckwerts*, for the plaintiff, cited *Re Dilke's Settlement Trusts, Verey* v. *Dilke* (1), and *O'Grady* v. *Wilmot* (2).

Swords, K.C., and *Andrew Clark*, for the defendants, referred to *Re Fane, Fane* v. *Fane* (3); *Lord Townshend* v. *Windham* (4); s. 27 of the Wills Act, 1837; *Re Byron's Settlement, Williams* v. *Mitchell* (5); *Re Tarrant's Trust* (6); *Eland* v. *Baker* (7).

MAUGHAM, J., after stating the facts.—The question that arises for determination in this action is this. Is the plaintiff right in claiming that the property comprised in the settlements beginning with the settlement of April 25, 1904, which was subject to the powers of appointment of the testator and which he has exercised in favour of a volunteer, is liable to be applied in satisfaction of the debt arising by the covenant to pay the sum of £10,000 and interest contained in the marriage settlement of July 18, 1899; or, on the other hand, are the defendants right when they allege that the powers of appointment conferred upon the testator are not general powers, for the reason that they could only be exercised with the consent of the trustees for the time being of the settlements, with the result that the property appointed is not assets for payment of any of the debts of the testator, including the debt arising by the failure to pay the sum of £10,000?

There is an old authority that if a testator made an appointment under a general power of appointment in favour of a volunteer, creditors of the testator, by instituting proceedings in Chancery, could satisfy their claims out of the appointed fund, to the extent to which the other assets of the testator proved insufficient for the purpose. This principle was laid down well over 100 years ago in the case of appointments made by will under a general power. The basis of the rule is accurately stated in WILLIAMS ON EXECUTORS AND ADMINISTRATORS (12th Edn.), vol. 2, p. 1083:

> "The basis of this rule was that the appointor could have exercised the power in favour of his creditors, and that the claims of creditors were regarded in equity as paramount to the claims of a volunteer. It was inequitable that the appointor should confer a benefit upon a volunteer whilst his creditors remained unsatisfied."

In *Lord Townshend* v. *Windham* (4), the matter came for consideration before LORD HARDWICKE. In that case there had been a general power of appointment made, not by will, but by deed. The appointment operated to transfer the property on the death of the appointor. LORD HARDWICKE considered in a somewhat elaborate manner the effect of an appointment under a general power, and he accepted the doctrine which had been laid down that where there was a general power of appointment of a sum of money to charge the estate of a third person, which it was absolutely in the appointor's pleasure to execute or not, he may do it for any purpose whatever, and appoint the money to be paid to himself or his A executors if he so pleased: and then he added this (2 Ves. Sen. at p. 9):

> "If he executes it voluntarily without consideration, for benefit of a third person, this shall be considered as part of his assets, and his creditors have the benefit of it. Nor does it differ, whether it is a power to charge a sum of money on land, or to create a chattel interest out of land; for it will depend B on the same foundation, provided it is a general power, which he may execute for any purpose; for it is a power to appoint a sum among other persons, who are at all described by the power, so that it is not absolutely in his power to do it for himself, there is no pretence that his creditors could have the benefit of it. Consider how the present differs from any of these cases; and notwithstanding I have endeavoured to find a difference, I do not see a substantial one to ground a different rule upon in point of justice. C The rules of the Court of Chancery are established as far as they can, in favour of just creditors, and to prevent persons having powers from disposing thereof voluntarily to defeat creditors; and the court has extended it of late: and though an unfortunate case may arise in the case of children, for whom parents are by nature bound to provide, it is impossible to say the consideration in respect of them is of so D high a nature as that of paying just debts; and therefore the court never preferred them to just creditors, who might otherwise be defeated of a satisfaction for their debts. On that ground was *Shirley* v. *Lord Ferrers* (8), which has been allowed ever since, and is agreeable to *Lassells* v. *Lord Cornwallis* (9). A distinction was endeavoured, that the appointment by Lord Ferrers was by will, this by deed; because whoever takes by will, takes as a legacy; but that E is not a material distinction; for if established the justice intended by the court in these cases would be avoided in every instance, as then it would be putting it barely on the form of the conveyance, and elude the rule of justice."

He points out that there is no substantial ground for a distinction:

> "for if there is a power to execute by will or deed, though executed by will, it operates not as a will to that purpose, but as an appointment; not as an appointment F of his own assets, but of the assets of another and takes not place by force of the will; it is therefore a slight and shadow of distinction only."

Then he goes into the other considerations, and explains the ground, as he conceives it, why the court has acted in the way in which it has acted, and remarks that on that foundation

> G "this court has grounded their opinion in the execution of powers, when they stop 'in transitu' (as it is called) and says, it shall not be given away from creditors"; and in the result he held that the donee of the power "having executed it, so as to gain the interest to himself, and attempted to pass it at the same time to his daughter: the court will not suffer it."

I have read that judgment at some length because it is clear that the House H of Lords in *O'Grady* v. *Wilmot* (2) placed great reliance upon the decision and upon the language used by LORD HARDWICKE, and I think I may take it that practically the whole of what LORD HARDWICKE said was adopted by the House of Lords. The question, therefore, which I have to decide here is the question whether a court of equity will interfere between the appointees under the power which existed in the present case, and stop the fund, as LORD HARDWICKE says, in transitu for the I benefit of creditors. The assets are assets in equity only, and any part of the fund not necessary for the payment of creditors would, of course, go, if there were anything over, to the appointees. It must be allowed that this is not a case under s. 27 of the Wills Act, under which section, as I conceive it, different considerations might well arise. In s. 27 of the Wills Act, 1837, the words "general powers" are not used; the phrase is "property which the testator may have power to appoint in any manner he may think proper." It has been held that a power to appoint by will expressly referring to the power is not within s. 27. That was

A decided in *Re Tarrant's Trust* (6), and in *Phillips* v. *Cayley* (10), overruling a decision to the contrary in *Re Marsh, Mason* v. *Thorne* (11). It has also been held that a power to appoint generally, with the exception of a specified person or specified persons, is not a power within the section: *Re Byron's Settlement, Williams* v. *Mitchell* (5). The courts in those cases were dealing with the true construction of the words of a statute, and I respectfully assent to those decisions.

B In considering, in the present case, whether the court as a court of equity can intercept the fund or the property, it may be useful to consider what was the duty or the power of the trustees whose consent was necessary to the exercise of the power. Was there imposed on them a duty towards the persons entitled in default of appointment? That may be put in another form: Could the persons entitled in default of appointment have brought an action for breach of trust against the C trustees who gave their consent to the exercise of the power, if they could establish that the trustees had not exercised any discretion in the matter as regards the persons who were to benefit by the proposed exercise of the power? In my opinion, the answer to this question must be in the negative, and I think *Eland* v. *Baker* (7), a decision of LORD ROMILLY'S, is distinguishable. My view is that the trustees in such a case have, it is true, a power of veto to the exercise of a power, but they D are not persons in whom the discretion as to the selection of the objects of the power is reposed; they have no duty to select, and they are entitled, if they think fit, to assent to the exercise of the power by the donee of it, leaving to him the free exercise of the power which has been reposed in him.

The matter is not untouched by authority. The Court of Appeal approved of a decision of PETERSON, J., in *Re Dilke's Settlement Trusts, Verey* v. *Dilke* (1). E They were there considering the question, not whether the property appointed had become assets for the payment of debts, but the question whether, where there was a power of appointment to be exercised only with the consent of certain trustees, the trustees were bound to consider and approve the persons in whom it was proposed that the power of appointment should be exercised, or, on the other hand, whether the right view was that the consent of the F trustees was merely to the exercise of the power, and not to the selection of the individuals to be benefited. It is true that in that case the settlement was one under which Sir Charles Wentworth Dilke, a person of unsound mind, not so found by inquisition, was tenant for life. The settlement was dated Dec. 1, 1914, and by it a sum of £48,000 was vested in trustees upon trust to pay the income to Sir Charles Wentworth Dilke during his life, and after his death, G subject to certain trusts which failed, "in trust for such person or persons as the tenant for life" with the consent and concurrence of certain persons who were trustees, should by deed personally appoint, "and in default of and so far as any such appointment shall not extend or operate, then as to the sum of £15,000 and the estate duty thereon as the" tenant for life should by any existing or future will appoint. PETERSON, J., pointed out, and I think to some extent at any rate relied H upon, the circumstance that Sir Charles, at the date of the original deed, was not of sound mind, and it might well be that the real intention of the provision was that the question whether Sir Charles was competent to exercise the power of appointment should be considered by the trustees, and that their consent to the execution of the deed, testified by their concurrence in the deed, should be obtained before it could be contended that the power had been exercised. In the Court of I Appeal, however, I do not find that any of their Lordships laid stress upon the circumstance that Sir Charles was, at the date of the settlement, a person of unsound mind not so found, and I think that the judgments are based upon a consideration of the frame of the words creating the power, and, in particular, the circumstance that under the words that there existed the selection was left to Sir Charles, and that upon the natural meaning of the words it was impossible to arrive at the conclusion that the trustees had to exercise a discretion as to the persons to be benefited by the exercise of the power, the more natural meaning of the words being that the consent of the trustees was merely to the exercise of the

A power by the donee of it. Stated in other language, their consent was required to the appointment to give validity and effect to the appointment, but there was no reason for assuming that they had any duty as regards the selection of the objects of the power.

On the fair reading of the judgments in that case, I think I am justified in taking them as supporting my own view that trustees in such a case as this are not concerned to consider the propriety of the appointment in the sense of exercising their B own opinion as regards the selection of the objects by the donee of the power. Having said that, I now return to the question which I conceive I have to decide. Ought the court consistently with the decisions to stop or to intercept the fund actually appointed here by the testator in such a way that it has been given away from the creditors of the testator? In my judgment, the equity extends to the present case. When once the conclusion is arrived at that the trustees are not C bound to exercise their own discretion as to the persons to be benefited by the exercise of the power, I think it necessarily follows that the equity of the creditors is as strong in the case where the power has been exercised as if it were an unfettered general power which the testator could exercise without consent. Accordingly, I must hold in favour of the contention which has been put forward on behalf of the plaintiff. D

Solicitors: *Church, Adams, Tatham & Co.*, for *Colborne, Coulman & Lawrence*, Newport, Monmouthshire; *John T. Lewis & Woods*, for *Frank Lewis & Son*, Newport, Monmouthshire.

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

E

T. M. FAIRCLOUGH & SONS, LTD. *v.* BERLINER AND ANOTHER

F

[Chancery Division (Maugham, J.), October 15, 1930]

[Reported [1931] 1 Ch. 60; 100 L.J.Ch. 29; 144 L.T. 175; 74 Sol. Jo. 703, 755; 47 T.L.R. 4]

Landlord and Tenant—Lease—Forfeiture—Relief—Application by one of two joint lessees—Law of Property Act, 1925 (15 & 16 *Geo.* 5, *c.* 20), *s.* 146 (2). G

Relief against forfeiture under s. 146 (2) of the Law of Property Act, 1925, cannot be granted to one of two or more joint lessees without the concurrence of the other lessee or lessees.

Notes. Applied: *Gill* v. *Lewis*, [1956] 1 All E.R. 844. Referred to: *Woodward* v. *Earl of Dudley*, [1954] 1 All E.R. 559. H

As to relief against forfeiture, see 20 Halsbury's Laws (2nd Edn.) 257 et seq; and for cases see 31 Digest (Repl.) 542 et seq. For Law of Property Act, 1925, see 20 Halsbury's Statutes (2nd Edn.) 427.

Case referred to:

(1) *Dendy* v. *Evans*, [1910] 1 K.B. 263; 79 L.J.K.B. 121; 102 L.T. 4; 54 Sol. Jo. 151, C.A.; 31 Digest (Repl.) 529, *6520*. I

Action for possession, damages for breach of covenant, and mesne profits.

The plaintiffs, T. M. Fairclough & Sons, Ltd., sought against the defendants, Victor Berliner and Mark Emmanuel Lyttlestone, to recover possession of certain premises in Whitechapel known as Premierland, and they also claimed damages for breaches of covenants to repair, mesne profits, and costs.

On July 12, 1921, the predecessors of the plaintiff company granted leases of the premises to a company called Premierland, Ltd., at a rent of £760 a year. The term became vested in the defendants, Messrs. Berliner and Lyttlestone, by an assignment, dated Sept. 19, 1924, made by the National Bank, Ltd., who had become mortgagees of the original term. The leases contained full repairing covenants, and they each of them would expire on Sept. 29, 1931. As early as 1926 the plaintiffs or their predecessors began to complain of the neglect to perform the repairing covenants contained in the leases, and these complaints became more and more frequent. The defendants said that they had had a trying time in 1928, and that Premierland had been running at a loss. In November, 1928, the plaintiffs instructed their surveyor to prepare a schedule of dilapidations for service. On Nov. 8 the defendants admitted that the matter had been overlooked, and referred to their financial difficulties. A notice and a schedule of dilapidations was served on Jan. 15, 1929. It was of a very extensive character requiring all sorts of dilapidations of a structural character to be made good. A further notice was served on June 11, 1929. The defendants were either unwilling, or unable fully to comply with the urgent requests to get on with the matter. In November they got a contract for the doing of a very small portion of the repairs by a firm called Brown & Co., but the rest of the repairs, which were estimated on behalf of the landlords to require well over £1,000 to be expended on them, had not been done. In the meantime the rent got in arrear, and on Nov. 21, 1929, the plaintiffs commenced this action. Evidence was given that substantially the premises were in very bad repair both as regards the roof, the walls, the heating apparatus, the sanitary appliances, and so forth. The cost of the necessary repairs would largely exceed the sum of £1,000. As regards the rent, there was due to Michaelmas, 1930 —the rent being due in advance—a total sum of £968 17*s.* 9*d.*, no rent having been paid after midsummer 1929. Upon the action coming on, the defendant, M. E. Lyttlestone, applied for relief against forfeiture of the leases under s. 146 of the Law of Property Act, 1925.

By the Law of Property Act, 1925, s. 146 (2):

> "Where a lessor is proceeding, by action, or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit."

By the Landlord and Tenant Act, 1927, s. 18 (1):

> "Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid; and in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as will render valueless the repairs covered by the covenant or agreement."

Blanco White for the plaintiffs.
Cox-Sinclair for the defendant, Lyttlestone.
The defendant, Berliner, in person.

MAUGHAM, J. [after stating the facts, continued :] The position is that there is a good deal of evidence to show that the defendants, either because they are unable through lacking the pecuniary means, or because they are unwilling to do so, have A abstained from carrying out their duties under the covenants of the leases. It would have been easy at any time after the issue of the writ to take steps to carry out the obligations of the defendants, and I would point out that either of the defendants could have done it. But they have not done it, and the rent is very largely in arrear. A sum of £380 has been paid into court in respect of the mesne profits, but it is obvious that a sum of something like £2,000 would be required B to comply with the obligations under the covenants of the leases, to pay the rent up to date, and to pay the costs of this action and the cost of ascertaining precisely the amount due, the fees of the surveyor and other amounts incident to a case of the present character.

There is a singular feature which has been urged to-day, and, I think, makes it clear to me that I am not in a position to grant any relief to the defendants. It C seems that while Mr. Lyttlestone is anxious to have relief against the forfeiture which has been established in the present case—the relief being claimed under s. 146 (2) of the Law of Property Act, 1925—Mr. Berliner, on the other hand, has told me frankly that he has no means sufficient to comply with his obligations under the leases, and that he is desirous that the whole thing should come to an end and he should have the advantage of the circumstance that the landlords are D desirous of recovering possession of the premises and thus limiting such liability as the lessees are under pursuant to the covenants of the leases. The dilapidations have been proved by a surveyor who has been called on behalf of the plaintiffs, except that the exact amount has not yet been ascertained, that being a matter which will require some careful investigation, particularly having regard to the fact that the plaintiffs admit that if they recover possession they propose to con- E vert the premises into a garage or a machine shop, and, accordingly, some of the repairs covered by the covenants in the leases would be rendered valueless if they were done. Therefore, under s. 18 (1) of the Landlord and Tenant Act, 1927, the damages for breaches of those covenants have to be diminished by reason of the circumstances. Primâ facie, therefore, it is clear that the lessors are entitled to support their right of forfeiture of the two leases. F

Counsel for Mr. Lyttlestone, under the provisions of s. 146 (2) of the Law of Property Act, applies to the court for relief. Two questions arise under that subsection: First, can Mr. Lyttlestone, one of two joint lessees, make such an application? And, secondly, if the application can be made, ought the court, in its discretion, having regard to the proceedings and conduct of the parties, the provisions of the Law of Property Act, 1925, s. 146, and to the other circumstances of the G case, to grant such relief? A third question would arise: If relief can and ought to be granted, on what terms should the court grant it? It will be noted that under s. 146 (2) the phrase is:

> "Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief." H

In the present case, in my judgment, it is not accurate to say that Mr. Lyttlestone is the lessee; the lessees here are joint lessees—Mr. Berliner and Mr. Lyttlestone. Section 146 (5) provides that "lessee" shall include an original or derivative underlessee, and the person deriving title under a lessee, but it does not in any way lead to the conclusion that, if there are two or more joint lessees, one of them can I apply to the court for relief, and there seems to me to be a very great objection to a provision which would enable one of such joint lessees to apply to the court unless the provision also in some way enabled the court in granting relief to absolve the other joint lessee from future liability. The provision in s. 146 (2) is in the nature of an indulgence to be given to a lessee, or joint lessees, who have not complied with their contractual obligations. The effect of granting relief under that subsection is to restore the lease as though it had never been forfeited. That is the result of the decision of *Dendy* v. *Evans* (1). Accordingly, if I were to accede to the application on behalf of Mr. Lyttlestone, the result would be that Mr. Berliner would continue to be liable under the onerous covenants contained in these leases, including the onerous obligation to pay rent up to the termination of the leases without, it may be, any prospect of being able to recoup himself by the use of the premises. In my opinion, s. 146 (2) can be applied only in the present case upon the application of the two joint lessees, and, no such application having been made for the reasons I have mentioned, it seems to me that the court has got no jurisdiction to grant relief.

I would, however, add that, having regard to the circumstance that one only of the joint lessees wishes relief, and having regard to the conduct of the parties that I have mentioned, I should, in any case, come to the conclusion that, if I had a right to grant relief, I should, in my discretion, refuse it in the circumstances of this case. I do not think there is any real chance, so far as I can ascertain, of the dilapidations being made good by Mr. Lyttlestone, and of the rent being paid up to the termination of the lease. I should add that the defendants have already charged their interest to a bank, and that alone seems to me to show that their pecuniary position is such that the best course in the interests of everybody would be to put an end to this litigation. In these circumstances the plaintiffs have a right to an order for possession of the premises, to an inquiry as to damages sustained by them by reason of the breaches of the covenants, regard being had to the provisions of s. 18 (1) of the Landlord and Tenant Act, 1927, and I think it would be convenient if the order contained an admission on behalf of the plaintiffs that they propose after the termination of the tenancy to convert the premises into a machine shop for an extension of their existing garage. That will render it unnecessary for the person, whoever he may be who takes the inquiry, to have the settling of that point. The plaintiffs will also be entitled to an order for the payment out of court of the sum paid into court in respect of mesne profits, and to a judgment for the amount of rent due less that amount.

Solicitors: *Stones, Morris & Stone*; *Lord & Peppercorn.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

Re ASKEW. MARJORIBANKS *v.* ASKEW

[CHANCERY DIVISION (Maugham, J.), May 8, 30, 1930]

[Reported [1930] 2 Ch. 259; 99 L.J.Ch. 466; 143 L.T. 616; 46 T.L.R. 539]

Conflict of Laws—Foreign law—Recognition—Renvoi—Legitimation per subsequens matrimonium.

By an indenture of settlement dated June 30, 1893, on the marriage of A., a British subject, with his wife F., the husband's trust fund was settled on the usual trusts for him and his wife and children if any, and it contained a power of revocation as to one-half of the fund in the event of the wife's death and the husband marrying again in favour of such second wife and any children by her as he should appoint. In January, 1911, a child, M., was born to W., a single woman, of which child A. was the father. Later in 1911, A., who had acquired a domicil in Germany, obtained from a German court a decree of divorce from F. In April, 1912, A. married W., in Germany. In 1913, A. by deed poll exercised the power of revocation in the settlement and appointed the part of the fund to which it extended after his death in favour of his second wife and the child, M. Evidence was given that under German law the question of legitimation per subsequens matrimonium was governed by the law of the country of which at the time of the marriage the father was a national, and that in the present case the German court, in deciding the question, would apply, not only the municipal law of England, but also the rules of international law as interpreted by the English courts, and would hold that M. was legitimated by the marriage of her parents.

Held: in accordance with the doctrine of renvoi in a case concerning status, the lex domicilii must apply, and M. must be regarded as the legitimate child of A.; and, therefore, the appointment in her favour was good.

Notes. Referred to: *Re Luck's Settlement Trusts, Re Luck's Will Trusts, Walter* v. *Luck*, [1940] 3 All E.R. 307; *Re O'Keefe, Poingdestre* v. *Sherman*, [1940] 1 All E.R. 216.

As to the application of foreign law by English courts and the doctrine of renvoi, see 7 HALSBURY'S LAWS (3rd Edn.) 5, 8 et seq., 53 et seq., 128, 129; and for cases see 3 DIGEST 372–374 and 11 DIGEST (Repl.) 324, 326, 489.

Cases referred to:

(1) *Re Ross, Ross* v. *Waterfield*, [1930] 1 Ch. 377; 99 L.J.Ch. 67; 142 L.T. 189; 46 T.L.R. 61; 11 Digest (Repl.) 394, *510*.

(2) *Casdagli* v. *Casdagli*, [1918] P. 89; 87 L.J.P. 73; 118 L.T. 404; 34 T.L.R. 175; 62 Sol. Jo. 292, C.A.; reversed, [1919] A.C. 145; 88 L.J.P. 49; 120 L.T. 52; 35 T.L.R. 30; 63 Sol. Jo. 39, H.L.; 11 Digest (Repl.) 344, *139*.

(3) *Re Grove, Vaucher* v. *Treasury Solicitor* (1888), 40 Ch.D. 216; 58 L.J.Ch. 57; 59 L.T. 587; 37 W.R. 1; 4 T.L.R. 762, C.A.; 11 Digest 347, *159*.

(4) *Re Bethell, Bethell* v. *Hildyard* (1888), 38 Ch.D. 220; 57 L.J.Ch. 487; 58 L.T. 674; 36 W.R. 503; 4 T.L.R. 319; 11 Digest (Repl.) 455, *907*.

(5) *Udny* v. *Udny* (1869), L.R. 1 Sc. & Div. 441, H.L.; 11 Digest (Repl.) 326, *22*.

(6) *Re Wright's Trust* (1856), 2 K. & J. 595; 25 L.J.Ch. 621; 27 L.T.O.S. 213; 20 J.P. 675; 2 Jur.N.S. 465; 4 W.R. 541; 69 E.R. 920; 11 Digest (Repl.) 458, *927*.

(7) *Re Johnson, Roberts* v. *A.-G.*, [1903] 1 Ch. 821; 72 L.J.Ch. 682; 88 L.T. 161; 51 W.R. 444; 19 T.L.R. 309; 11 Digest (Repl.) 359, *283*.

(8) *Bell* v. *Kennedy* (1868), L.R. 1 Sc. & Div. 307, H.L.; 11 Digest (Repl.) 329, *39*.

(9) *Abd-ul-Messih* v. *Farra* (1888), 13 App. Cas. 431; 57 L.J.P.C. 88; 59 L.T. 106; 4 T.L.R. 407, P.C.; 11 Digest (Repl.) 344, *138*.

(10) *Re Tootal's Trusts* (1883), 23 Ch.D. 532; 52 L.J.Ch. 664; 48 L.T. 816; 31 W.R. 653; 11 Digest (Repl.) 344, *137*.

(11) *Re Annesley, Davidson* v. *Annesley*, [1926] Ch. 692; 95 L.J.Ch. 404; 135 L.T. 508; 42 T.L.R. 584; 11 Digest (Repl.) 360, *285*.

Originating Summons.

The question to be decided upon this summons was whether, on the true construction of a settlement of June 30, 1893, and in the events which had happened, the power of appointment over part of the husband's trust fund thereby constituted conferred upon John Bertram Askew—now deceased—was validly and effectively exercised by a deed poll dated June 13, 1913. That question depended upon what view should be taken as to the marriage in Germany of the defendant Anna Askew, with the said John Bertram Askew, as effecting the legitimation of the defendant Margarete Askew, an infant, who was born previously to the marriage and before the date of a divorce according to German law.

By the settlement of June 30, 1893, the husband's trust fund was settled upon the occasion of the marriage of John Bertram Askew with Frederica Louisa Dallas upon trust during the life of John Bertram Askew to apply the income for the benefit of him and Frederica Louisa, his wife, and the issue of their marriage as therein mentioned, and after the death of the husband and the wife, upon trusts for the issue of the marriage. By cl. 16 of the settlement it was in effect provided that, if John Bertram Askew should marry again, he might by deed or will revoke the trusts, powers and provisions thereinbefore contained concerning any part of the husband's trust fund not exceeding one-half thereof, and might appoint the part to which such revocation should extend after his death to be held upon such trusts and subject to such powers and provisions for the benefit of any wife who might survive him or any child or other issue of such subsequent marriage as he might think proper, but so that any wife who survived him should not take more than a life interest, and provided that an only child or any two or more children and any issue of a child or children collectively of the husband by a subsequent marriage should not under an exercise of the power become entitled to a larger share of the husband's trust fund than such only child or such children collectively would have taken in case the husband's trust fund had been equally divided between all the children of the husband by every marriage who, being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry. There were issue of the marriage between John Bertram Askew and Frederica Louisa Askew two children, who are defendants to the present application. For some years before 1912 John Bertram Askew and his then wife had been separated, he living in Germany and she living with the two children of the marriage in Switzerland. J. B. Askew admittedly acquired a de facto German domicil prior to 1911. In 1911 J. B. Askew instituted proceedings in the proper court in Germany having jurisdiction in the matter, for a divorce from Frederica Louisa, his wife, and in June, 1911, such court duly made its decree, dissolving the marriage with the said Frederica Louisa Askew. The decree in due course became absolute. On April 20, 1912, after the first marriage had been absolutely dissolved, J. B. Askew married the defendant A. Askew in Berlin. The defendant Margarete Askew had, however, been born in Switzerland on Jan. 30, 1911, to the defendant A. Askew, who had been living with J. B. Askew since December, 1909, and she was acknowledged to be the daughter of J. B. Askew. If German local law were applicable, the subsequent marriage of the parents of the defendant Margarete Askew would effect her legitimation, although she was born before the divorce, which was not final until July 27, 1911. By deed poll dated June 13, 1913, J. B. Askew purported partially to revoke the trusts relating to the husband's trust fund under the settlement, and to appoint the income of all the part of the husband's trust fund to which the revocation should extend from and after his death upon trust to pay the income to A. Askew for life if she should survive him, and from and after the death of the survivor of him and A. Askew, upon trust, in the events which have happened, for the defendant Margarete Askew absolutely. J. B. Askew died at Moscow on Feb. 5, 1929, his first wife having previously died on Oct. 1, 1918. In these circumstances this summons was taken out upon the application of Sir George John Marjoribanks and David Hugh Watson Askew, the trustees of the settlement of June 30, 1893, for the determination of the questions whether the power of appointment over part of the husband's trust fund was validly and effectively exercised in favour of the defendants Anna Askew and Margarete Askew, or either of them, by the deed poll dated June 13, 1913.

By the Legitimacy Act, 1926:

> "Section 1 (2): Nothing in this Act shall operate to legitimatise a person whose father or mother was married to a third person when the illegitimate person was born."
>
> "Section 8: When the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, and the father of the illegitimate person was or is, at the time of the marriage, domiciled in a country, other than England or Wales, by the law of which the illegitimate person became legitimated by virtue of such subsequent marriage, that person, if living, shall in England and Wales be recognised as having been so legitimated from the commencement of this Act or from the date of the marriage, whichever last happens, notwithstanding that his father was not at the date of the birth of such person domiciled in a country in which legitimation by subsequent marriage was permitted by law."

Rawlence for the trustees.

H. S. G. Buckmaster, for the children of the first marriage, referred to *Re Ross, Ross* v. *Waterfield* (1); *Casdagli* v. *Casdagli* (2).

R. F. Roxburgh, for the second wife and her daughter, relied on *Re Grove, Vaucher* v. *Treasury Solicitor* (3); *Re Bethell, Bethell* v. *Hildyard* (4).

Cur. adv. vult.

July 30. **MAUGHAM, J.**, read the following judgment. The trustees are naturally desirous of the protection of the court in relation to the question whether the power of appointment in question was validly exercised by the deed poll, and for this purpose it is necessary to determine whether the defendant Margarete Askew, though born out of wedlock, during the continuance of a previous marriage, is, having regard to her father's domicil, legitimate. The Legitimacy Act, 1926, I may point out, would not have had that effect, having regard to the fact that J. B. Askew was married to his first wife when the defendant M. Askew was born.

The question of legitimation of a child by the subsequent marriage of its parents in a foreign country, apart from the provisions of the Legitimacy Act, 1926, s. 1 (2) and s. 8, appears at first sight to be well settled. Dicey (Rule 137, case I, in his Conflict of Laws) states the result of the decisions thus:

> "If both the law of the father's domicil at the time of the birth of the child and the law of the father's domicil at the time of the subsequent marriage allow of legitimatio per subsequens matrimonium, the child becomes or may become legitimate on the marriage of the parents."

The authorities cited are: *Udny* v. *Udny* (5); *Re Wrights' Trust* (6); *Re Grove, Vaucher* v. *Treasury Solicitor* (3); and they bear out the proposition. J. B. Askew was admittedly domiciled in Germany both at the date of the birth and at the time of the subsequent marriage. But what is the meaning of the phrase "the law of the father's domicil"? Does it refer to the municipal law or local law of Germany or does it refer to the whole of the laws applicable in Germany, including the views entertained in Germany as to the rules of private international law? There is no doubt that Dicey means the latter—see his Interpretation of Terms, Definition 11—but, in my opinion, it is much more doubtful whether the courts who have dealt with the matter did not mean the former. The so-called doctrine of renvoi, which has been so much discussed by jurists of recent years, had not been formulated in earlier days; and those who look at the statement of the foreign law in the earlier cases—see, for example, *Re Wrights' Trusts* (6) and *Re Grove*, *Vaucher* v. *Treasury Solicitor* (3)—will find that the foreign law as stated was the local or municipal law, and that no evidence was adduced as to the rules of private international law applied in the foreign country. It would seem that rules of private international law, not being founded on custom or statute, but being based upon considerations of justice and what is called "comity," ought to be the same in all countries, though it is now well known—contrary to the belief entertained by Lord Westbury: see *Udny* v. *Udny* (5)—that they are not. I am convinced that sixty or seventy years ago it never would have occurred to a lawyer who was proving, say, the law of Italy (or France) in relation to the succession to an Englishwoman dying domiciled in Italy (or France) to depose (first) that the Italian (or the French) law gave a son a legitima portio; (secondly) that foreigners domiciled in Italy (or France) were deemed to retain their personal law; (thirdly) that he was informed that, according to English law, an English testator had a free power of disposition; and (finally) that accordingly by an application of Italian (or French) rules of private international law the son had not (or had) a right to a legitima portio. It is on evidence of this kind that English courts now have to decide cases relating to the succession to movables belonging to British subjects who die domiciled abroad, and other cognate matters. It may be added that there is generally an acute conflict of expert opinion as to the foreign law, which has to be proved afresh in each case. Foreign jurists and foreign courts take from time to time varying views on the subject of renvoi.

The result is not always satisfactory. It may then be useful to consider the question from the point of view of principle before dealing with the four modern authorities which must, I think, guide me in the matter. I will take the case of John Roe, a British subject, who goes to a foreign country, the kingdom of Utopia, and there acquires a permanent home without any intention of returning to his native land. He does not care to become a naturalised Utopian, and he does not trouble to fulfil the legal formalities which Utopia requires before legally admitting him to a Utopian domicil. Now the kingdom of Utopia is one which—I assume—has adopted what is called the principle of nationality for foreigners, including those who have permanently settled in the realm, and it accordingly applies their national law in all questions relating to their status, capacity, and the succession to their surplus assets and the like. The first question that arises is whether in these circumstances John Roe in an English court can be said to have acquired a Utopian domicil. Clearly this depends on the true meaning to be attached to the word "domicil." Until the decision of the House of Lords to be referred to later this was at least doubtful; but it is now, I think, finally settled that in an English court John Roe must be taken to have been domiciled in Utopia, because domicil is a pure question of fact and does not in any true sense connote a legal relation. In English courts English law must be applied; and by that law all these matters must be decided, at any rate primâ facie, by the lex domicilii.

Now the second question arises. When the English courts refer the matter to the law of Utopia as the lex domicilii, do they mean the whole of that law, or do they mean the local or municipal law, which in Utopia would apply to Utopian subjects? In order fully to appreciate this matter, it is necessary to answer the question: How comes it that an English court applies to John Roe the system of law of Utopia to which he does not owe allegiance? The answer must be that, in the view of an English court, John Roe, by acquiring a permanent home in Utopia, has attracted to himself the system of personal law which Utopia would apply to him, and it may be added that this would be in accordance with his presumed intention. Moreover, questions of private international law, in the absence of statute, depend largely on the historical views and the opinions of jurists which have been adopted in our courts, and it is the fact that for some hundreds of years before the nineteenth century, continental and British jurists alike were practically united in the view that there existed in the world a number of civil societies based on domicil, in the sense that the status and capacity of the members of those A societies were governed by the lex domicilii, whatever their nationalities might be. In France, Italy, Germany, and elsewhere, a different principle, namely, that of nationality, has gradually been introduced and now prevails; but in the British Empire, including as it does within its area so many distinct systems of law, the old doctrine is retained, and domicil is still the criterion in our courts of the personal law. If the law of Utopia had taken the same view as the English courts B and applied to John Roe the Utopian (local) law, there would, of course, be no difficulty whatever. But since the jurists of Utopia have adopted the principle of nationality as governing the question of his personal law, the result is that when the English court makes an inquiry as to the Utopian law, the first answer may be that Utopian primâ facie applies to John Roe the laws of England. It is, I think, a misunderstanding of the problem to suggest that this leads to a deadlock. C Like others before me I have spoken of the lex domicilii as applying to John Roe; but it should not be forgotten that the English court is not applying Utopian law "as such," and the phrase is really a short way of referring to rights acquired under the lex domicilii. The inquiry which the court makes is, of course, as to Utopian law as a fact, and one to be proved in evidence like any other. The inquiry might accurately be expanded thus: What rights have been acquired in Utopia by the D parties to the English suit by reason of the de facto domicil of John Roe in Utopia? For the English court will enforce these rights, though I repeat it does not, properly speaking, enforce Utopian laws. It is evident that, so stated, the question involves this: Have the parties acquired rights in Utopia by reason of the personal law of John Roe being English local law or Utopian local law? There is this alternative and no other. It is apparent that there is no room here for a deadlock, and that E the circulus inextricabilis is no better than a—perhaps amusing—quibble. The English judges and the foreign judges do not bow to each other like the officers at Fontenoy. The English court has to decide a matter within its jurisdiction according to English law in the wide sense, and if the matter depends on foreign domicil it is only necessary to prove certain facts as to rights under the foreign law. It is, therefore, clear, I think, that when we inquire whether John Roe has acquired F rights in Utopia by Utopian law we must mean by the whole of the laws of Utopia, including any views of private international law which may be deemed to give him rights or subject him to restrictions, though an Englishman settled in that land.

A final question may sometimes remain, namely, whether the lex domicilii is one which the English courts can recognise. If it is, we have only to ascertain what the lex domicilii in the wider sense is. I will add that I am not aware of any G satisfactory definition of term renvoi; but it will be noted that, if I am right, an English court can never have anything to do with it, except so far as foreign experts may expound the doctrine as being part of the lex domicilii.

I will now deal with the four authorities to which I have referred. The first is the much-discussed case of *Re Johnson, Roberts* v. *A.-G.* (7). FARWELL, J., had H there to consider the proper distribution of the movables of Miss Johnson, a British subject domiciled at her birth in Malta, but at the date of her death—which took place in 1894—domiciled de facto in the Grand Duchy of Baden, where she had not been naturalised. By the certificate of the master it was found that, according to the law of Baden, the legal succession to the property of the deceased of which she had not disposed by will was governed solely by the law of the country of which I the testatrix was a subject at the time of her death. Now it is clear that LORD WESTBURY in *Bell* v. *Kennedy* (8) and in *Udny* v. *Udny* (5) had thought that what he termed civil "status" was determined by the single criterion of domicil, that international law depended on rules common to the jurisprudence of all civilised nations, and that accordingly in all such countries an acquired domicil would be recognised as attracting to the individual the municipal law. In *Abd-ul-Messih* v. *Farra* (9), LORD WATSON—approving a decision of CHITTY, J., in *Re Tootals' Trusts* (10)—had followed the same line. He said, after referring to *Udny* v. *Udny* (5):

> "According to English law, the conclusion or inference is, that the man has thereby attracted to himself the municipal law of the territory in which he has voluntarily settled, so that it becomes the measure of his personal capacity, upon which his majority or minority, his succession, and testacy or intestacy must depend."

Now Farwell, J., had to apply these views to a case where the foreign law said that the propositus had retained his national law. Having come to the conclusion that the courts of Baden paid no heed to domicil, he not unnaturally decided, following the dicta I have referred to, that there could be no domicil of choice since

> "a domicil of choice ineffectual to create any rights and liabilities governing the distribution of movables in the country supposed to have been chosen was for that purpose no domicil at all"

and that the propositus was left with his domicil of origin unaffected. He added that the Baden courts would in effect have disavowed him and disclaimed jurisdiction. His second ground for his decision was that, even if the Baden courts would not really have refused jurisdiction, he was of opinion that distribution according to the law of nationality meant according to English law but according to that law as applicable in the circumstances to the domicil of origin, which was Malta. Accordingly, the decision was that the movables must be distributed according to the law of Malta, not according to the municipal law of England. It is, I think, evident that Sir George Farwell's judgment, at least on the first point, was mainly based on the dicta and the views of Lord Westbury and Lord Watson which, since the decision I am now going to mention, can no longer be treated as correct.

In the important case of *Casdagli* v. *Casdagli* (2) the question arose whether a petition for dissolution of marriage can be entertained by an English court if presented in a case where the marriage and the domicil de facto was Egyptian. The husband, who was the respondent and the British subject, objected to the jurisdiction, while the wife set up the contention that the husband, being a British protected subject, and entitled to privileges and immunities by reason of the extra-territorial jurisdiction exercised by His Majesty in that country, could not in law acquire an Egyptian domicil. In the Court of Appeal this view prevailed, Scrutton, L.J., dissenting. In the House of Lords the decision of the Court of Appeal was overruled, and Lord Finlay, Lord Haldane, Lord Dunedin and Lord Phillimore expressed approval of the judgment of Scrutton, L.J. The House of Lords overruled the opinion of Chitty, J., in *Tootals' Trust* (10), and some of the dicta of Lord Watson in *Abd-ul-Messih* v. *Farra* (9), including a statement that

> "residence in a foreign state as a privileged member of an 'ex territorial' community, although it may be effectual to destroy a residential domicil acquired elsewhere, is ineffectual to create a new domicil of choice."

In effect the House of Lords declined to accept the view that domicil was a relation created by law between an individual and a country, involving that the individual had attracted to himself the municipal law of that country. The conclusion was come to that the husband had in fact acquired a legal Egyptian domicil, and not the less that he was entitled to the privileges conceded by the capitulations, which were regarded in the house as privileges made effectual by Egyptian law and not by English law. The judgment of Scrutton, L.J., having been accepted in the House of Lords, I return to that judgment, and I accept his view that in such a case as the present there are two questions to be determined, the first question being: Is there a domicil or permanent home, which depends on the fact of residence and an intention to continue to reside? and the second question being: Is there a lex domicilii which the English courts will recognise? He goes on to say this ([1918] P. at p. 110):

> "The law administered may vary with the nationality of the resident; a German court may administer different law for a Belgian and a Russian in the

matter of status. The law of the domicil would appear to be the law which A the sovereign of the domicil would administer in the case of the domiciled person. If so, can it make any difference whether the sovereign of the domicil administers the law directly, or allows another sovereign by grant to exercise part of his sovereignty by administering such law as he pleases in courts which the sovereign of the domicil allows to exist in his territory? The law appears to be still the law of the domicil, allowed to be administered in the B country of the domicil by the sovereign power of that country, whose consent is necessary for its administration. Practical and theoretical difficulties arise from the fact that, while England decides questions of status in the event of conflict of laws by the law of the domicil, many foreign countries now determine those questions by the law of the nationality of the person in question. Hence it has been argued that if the country of allegiance looks to or sends back the C decision to the law of the domicil, and the country of domicil looks to or sends back (renvoyer) the decision to the law of nationality, there is an inextricable circle in 'the doctrine of the renvoi,' and no result is reached. I do not see that this difficulty is insoluble. If the country of nationality applies the law which the country of domicil would apply to such a case if arising in its courts, it may well apply its own law as to the subject-matter of dispute, being that D which the country of domicil would apply, but not that part of it which would remit the matter to the law of domicil, which part would have spent its operation in the first remittance. The knot may be cut in another way, not so logical, if the country of domicil says: 'We are ready to apply the law of nationality, but if the country of nationality chooses to remit the matter to us we will apply the same law as we should apply to our own subjects.' This is E the German solution of the difficulty."

This decision seems to me to clear up more than one point of considerable difficulty. In the first place, it follows, I think, that LORD WESTBURY's dictum in *Bell* v. *Kennedy* (8) that domicil is "the relation which the law creates between an individual and a particular locality or country" is no longer to be relied on. F Nor is it true to say that "residence in a foreign country without subjection to its municipal laws and customs is . . . ineffectual to create a new domicil." It is reasonably clear that domicil does not depend upon the question of the attraction of the local or municipal law, and that the fact that the local courts decide a question arising as regards a foreigner in their land solely by the law of his nationality is no reason for treating those courts as disclaiming jurisdiction. G Accordingly, I think *Re Johnson, Roberts* v. *A.-G.* (7) and the reasons given for that decision by SIR GEORGE FARWELL are no longer of authority.

I will now deal with *Re Annesley, Davidson* v. *Annesley* (11). In that case RUSSELL, J., had to determine, first, whether the domicil of the testatrix was English or French, she having died in France without having acquired a formal French domicil according to French law, and, secondly, whether French municipal H law applied to her so that she had power only to dispose of one-third of her movable property. It was clear that the testatrix had acquired a permanent home in France, and that she had no intention of returning to this country. The learned judge, basing his view on the decision in *Casdagli* v. *Casdagli* (2), to which I have referred, declined to follow *Re Johnson, Roberts* v. *A.-G.* (7) in so far as that case decided that a domicil in a foreign country, not recognised by the law of that I country, is in the eye of the English law no domicil at all; and he followed his own view that the question of domicil was to be determined in accordance with the requirements of English law as to domicil, and, accordingly, that the domicil of the testatrix at the time of her death was French. He then had to determine whether French (municipal) law ought to be applied or whether the national law of the testatrix, namely, English (municipal) law ought to be applied. The French experts differed strongly on what is called the doctrine of renvoi, two experts taking the view that a French court would distribute the movables of the testatrix in

A accordance with English municipal law, and one expert equally strongly taking the view that a French court would accept the renvoi and distribute in accordance with French municipal law. The learned judge came to the conclusion that he must accept the latter view, having regard to two decisions of the Court of Cassation in France. The result was that he held that the testatrix had power only to dispose of one-third of her movable property by her will.

B In *Re Annesley*, *Davidson* v. *Annesley* (11), however, the learned judge suggested an alternative ground for his decision that French municipal law was to apply. He expressed himself in the following terms ([1926] 1 Ch. at p. 708):

> "Speaking for myself, I should like to reach the same conclusion by a much more direct route along which no question of renvoi need be encountered at all. C When the law of England requires that the personal estate of a British subject who dies domiciled, according to the requirements of law, in a foreign country shall be administered in accordance with the law of that country, why should this not mean in accordance with the law which that country would apply, not to the propositus, but to its own nationals legally domiciled there? In other words, when we say that French law applies to the administration of the D personal estate of an Englishman who dies domiciled in France, we mean that French municipal law which France applies in the case of Frenchmen. This appears to me a simple and rational solution which avoids altogether that endless oscillation which otherwise would result from the law of the country of nationality invoking the law of the country of domicil, while the law of the country of domicil in turn invokes the law of the country of nationality, and I E am glad to find that this simple solution has in fact been adopted by the Surrogates' Court of New York."

It may be observed that this simple and rational solution is one that does not lead necessarily to the same result as that at which RUSSELL, J., arrived on his view of the French law, including the rules of private international law applicable as a fact to the case. What may be called the short route resulted in the application F of the municipal law as the law of the domicil in *Re Annesley*, *Davidson* v. *Annesley* (11); but that route would have resulted in a decision contrary to that which LUXMOORE, J., pronounced in the case I am about to mention, and he found it necessary, therefore, to reject that part of the judgment of RUSSELL, J.

The last case I have to refer to is *Re Ross*, *Ross* v. *Waterfield* (1). The testatrix, an Englishwoman, whose domicil of origin was English, had acquired a domicil in G Italy and by her testamentary disposition excluded her son and only child from any share in her movable and immovable property situate in Italy and in her movable property situate elsewhere than in Italy. There was again some conflict of evidence as regards the foreign law; but the learned judge accepted the views of two Italian experts who deposed that the Italian courts would determine the case on the footing that "the English law applicable was that part of the law which H would be applicable to an English national domiciled in England." It was clear that the Italian courts looked to the doctrine of nationality and apparently applied the local law of the nationality. The learned judge went through nearly all the reported cases on the question whether the English rule which refers such a matter to the lex domicilii refers only to that part of the domiciling law which is applicable to nationals of the country of domicil, that is, to the local or municipal law, or I whether the phrase refers to the whole law of the country of domicil, including the rules of private international law. Without wholly agreeing with his explanation of all the cases I think there can be no doubt that he was right in coming to the conclusion that the latter view is correct; and like RUSSELL, J., he declined to follow *Re Johnson*, *Roberts* v. *A.-G.* (7). As I have already pointed out, he also declined to accept the alternative ground on which RUSSELL, J., was disposed to decide *Re Annesley*, *Davidson* v. *Annesley* (11). It will be seen that I fully agree with the substance of this decision; but I would be inclined to express some passages in the judgment in a somewhat different form, for, as I have said, I think

the foreign law is a matter of fact in our courts. If the proposition that where a A
British national dies domiciled in a foreign country his movables here must be distributed according to our view of what the courts of that country would decide in the particular case means that generally speaking we must ascertain the foreign municipal law and also the rules of private international law applied by the foreign country and then decide the case, I respectfully agree; but if the proposition is to be taken literally I think there should be a qualification. I do not think an English B
court administering the estate of a British national in this country is bound to follow the decision of all foreign courts, however erroneous or unreasonable. I am not convinced that an English court is bound to accept all the views of a foreign court on the rules of private international law, where they plainly conflict with our notions of comity. Further there may be legislation in the foreign country directed specifically against persons who are foreigners in that country which an English C
court would not be disposed to enforce. Suppose, for example, a law passed in a country that every foreigner who died there without having been naturalised must be held to die intestate, or must have the whole of his movables wherever situate forfeited to the State, or is only empowered to bequeath his property to subjects of that State, other legacies being void, would our courts be bound to follow such a law? It is one thing to hold that the law of England requires that the movables D
of a British subject who dies domiciled in a foreign country shall be administered in accordance with the law which that country would apply to its own nationals, and another to hold that our law in all cases requires his movables to be administered as the law of that country requires in the case of foreigners. In my opinion, the safer view is that an English court, in deciding a question arising here as to the administration of the movables of an Englishman who has died abroad, or as to E
the status of such a person, is deciding a question of English law in the wide sense, which may, no doubt, include or involve in a particular case the consideration of foreign views on private international law, but allows us a certain power of discrimination in the application of them. As SCRUTTON, L.J., remarked in *Casdagli* v. *Casdagli* (2), the lex domicilii must be one which our courts will recognise.

I will now return to the present case which, if I am right in the views expressed F
above, will present little difficulty. There is, fortunately, no contest as to the German law, for the affidavit of Dr. Hellmut Rost, a doctor of laws of the University of Erlangen, was accepted by all parties as being correct, another affidavit being withdrawn. Dr. Rost deposed as follows:

> "The child Margarete Askew is according to German law legitimated by the G
> subsequent marriage of John Bertram Askew and Anna Wengels. I have come to this conclusion on the following grounds: The German Civil Code and the Introductory Act do not contain any specific rule as to the effect of a subsequent marriage of the parents of an illegitimate child where the father of the child is not a German national, but only provides that where the father is a German national the question is to be decided by German law (art. 1719 of H
> the Civil Code combined with art. 22 of the Introductory Act). A general principle of the German law is, however, that the law of the country of which the father at the time of the marriage is a national governs the question of legitimation per subsequens matrimonium. I am informed and believe that J. B. Askew was an Englishman. Therefore, English law would be applied by the German court in deciding the question. (I am informed that the I
> English law refers the question back to the law of the domicil, in the present case German law.) The German court would in these circumstances first have to decide whether to apply the municipal law of England only or also the principles of international private law as interpreted by the English courts. The rule followed by the German court is that both the municipal law and the rules of international law as interpreted by the English court are to be applied. The German court, therefore, accepts the renvoi. There is no general statutory rule of German law as to which municipal law in the case of renvoi as in the

> present case is to be ultimately applied. The question has, however, been decided by numerous decisions of the Reichsgericht, the court of the highest instance in Germany (Confer Reports, vol. 62, p. 404; vol. 64, p. 393; vol. 78, p. 28; and others). These decisions are to the effect that in a case where the German law provides that the law of nationality is to govern a question and the law of nationality refers to the law of domicil and the domicil is German, the German court is to apply German municipal law. I am, therefore, of the opinion that the German court would hold that according to German law Margarete Askew was legitimated by the marriage of her parents notwithstanding the fact that her father at the time of her birth was still married to a woman other than her mother, and that by reason of the legitimation of the child Margarete Askew has become issue of the marriage between John Bertram Askew and Anna Askew, née Wengels.''

I take this deposition as proving as a fact that the defendant Margarete Askew acquired in Germany the status of legitimacy. For the reasons given above I hold that in an English court the lex domicilii in the wide sense must primâ facie apply, and this being a law which the English courts will recognise, the conclusion is that the defendant M. Askew is a legitimate child of J. B. Askew and that the power of appointment was effectively exercised in her favour.

I think it proper to add that, in my opinion, it is unsatisfactory to find that upon the evidence adduced in *Re Annesley, Davidson* v. *Annesley* (11) and *Re Ross, Ross* v. *Waterfield* (1), the courts were bound to hold that, although both in France and in Italy the national law of the de cujus is held to prevail, yet owing to a divergence on the theoretical question of renvoi, the property and capacity of an Englishman domiciled in Italy is held to be a matter of (local) English law, whilst the property and capacity of an Englishman domiciled in France is held to be a matter of (local) French law. Nor is there any certainty that a contrary result will not be reached upon the evidence adduced in the next two cases which arise as to persons dying in France and Italy respectively. Those who have any acquaintance with the extensive literature that has appeared on the continent on the subject of renvoi and the great diversity of view that exists would not be surprised to find that the legal decisions in France and Italy, where legal decisions are not binding as authorities to be followed, had changed in their effect. An Englishman domiciled de facto in France cannot be certain that his personal law is the municipal law of France, nor that, if he crosses the border and becomes domiciled de facto in Italy, his personal law will become the municipal law of England. It may be added that views which seem strange to an English lawyer are entertained in these matters in some eastern countries and also in some of the States in South America; and in those countries the result of acquiring a domicil must be very doubtful. I cannot refrain from expressing the opinion that it is desirable that the position of British subjects who acquire domicils in countries which do not agree with our view as to the effect of a foreign domicil should be made clear by a very short statute. There is much to be said for the "simple and rational solution" suggested by Russell, J., in *Re Annesley, Davidson* v. *Annesley* (11); but whether the municipal law of the foreign country or the municipal law of England is to be held applicable in British courts in these cases, it is clearly desirable that the matter should be certain and should not be held ultimately to depend on the doubtful and conflicting evidence of foreign experts.

Solicitors: *Williams & James*; *Buckeridge & Braune.*

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

SLINGSBY *v.* WESTMINSTER BANK, LTD.

[KING'S BENCH DIVISION (Finlay, J.), July 17, October 14, 1930]

[Reported [1931] 1 K.B. 173; 100 L.J.K.B. 195; 144 L.T. 369; 47 T.L.R. 1; 36 Com. Cas. 54]

Bank—"Crossed cheque"—Warrant for payment of dividend—Warrant for payment of interest on war stock crossed "& Co. Not negotiable"—Bills of Exchange Act, 1882 (45 *&* 46 *Vict., c.* 61), *s.* 82, *s.* 95.

A warrant for the payment of interest on 5 per cent. War Stock 1929–47 was issued by the Bank of England on the usual printed form used for that purpose. It was crossed "& Co. Not negotiable," and contained a direction signed by the Chief Accountant to the Bank of England to the cashiers of the Bank of England to pay the sum specified to the order of a named person.

Held: that the document was a crossed cheque within the meaning of s. 82, and also a dividend warrant within the meaning of s. 95, of the Bills of Exchange Act, 1882, and, therefore, a banker who in good faith and without negligence received payment of it for a customer who had no title thereto incurred no liability to the true owner of the warrant by reason only of having received such payment.

Notes. In *Slingsby* v. *District Bank, Ltd.*, [1931] All E.R.Rep. 143, SCRUTTON, L.J., disagreed with the finding of fact (see end of judgment of FINLAY, J., infra) that the defendant bank had not been guilty of negligence.

Doubted: *Slingsby* v. *District Bank, Ltd.*, [1931] All E.R.Rep. 143. Referred to: *Slingsby* v. *Westminster Bank, Ltd.* (*No. 2*), [1931] 2 K.B. 583.

As to the collection and payment of cheques and other documents, see 2 HALSBURY'S LAWS (3rd Edn.) 176 et seq.; and for cases see 3 DIGEST 201 et seq. For Bills of Exchange Act, 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 505.

Cases referred to:

(1) *Capital and Counties Bank, Ltd.* v. *Gordon, London City and Midland Bank, Ltd.* v. *Gordon*, [1903] A.C. 240; 72 L.J.K.B. 451; 88 L.T. 574; 51 W.R. 671; 19 T.L.R. 462; 8 Com. Cas. 221, H.L.; 6 Digest 35, *241*.

(2) *Ross* v. *London County Westminster and Parr's Bank*, [1919] 1 K.B. 628; 88 L.J.K.B. 927; 120 L.T. 636; 6 Digest 35, *242*.

(3) *A. L. Underwood, Ltd.* v. *Bank of Liverpool, Same* v. *Barclays Bank*, [1924] 1 K.B. 775; 93 L.J.K.B. 690; 131 L.T. 271; 40 T.L.R. 302; 68 Sol. Jo. 716; 29 Com. Cas. 182, C.A.; Digest Supp.

(4) *Taxation Comrs.* v. *English, Scottish and Australian Bank*, [1920] A.C. 683; 89 L.J.P.C. 181; 123 L.T. 34; 36 T.L.R. 305, P.C.; Digest Supp.

(5) *Lloyds Bank* v. *Chartered Bank of India, Australia and China*, [1929] 1 K.B. 40; 97 L.J.K.B. 609; 139 L.T. 126; 44 T.L.R. 534; 33 Com. Cas. 306, C.A.; Digest Supp.

Further Consideration of an action tried at the Manchester Assizes.

The plaintiffs were the executors of the estate of Harry Turner, deceased, of Macclesfield, and as such, at all material dates, were the holders of £10,000 5 per cent. war stock 1929–47. Messrs Cumberbirch and Potts, of Macclesfield, were the solicitors of the estate. James Cumberbirch, a member of the above firm, was a customer of the defendant bank at their Macclesfield branch. On Dec. 2, 1929, Mrs. Mary Edith Slingsby, the daughter of the deceased and the first plaintiff as an executor, and a beneficiary, under the will, received a warrant for the payment of £250 half-yearly interest on war stock. The warrant was on the usual printed form issued by the Bank of England and was crossed "& Co. Not negotiable." It was payable to the order of Mary Edith Slingsby [sic] a/c Harry Turner deceased. She signed this warrant in the space provided, and gave it to her son, who handed it in to the managing clerk of Messrs. Cumberbirch and Potts on or about the same date. On Jan. 1, 1930, James Cumberbirch went to interview the manager of the Westminster Bank's branch at Macclesfield concerning an overdraft. The record of the interview was made shortly afterwards by the manager, Mr. Godwin, and was as follows:

> "Mr. Cumberbirch saw me with reference to cheques of his presented for payment through the clearing for £1,000 and £280. He had overlooked the fact that it was New Year's Day, and that the banks were closed at eleven o'clock. He stated that he had sold the £2,000 ordinary Palatine Industrial Finance shares to a friend of his, Mr. J. Pickford, of Macclesfield, for £1,500, and that he would receive payment in a few days. His present holding in the company was some 14,000 shares. His firm had just completed a very successful year, and the profits were over £4,000. He paid into his account his firm's cheque for £1,500, and stated that against the deposit of further security, he might require temporary overdraft accommodation for £3,000. He had advanced money to various clients—Mrs. Slingsby owed him £250 which he had lent her over Christmas pending receipt of dividends due under her late father's will (she received £1,000 per annum clear). Some delay had arisen in connection with the settlement of her affairs. William Graty, of Wilmslow, owed him £1,000 on mortgage, and this would either be entirely repaid or £350 paid in and a fresh mortgage of £650 taken, which would be deposited as security. After some discussion it was agreed to leave matters in abeyance pending Pickford's cheque for £1,500 and to see what arrangements were come to regarding Graty's mortgage and other payments due."

On Jan. 16, 1930, Mr. Cumberbirch again went to the bank and, filling in a paying-in slip, paid to the credit of his own account the warrant for £250. The following was endorsed on the paying-in slip: "Div. on £10,000 war stock payable to M. E. Slingsby, a/c Harry Turner, decd." Owing to a difference in name, the warrant having been made payable to M. E. "Stingsby," the cashier consulted Mr. Godwin, who again interviewed Mr. Cumberbirch. The manager, Mr. Godwin, having received Mr. Cumberbirch's explanation of this somewhat unusual transaction, made a note on the paying-in slip as follows:

> "Mr. Cumberbirch stated that in anticipation of this payment he had advanced this sum to Mrs. M. E. Slingsby, and Mrs. Slingsby had signed this d/wt (dividend warrant) and handed it to him in repaymt. of the loan. See m/i (memorandum of interview) of 1/1/30."

It was agreed on both sides that in fact Mr. Cumberbirch had misappropriated the warrant and the case was argued on that footing. The plaintiffs claimed: (i) £250, the proceeds of the warrant as money had and received by the defendants to their use; (ii) damages for wrongful conversion; and (iii) damages for the negligence of the defendants in paying the proceeds of the warrant to a person not entitled thereto. The defendants denied negligence and relied on the protection of ss. 82 and 95 of the Bills of Exchange Act, 1882, averring that the warrant in question was a dividend warrant, and alternatively that it was a crossed cheque. After the trial, reference was made to the Bank of England for information regarding the issue of the loan and the authority under which warrants for payment of interest were signed by the chief accountant, which information was sent direct to FINLAY, J.

Laski, K.C., and *C. Gandy* for the plaintiffs.

A. T. Miller, K.C., and *B. B. Stenham* for the defendants.

Cur. adv. vult.

Oct. 14, 1930.—**FINLAY, J.,** read the following judgment. In this case the plaintiffs, executors of Harry Turner, deceased, sued the defendant bank to recover £250, the amount of a Bank of England warrant for that amount. The claim is put in various ways—money had and received, damages for conversion of the warrant or the proceeds thereof, damages for negligence.

The facts were scarcely at all in dispute, and the amount at stake is not very large, but the case raises more than one point of some interest and difficulty. The plaintiffs were the executors of the deceased who left a very substantial estate, much of it devoted to charity. The first plaintiff was the daughter of the testator and a considerable beneficiary under his will. On Dec. 2, 1929, the plaintiff, Mrs. Slingsby, received the warrant sued on. The warrant was produced before me. It is the usual form of the Bank of England, crossed "& Co. Not negotiable." Mrs. Slingsby signed the warrant and gave it to her son to take to Mr. Bennett, the managing clerk of Messrs. Cumberbirch and Potts, who lived in the same road as she did. Messrs. Cumberbirch and Potts were solicitors in practice at Macclesfield, and Mr. Cumberbirch, who then bore a high reputation, was the solicitor of the executors. It had been previously arranged by the executors that any warrants, &c., received by Mrs. Slingsby should be handed to Mr. Cumberbirch for attention, and it was pursuant to this arrangement that this warrant was sent to Mr. Bennett. Mr. Bennett having received it, took it to the office and handed it to Mr. Cumberbirch. Mr. Cumberbirch had an account with the defendants' Macclesfield branch. On Jan. 1, 1930, this account was overdrawn to a substantial amount. The precise position of the account is seen from the entries in the pass-book. On Jan. 1 there was an interview between Mr. Cumberbirch and Mr. Godwin, the manager of the Macclesfield branch of the defendants' bank. I find, and indeed it was little disputed, that the effect of what then took place is accurately set out in the memorandum made shortly after the interview by Mr. Godwin. This interview is of much importance upon one of the issues I have to consider. On Jan. 16, Mr. Cumberbirch again came to the bank, filled in the paying-in slip which was before me, and paid in to the credit of his account the warrant for £250. The cashier, Mr. Hanrahan, to whom Mr. Cumberbirch actually handed the note, observed that there was an error on its face, "Stingsby" being printed for "Slingsby" and also that the warrant was expressed to be "a/c Harry Turner, deceased." He took the warrant to Mr. Godwin, the manager, who was just about to have an interview with Mr. Cumberbirch. Mr. Godwin was examined and cross-examined in much detail as to this important interview, but what took place is clear enough and can be concisely stated. Mr. Godwin said to Mr. Cumberbirch that the transaction was unusual, and asked for an explanation. Mr. Cumberbirch referred to his conversation of Jan. 1, and said that this payment had reference to the matter then discussed. Mr. Godwin then asked if it would not have been more desirable if Mrs. Slingsby had given her own cheque in the usual way. To this Mr. Cumberbirch replied that she had preferred to hand over the warrant, because to have given her own cheque would have made it evident that she was probably receiving accommodation from her solicitors. Mr. Godwin, having asked those questions and received those answers, was satisfied, and he made the note which now appears on the paying-in slip. The amount was credited to Mr. Cumberbirch's account on Jan. 16, and on Jan. 17 the amount was actually paid to the bank. It may be convenient at this stage to say (of course without prejudice to any explanation which Mr. Cumberbirch may in any other proceedings be able to give) that both sides before me concurred in the view that Mr. Cumberbirch had in fact misappropriated the warrant, and the case was argued on that footing throughout. Mr. Cumberbirch had for many years carried on (in partnership with Mr. Potts, who still practises there) a large and leading practice as a solicitor in Macclesfield. I am satisfied that right up to the date of his disappearance shortly after Jan. 16 he was generally respected and trusted. He was not the regular solicitor for the defendant bank, but he had from time to time acted for them. He was well known both as a prominent and trusted solicitor and also socially by Mr. Godwin, the bank manager. I am satisfied, and I find as a fact, that there was nothing in Mr. Cumberbirch's past record or in what was then known of his position to arouse any suspicion with regard to him either on Jan. 1 or Jan. 16. On the contrary, he was on both these dates regarded by everyone as a reliable and honourable

A solicitor of high standing and in large practice. These are the facts, and it is upon these facts that the plaintiffs claim to recover £250 from the defendant bank.

I now proceed to state and examine the various points which arose and were argued before me. The defence of the bank was based mainly on s. 82 of the Bills of Exchange Act, 1882, and they claimed to be entitled to the benefit of this section upon two distinct grounds: (i) that the warrant was a crossed cheque; (ii) that it B was within s. 95 a dividend warrant. As I have formed the view that this document is a dividend warrant within s. 95 it is not strictly speaking necessary that I should decide whether, apart from s. 95, it would fall within s. 82 as being a crossed cheque. But as a considerable argument was addressed to me upon this point, and as I have formed a view on it, I may as well express it. In my opinion, this was a cheque. It seems beyond doubt to possess all the indicia of a cheque C except one. It is an unconditional order drawn on a banker, payable on demand. It is crossed and bears the words: "Not negotiable." But it was said that it was not a cheque because the drawer was himself an official of the bank on which the cheque was drawn. It would seem to follow from the decision of the House of Lords in *London City and Midland Bank* v. *Gordon* (1) that a draft drawn by one branch of a bank on its head office, or by an official of a bank upon his own bank, D cannot be regarded as a cheque. If this is so, the judgment of BAILHACHE, J., in *Ross* v. *London County Westminster and Parr's Bank* (2) cannot on this point be relied on. But in what capacity was the official acting when he drew this draft? I think the true view is that he was acting as the agent of the government. If this is so, the transaction ceased to be merely an inter-departmental one, as where a branch of a bank draws on its head office, and the substance of it is that the government E is drawing on moneys in the hands of the bank. I should explain that at the hearing in Manchester I expressed a wish for precise information as to the authority under which the chief accountant signed. This information was, not unnaturally, not available at short notice in a circuit town, and it was, accordingly, arranged that the solicitors should make enquiries of the Bank of England and place at my disposal any information which they obtained. The letters of July 28 and F Aug. 29, 1930, with their annexes, are, accordingly, to be looked at. It seems to me that reference to the Acts of Parliament and particularly Part III of the National Debt Act, 1870, and s. 4 of the National Debt Act, 1889, support the conclusion at which I have arrived.

But, apart from that, I am of opinion, as already indicated, that this draft is within s. 95. This depends upon whether it is "a warrant for the payment of G dividend" within the meaning of the section. Upon this it is necessary to consider the exact effect of the document and the sections under which the loan was issued in respect of which this interest or dividend was paid. The stock was issued under warrant pursuant to s. 1 (1) of the War Loan Act, 1916. By s. 37 (4) of the Finance Act, 1917, the National Debt Act, 1870, is made applicable. In that Act "dividend" is used throughout as meaning the sum payable by way of interest on H government stock: see, particularly, Part III of the Act, headed: "Payment of dividends." In this connection, the following three Acts, Dividends and Stock Act, 1869, the National Debt Act, 1889, and the Crossed Cheques Act, 1876, also require consideration. The point is whether "dividend" in the Act of 1882 is used in the narrower sense as meaning that part of the profits of a company divisible among its shareholders, or in a broader sense as meaning that which is to be divided. I I think that the broader construction is to be preferred. I arrived at this conclusion on the construction of s. 95 of the Act of 1882. Whatever doubts there may be on the construction of the section by itself, seems to me to be resolved when one looks at the legislation referred to. That legislation, I think, makes it clear that "dividend" is the word used by the legislature to signify interest on government stock. In this connection I attach particular importance to the Act of 1876. Leading counsel for the plaintiffs, in the course of his very skilful argument, practically admitted that he could not have maintained his position if the matter had depended upon the Act of 1876. I agree with him in this, but it certainly is startling if the legislature, in re-enacting and generalising the law, has effected so important a change as would be the exclusion of all drafts made in payment of interest on government loans. I, therefore, arrive at the conclusion that the document in question, even if it is not a cheque, falls within s. 95.

This brings me to the question—a pure question of fact, but by no means free from difficulty—namely, whether the conduct of the bank was without negligence. As to good faith, I need say nothing, for there was no suggestion of bad faith. As to negligence, the case differs from a good many that have been decided in this respect, that here inquiries were in fact made. But this does not, I think, affect the point that has to be decided. Where no inquiries are made, the question is whether a reasonably competent and careful bank official would have made inquiries. The duty has been stated in a good many cases. I may refer to *A. L. Underwood, Ltd.* v. *Bank of Liverpool* (3) particularly, where Scrutton, L.J., says ([1924] 1 K.B. 775 at p. 793):

> "The test of the standard of duty in such cases is stated by Lord Dunedin in *Commissioners of Taxation* v. *English, &c., Bank* (4) ([1920] A.C. at p. 689) to be 'the ordinary practice of bankers.' "

I may also refer to *Lloyds Bank* v. *Chartered Bank of India, Australia and China* (5) ([1929] 1 K.B. at p. 69), particularly where the present Lord Chancellor (then Sankey, L.J.) says:

> "I think the duty of the defendants to the true owner of the cheque was (i) the exercise of the same care and forethought with regard to the cheque paid in by the customer as a reasonable man would bring to bear on similar business of his own: see Sir John Paget on Banking (4th Edn.), p. 274, and (ii) to provide a reasonable and competent staff to carry out this duty."

Where inquiries are made, the question is whether a reasonably competent and careful bank official would have been satisfied with the answers he received or would have pursued the matter further. The facts are set out earlier in this judgment. It is only necessary that I should state the conclusion at which I have arrived. Upon the whole I think it is established that the bank officials were not guilty of any negligence. It cannot be expected, as was said in one of the cases, that bank officials should be amateur detectives. Mr. Godwin considered that the matter called for inquiry, and I think he would have been negligent if he had not. But the answer he received appeared to harmonise perfectly with the information he had previously received. It is obvious that this plot was carefully constructed and carried out by Mr. Cumberbirch. It would not, in my opinion, be right to hold that it was negligent to believe a statement made by a man then in the highest repute, consistent with the information Mr. Godwin already was in possession of, and not on its face improbable. On the whole, therefore, I hold that the bank are entitled to rely on s. 82, because their officials acted in good faith and without negligence, and there must be judgment for the defendant bank.

Judgment for defendants.

Solicitors: *Vaudry, Osborne & Miller*, Manchester; *Sale & Co.*, Manchester.

[*Reported by* R. A. Yule, Esq., *Barrister-at-Law.*]

Re CARROLL

[Court of Appeal (Scrutton, Lawrence and Greer, L.JJ.), October 14, 1930]

[Reported [1931] 1 K.B. 104; 100 L.J.K.B. 62; 144 L.J. 154;
47 T.L.R. 20; 74 Sol. Jo. 770]

Habeas Corpus—Court of Appeal—No original jurisdiction—Power to order security for costs.

The appellant applied to the judge in chambers for leave to issue a writ of habeas corpus directed to the respondents, a children's home, to bring up the body of her infant daughter. The judge dismissed the application and his decision was affirmed by the Divisional Court. The respondents' costs in those proceedings had been taxed, but were not paid. On appeal,

Held: the Court of Appeal, while part of the Supreme Court of Judicature, was not part of the High Court of Justice, and had no original jurisdiction in habeas corpus (*Ex parte Le Gros* (1) (1914), 30 T.L.R. 249, applied), and, therefore, could only deal with the case by way of appeal; but the fact that the subject-matter was habeas corpus did not prevent the court making an order requiring security for costs to be given where the applicant was an impecunious person.

Notes. Considered: *Re A (an infant)*, [1955] 2 All E.R. 202.

As to the renewal of application for a writ of habeas corpus, see 11 Halsbury's Laws (3rd Edn.) 38–39, para. 69; and for cases on the subject, see 16 Digest 258, *611–613*.

As to costs of an appeal in an application for a writ of habeas corpus, see 11 Halsbury's Laws (3rd Edn.) 50–51, para. 102; and for cases on the subject, see 16 Digest 270–271, *792–813*.

Cases referred to:

(1) *Ex parte Le Gros* (1914), 30 T.L.R. 249; 78 J.P.Jo. 63, C.A.; 14 Digest (Repl.) 607, *6021*.

(2) *Cox* v. *Hakes* (1890), 15 App. Cas. 506; 60 L.J.Q.B. 89; 63 L.T. 392; 54 J.P. 820; 39 W.R. 145; 6 T.L.R. 465; 17 Cox, C.C. 158, H.L.; 16 Digest 250, *508*.

(3) *Eshugbayi Eleko* v. *Nigeria Government (Administering Officer)*, [1928] A.C. 459; 97 L.J.P.C. 97; 139 L.T. 527; 44 T.L.R. 632; 72 Sol. Jo. 452, P.C.; Digest Supp.

(4) *Ex parte Woodhall* (1888), 20 Q.B.D. 832; 57 L.J.M.C. 71; 59 L.T. 841; 52 J.P. 581; 36 W.R. 655; 4 T.L.R. 515, C.A.; 14 Digest (Repl.) 607, *6019*.

Motion by the respondents for security of the costs of an appeal from the Divisional Court.

Ellen Carroll, an unmarried woman (hereinafter called "the appellant"), applied to Charles, J., in chambers for leave to issue a writ of habeas corpus directed to the respondents, the Homeless Children's Aid and Adoption Society and F. B. Meyer's Children's Home (Incorporated), to bring up the body of her infant daughter, Joan Margaret Carroll. Charles, J., refused the application and the appellant appealed to the Divisional Court, who also refused to order the issue of the writ and dismissed the appeal with costs. The respondents' costs in these proceedings had been taxed and amounted to £105, but were not paid. The appellant, who was a domestic servant, thereupon served on the respondents a notice of appeal against the refusal of the Divisional Court to order the issue of the writ of habeas corpus, and it was stated in the notice that the Court of Appeal would be asked to order that the costs of the appeal and the costs of the proceedings before Charles, J., and the Divisional Court should be paid by the respondents.

Sir Thomas Inskip, K.C., and *E. G. Palmer* for the respondents.

Serjeant Sullivan, K.C., and *Seuffert* for the appellant, referred to *Cox* v. *Hakes* (2), and *Eshugbayi Eleko* v. *Nigeria Government (Administering Officer)* (3).

Ex parte Le Gros (1) was also referred to by the court.

Section 1 of the Supreme Court of Judicature (Consolidation) Act, 1925, provides:

> "There shall be a Supreme Court of Judicature in England consisting of His Majesty's High Court of Justice (in this Act referred to as 'the High Court') and His Majesty's Court of Appeal (in this Act referred to as 'the Court of Appeal'), with such jurisdiction as is conferred on those Courts respectively by this Act."

SCRUTTON, L.J.—This application for an order for security for costs is made by the respondents, who have been served with a notice of appeal in which it is stated that the Court of Appeal will be asked to make an order that the respondents shall pay the costs of the appeal and of the proceedings before Charles, J., and the Divisional Court. The application for security for the costs of the appeal is now made against an impecunious appellant, Ellen Carroll. The answer made on behalf of the appellant is that she is applying for a writ of habeas corpus to be issue directed to the respondents in respect of her infant daughter, Joan Margaret Carroll, and that the court will not order security for the costs of the appeal to be given in such a case.

The writ of habeas corpus is viewed with greatest favour by the courts. In *Eshugbayi Eleko* v. *Nigeria Government (Administering Officer)* (3) in the Privy Council, Lord Hailsham, L.C., said ([1928] A.C. at p. 468):

> "If it be conceded that any judge has jurisdiction to order the writ to issue, then in the view of their Lordships each judge is a tribunal to which application can be made within the meaning of the rule, and every judge must hear the application on the merits. It follows that, although by the Judicature Act the courts have been combined in the one High Court of Justice, each judge of that court still has jurisdiction to entertain an application for a writ of habeas corpus in term time or in vacation, and that he is bound to hear and determine such an application on its merits notwithstanding that some other judge has already refused a similar application. The same principle must apply in the case of the judges of the Supreme Court of Nigeria."

Following the views expressed in that case with regard to an applicant's right to make successive and repeated applications to the judges of the High Court of Justice for the writ of habeas corpus, it is suggested, on behalf of the appellant, that what is really happening here is not an appeal from the refusal of the writ by the Divisional Court, but an original application to the Court of Appeal to order the issue of the writ, and that, therefore, no order for security for costs can be made in these proceedings. That turns on the question whether the Court of Appeal is a member of the High Court of Justice. The answer to that question is to be found in s. 1 of the Supreme Court of Judicature (Consolidation) Act, 1925, and the answer is that it is not. That section refers to the High Court of Justice, but the Court of Appeal is there referred to as a separate court. The Court of Appeal, while part of the Supreme Court of Judicature, is not part of the High Court of Justice. Moreover, that point has been dealt with in *Ex parte Le Gros* (1), where the view was expressed that the Court of Appeal was not part of the High Court of Justice.

In that case an application was made on behalf of one Le Gros for a rule nisi for a writ of habeas corpus directed to the Governor of Brixton Prison, to which Le Gros had been committed with a view to his extradition. An application for the same purpose had been made to the Divisional Court and refused. It was submitted by counsel for the applicant that he did not come as appealing from the decision of the Divisional Court, but to invoke the original jurisdiction of the Appeal Court to hear the case; he said that, according to *Cox* v. *Hakes* (2), he was entitled to go from judge to judge; *Ex parte Woodhall* (4) did not affect the original jurisdiction of the court. Alternatively, he applied to Lord Reading, C.J.—who was a member of the court—as a judge of the King's Bench Division to hear the application. Lord Reading, C.J., said that it was not open to them as a Court of Appeal to hear the application. As for himself, he was sitting then as a member of the Court of Appeal, and could not take the application. He had no greater power than any other judge of the King's Bench Division to hear it, but he would express no opinion whether any other judge of the King's Bench Division could take it after adverse decisions of other judges of the same Division.

The Court of Appeal is a statutory court, and *Ex parte Le Gros* (1) binds us to hold that no original jurisdiction in habeas corpus cases has been conferred on the Court of Appeal as distinct from the High Court of Justice. In these circumstances, we are left with an appeal, and the court can only deal with the matter by way of an appeal, and I am quite unable to follow the argument of counsel for the appellant that the respondents who have been served with the notice of appeal stating that an order for costs would be asked for against them, have no right to appeal and to object to the order being made. There is nothing in the fact that the matter of the appeal is habeas corpus to prevent the court making an order requiring security for the costs of the appeal to be given in such a case as this, where the appellant is an impecunious person who has already had two decisions given against her. An impecunious person should not be allowed a second "bite at a cherry" unless he or she provides security for the costs. The rule of stopping an appeal by an impecunious litigant has been mitigated by the Poor Persons Rules, which provide that, if a person satisfies certain conditions, he will be granted legal aid.

In the present case, there is no doubt that the appellant is impecunious and will be unable to pay the costs of the respondents should she fail in her appeal. This case, therefore, seems peculiarly a case in which the court ought to exercise its power of ordering security for costs of the appeal to be given. I do not say that in every habeas corpus case security for costs will be ordered, but I do say that the mere fact that it is an appeal in a habeas corpus case will not prevent an order being made for security for costs against an impecunious appellant. Security for costs must be given in the sum of £35.

LAWRENCE, L.J.—I agree.

GREER, L.J.—I agree.

Solicitors: *Carter & Bell*; *Ellis & Willes*, and *Ingpen & Armitage*.

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

A

Re CARROLL (No. 2)

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), October 31, November 3, 17, December 2, 1930]

[Reported [1931] 1 K.B. 317; 100 L.J.K.B. 113; 144 L.T. 383; 95 J.P. 25; 47 T.L.R. 125; 75 Sol. Jo. 98; 29 L.G.R. 152] B

Infant—Religion—Illegitimate child—Right of mother to require that infant be brought up in religion she wishes.

In the absence of any suggestion that the mother of an illegitimate child is of so bad a character and has so neglected her duty that her wishes as to the religion and education of the child may be disregarded, she has a legal right to require that the child should be brought up in the religion which she desires. C The responsibility for religious views is that of the parent of a child, not of the court, and the court should not sanction any proposal, excellent in itself, which does not give effect to the parent's views on the child's education, religious and secular. Those views are none the worse because they follow from the teaching of the parent's religious advisers. The court will undertake a dangerous and impossible task if it substitutes its own wishes and D responsibility for those of the parent in the matter of religion.

So **held** by SCRUTTON and SLESSER, L.JJ., GREER, L.J., dissentiente.

Per SCRUTTON, L.J.: It is not universally accepted that a "home" [as distinct from an institution] with no external education is the best thing for a child. Many home brought-up children are spoilt and deprived of independent E initiative. I cannot regard the difference between home training and training in a respectable institution as sufficiently important to entitle the court to disregard the parent's wishes as to religion in the case of a child so young as to have no wishes of its own.

Per SLESSER, L.J.: The court can now exercise the original jurisdiction of the Court of Chancery as well as the old common law jurisdiction, and it is clear F that, on application by habeas corpus, although the parent has not been guilty of any misconduct to disentitle him to the custody of the child, the court may, under its Chancery jurisdiction, if satisfied that it is for the welfare of the child in some very serious and important respect, refuse to give the parent such custody. The court is not concerned with the respective merits of religions when considering the welfare of a child, but it is concerned with the possible G invasion of natural law (unless expressly authorised by statute) involved in bringing up a child in a religion different from that of its parent. The wishes of the mother are primarily to be considered, and the burden is on those seeking to show that it would be detrimental to the interests of the child that it should be delivered to the custody of the mother or any person in whose custody she desires it to be.

H

Court of Appeal—Habeas corpus—Refusal of writ by court below—Jurisdiction of Court of Appeal to entertain appeal.

On an appeal by the applicant for a writ of habeas corpus against a refusal of leave to issue the writ the Court of Appeal must approach the matter de novo and independently and not as a matter determined by the discretion of the court below. Even if it were otherwise, the Court of Appeal will always inter- I fere with the exercise of discretion if it is of opinion that the court below has not attached sufficient importance to some question of law.

Habeas Corpus—Corporation—Direction of writ to officer.

Per SLESSER, L.J.: A writ of habeas corpus can be directed to a corporation, for a corporation may be liable in an action for false imprisonment, but difficulties may arise if no persons are served who may commit contempt by disobeying the order of the court, and so the writ should be directed to an officer of the corporation.

A **Notes.** Considered: *Re A* (*an infant*), [1955] 2 All E.R. 202.

As to the custody and upbringing of an infant, see 21 HALSBURY'S LAWS (3rd Edn.) 191 et seq., and as to habeas corpus generally, see ibid., vol. 11, 24 et seq. For cases see DIGEST 256 et seq. and 16 DIGEST 248 et seq.

Cases referred to:

(1) *Barnardo* v. *Ford*, *Gossage's Case*, [1892] A.C. 326; 61 L.J.Q.B. 728; 67 L.T.
B 1; 56 J.P. 629; 41 W.R. 333; 8 T.L.R. 728; 36 Sol. Jo. 681; 1 R. 17, H.L.; 30 Digest (Repl.) 149, *40*.

(2) *Humphrys* v. *Polak*, [1901] 2 K.B. 385; 70 L.J.K.B. 752; 85 L.T. 103; 49 W.R. 612, C.A.; 3 Digest 382, *211*.

(3) *R.* v. *Barnardo*, *Jones' Case*, [1891] 1 Q.B. 194; 64 L.T. 72; 55 J.P. 5; 39 W.R. 195; 7 T.L.R. 109, C.A.; affirmed sub nom. *Barnardo* v. *McHugh*,
C [1891] A.C. 388; 61 L.J.Q.B. 721; 65 L.T. 423; 55 J.P. 628; 40 W.R. 97; 7 T.L.R. 726, H.L.; 3 Digest 382, *207*.

(4) *R.* v. *New* (1904), 20 T.L.R. 583, C.A.; 3 Digest (Repl.) 383, *225*.

(5) *Cox* v. *Hakes* (1890), 15 App. Cas. 506; 60 L.J.Q.B. 89; 63 L.T. 392; 54 J.P. 820; 39 W.R. 145; 6 T.L.R. 465; 17 Cox, C.C. 158, H.L.; 16 Digest 250, *508*.

D (6) *Re Carroll*, [1931] 1 K.B. 104; 100 L.J.K.B. 62; 144 L.T. 154; 47 T.L.R. 20; 74 Sol. Jo. 770, C.A.; Digest Supp.

(7) *Re Agar-Ellis*, *Agar-Ellis* v. *Lascelles* (1878), 10 Ch.D. 49; 48 L.J.Ch. 1; 39 L.T. 380; 43 J.P. 36; 27 W.R. 117, C.A.; 28 Digest 275, *1258*; (1883) 24 Ch.D. 317; 53 L.J.Ch. 10; 50 L.T. 161; 32 W.R. 1, C.A.; 28 Digest 256, *1118*.

E (8) *Re Curtis* (1859), 28 L.J.Ch. 458; 23 J.P. 708; 7 W.R. 474; sub nom. *Curtis* v. *Curtis* 34 L.T.O.S. 10; 5 Jur.N.S. 1147; 28 Digest 264, *1170*.

(9) *R.* v. *Gyngall* (1893), 2 Q.B. 232; 9 T.L.R. 471; 4 R. 448; sub nom. *Re Gyngall*, 62 L.J.Q.B. 559; 57 J.P. 773; sub nom. *R.* v. *Gyngall*, *Re Hausherr* (*otherwise Austen*), 69 L.T. 481, C.A.; 28 Digest 141, *25*.

(10) *Re O'Hara*, [1900] 2 I.R. 232; 28 Digest 258, *1126 iii*.

F (11) *R.* v. *Nash*, *Re Carey* (1883), 10 Q.B.D. 454; 52 L.J.Q.B. 442; 48 L.T. 447; 31 W.R. 420, C.A.; 3 Digest 381, *204*.

(12) *Hottentot Venus' Case* (1810), 13 East. 195; 104 E.R. 344; 16 Digest 255, *562*.

(13) *Talbot* v. *Earl of Shrewsbury*, *Doyle* v. *Wright*, *Talbot* v. *Berkeley* (1840), 4 My. & Cr. 672; 9 L.J.Ch. 125; 4 Jur. 380; 41 E.R. 259, L.C.; 28 Digest
G 279, *1306*.

(14) *Re Hunt* (*A Minor*) (1843), 2 Con. & Law 373; 28 Digest 276, *1265 ii*.

(15) *Re Austin*, *Austin* v. *Austin* (1865), 4 De G.J. & Sm. 716; 6 New Rep. 189; 34 L.J.Ch. 499; 12 L.T. 440; 29 J.P. 691; 11 Jur.N.S. 536; 13 W.R. 761; 46 E.R. 1098, L.C.; 28 Digest 277, *1274*.

(16) *Re Newbery* (1866), 1 Ch. App. 263; 35 L.J.Ch. 330; 13 L.T. 781; 12 Jur.N.S.
H 154; 14 W.R. 360, L.JJ.; 28 Digest 276, *1266*.

(17) *Hawksworth* v. *Hawksworth* (1871), 6 Ch. App. 539; 40 L.J.Ch. 534; 25 L.T. 115; 35 J.P. 788; 19 W.R. 735, L.JJ.; 28 Digest 279, *1302*.

(18) *Andrews* v. *Salt* (1873), 8 Ch. App. 622; 28 L.T. 686; 37 J.P. 374; 21 W.R. 616, L.JJ.; 28 Digest 274, *1257*.

(19) *Ex parte Hopkins* (1732), 3 P. Wms. 152; 24 E.R. 1009, L.C.; 28 Digest 272,
I *1246*.

(20) *Stileman* v. *Ashdown* (1742), 2 Atk. 477; 26 E.R. 688, L.C.; 25 Digest 189, *291*.

(21) *De Manneville* v. *De Manneville* (1804), 10 Ves. 52; 32 E.R. 762, L.C.; 28 Digest 339, *2069*.

(22) *Re Marquis of Salisbury and Ecclesiastical Comrs.* (1876), 2 Ch.D. 29; 45 L.J.Ch. 250; 34 L.T. 5; 40 J.P. 404; 24 W.R. 380, C.A.; 28 Digest 290, *1448*.

(23) *Ex parte Skinner* (1824), 9 Moore, C.P. 278; 28 Digest 263, *1163*.
(24) *R.* v. *De Manneville* (1804), 5 East, 221; 1 Smith, K.B. 358; 102 E.R. 1054; 28 Digest 262, *1158*.
(25) *Re Hakewill* (1852), 12 C.B. 223; 138 E.R. 888; 16 Digest 268, *760*.
(26) *R.* v. *Greenhill* (1836), 4 Ad. & El. 624; 6 Nev. & M.K.B. 244; 111 E.R. 922; 28 Digest 265, *1179*.
(27) *R.* v. *Clarke, Re Race* (1857), 7 E. & B. 186; 26 L.J.Q.B. 169; 28 L.T.O.S. 250, 252; 3 Jur.N.S. 335; 5 W.R. 222; 21 J.P.Jo. 53; 119 E.R. 1217; 28 Digest 272, *1242*.
(28) *R.* v. *Howes, Ex parte Barford* (1860), 3 E. & E. 332; 30 L.J.M.C. 47; 3 L.T. 467; 7 Jur.N.S. 22; 9 W.R. 99; 8 Cox, C.C. 405; 121 E.R. 467; sub nom. *R.* v. *Howse, Ex parte Barford*, 25 J.P. 23; 28 Digest 271, *1236*.
(29) *Cartlidge* v. *Cartlidge* (1862), 2 Sw. & Tr. 567; 31 L.J.P.M. & A. 85; 6 L.T. 397; 10 W.R. 672; 164 E.R. 1117; 27 Digest (Repl.) 502, *4446*.
(30) *Shelley* v. *Westbrooke* (1817), Jac. 266; 37 E.R. 850; 28 Digest 264, *1174*.
(31) *Re Besant* (1879), 11 Ch.D. 508; 48 L.J.Ch. 497; 40 L.T. 469; 43 J.P. 301; 27 W.R. 741, C.A.; 28 Digest 341, *2088*.
(32) *Re Scanlan (Infants)* (1888), 40 Ch.D. 200; 57 L.J.Ch. 718; 59 L.T. 599; 36 W.R. 842; 4 T.L.R. 611; 28 Digest 275, *1262*.
(33) *Re McGrath (Infants)*, [1893] 1 Ch. 143; 62 L.J.Ch. 208; 67 L.T. 636; 41 W.R. 97; 9 T.L.R. 65; 37 Sol. Jo. 45; 2 R. 137, C.A.; 28 Digest 276, *1269*.
(34) *Re Grey*, [1902] 2 I.R. 684; 28 Digest 267, *p*.
(35) *F.* v. *F.*, [1902] 1 Ch. 688; 71 L.J.Ch. 415; 28 Digest 293, *1491*.
(36) *Re Kerrigan* (1901), 39 S.L.R. 8.
(37) *Green* v. *Green*, [1929] P. 101; 98 L.J.P. 58; 140 L.T. 93; sub nom. *G.* v. *G.* 45 T.L.R. 7; 73 Sol. Jo. 111; 27 Digest (Repl.) 664, *6286*.
(38) *Re Thain, Thain* v. *Taylor*, [1926] Ch. 677; 95 L.J.Ch. 292; 135 L.T. 99; 70 Sol. Jo. 634, C.A.; Digest Supp.
(39) *R.* v. *Felton and Wenman* (1758), 1 Bott's Poor Law (5th Edn.), p. 478; 3 Digest 383, *215*.
(40) *R.* v. *Walker* (1912), 28 T.L.R. 342, D.C.; 3 Digest 382, *208*.
(41) *Ex parte Knee* (1804), 1 Bos. & P.N.R. 148; 127 E.R. 416; 3 Digest 381, *199*.
(42) *R.* v. *Bolton Union* (1892), 36 Sol. Jo. 255; 56 J.P.Jo. 149; 3 Digest 384, *228*.
(43) *Re White* (1893), 9 T.L.R. 575; 3 Digest 384, *227*.
(44) *Re Fynn* (1848), 2 De G. & Sm. 457; 12 L.T.O.S. 143; 1 Jur. 713; 64 E.R. 205; 28 Digest 262, *1160*.
(45) *Goff* v. *Great Northern Rail Co.* (1861), 3 E. & E. 672; 30 L.J.Q.B. 148; 3 L.T. 850; 25 J.P. 326; 7 Jur.N.S. 286; 121 E.R. 594; 13 Digest 404, *1261*.
(46) *R.* v. *Poplar Borough Council (No. 1)*, [1922] 1 K.B. 72; 91 L.J.K.B. 163; 126 L.T. 189; 85 J.P. 273; 37 T.L.R. 963; 66 Sol. Jo. (W.R.) 2; 19 L.G.R. 675; sub nom. *R.* v. *Poplar Borough Council, Ex parte L.C.C., R.* v. *Poplar Borough Council, Ex parte Metropolitan Asylum's Board*, 2 B.R.A. 810, C.A.; 16 Digest 293, *1066*.

Appeal from a judgment of the Divisional Court, affirming an order of CHARLES, J., in chambers, refusing leave to issue a writ of habeas corpus directed to the respondent, an incorporated society, namely, the Homeless Children's Aid and Adoption Society and F. B. Meyer Children's Homes, to have the body of Joan Margaret Carroll brought before the court.

Joan Margaret Carroll, the illegitimate offspring of the applicant for the rule Ellen Carroll, a spinster, was born at a public institution called the Warkworth House, Isleworth, on April 14, 1929, and was, therefore, at the time of the hearing under two years old. The mother was at all times a member of the Roman Catholic Church, and the child was duly baptised by a Roman Catholic priest, the Rev. Ralf Gardner, according to the rites of the Roman Catholic Church. Some time in October, 1929, the mother wrote to a Mr. Beesley, the secretary of the respondent society, asking him if he would help to get the little girl adopted, and on Oct. 31, Mr. Beesley answered that he would be pleased to help in any way he might be able. The respondent society was incorporated on Dec. 1, 1924, under s. 20 of the Companies (Consolidation) Act, 1908, as a company limited by guarantee not having share capital. The society was one which not only conducted a children's home at Wanstead and placed out children with foster parents, but also arranged for the adoption of children with whom the society kept in touch by visitation until the child reached the age of sixteen years. The society was a Protestant organisation and brought up the children under its care and arranged for their adoption in a religious belief described by them as the Protestant Evangelical faith.

In his letter of Oct. 31, Mr. Beesley enclosed a form which the applicant sent back filled up on Nov. 2, 1929. That form was headed: "Particulars to be given by a mother on application for the admission of a child." In answer to the question: "Do you wish us to arrange for the adoption of the child?" the applicant answered: "Yes." To the question: "Has the child been baptised?" she replied: "Yes." She also said that she was not able to contribute anything to the support of the child. Nevertheless, above her signature appeared the words: "Should my child be received, I promise to make my payments regularly or remove my child if required at any time to do so." From the form which she returned it appeared that the child was her second child; that she wished the society to arrange for the adoption; and that, in answer to the question whether the child had been baptised, she answered: "Yes," but omitted to add whether by a Protestant or a Roman Catholic ceremony. The form itself did not make any distinction as to kinds of baptism. On Nov. 23, a would-be adopter applied to the society for particulars. The adopter was twenty-four and his wife twenty-seven. He stated that he was in business on his own account and that he was prepared to bring the child up in the Protestant faith. On Nov. 28, Mr. Beesley wrote to the applicant: "We have some friends wishing to adopt a little one," and asked the applicant to bring the little girl to his office on Dec. 5, when the would-be adopters would take the child back on a visit with a view to adoption. The applicant attended at the office with the child on Dec. 3. The child was then handed over to the prospective adopters, and, after that, the applicant was called into the room and, according to the evidence on behalf of the society, it was explained to her that the child would be brought up in the Protestant Evangelical faith. On the other hand, the applicant said that no question was asked as to the religion of the child at any of the interviews, and that she did not fully realise what the effect of giving up all her rights over her child would be. On Dec. 3, however, she signed what was said to be a consent to an adoption order under the Adoption of Children Act, 1926, the name of the adopters being omitted, in which she consented to the making of an adoption order. She also signed a form of "mother's guardianship agreement," agreeing not to interfere with the training, education, or control of the child. She undertook not to molest or interfere with any person connected with the society or persons having the care of the child. The child then went to live with the adopter and his wife. The adopter subsequently expressed to Mr. Beesley the great pleasure of himself and his wife at the adoption of the child, and reported the child's progress from time to time to the society.

On Dec. 7, 1929, Father Rusher, the Roman Catholic chaplain to Warkworth House, wrote to Mr. Beesley saying that the applicant was a Roman Catholic and that the child was baptised as such. He further stated that the applicant was anxious that the child should be brought up in the faith of its baptism, and that she had forgotten that important point in her anxiety. On Jan. 17, 1930, the adopter filled in the society's form of adoption agreement which it was the intention of the society to use in applying to the court for the adoption order. Mr. Beesley said that that would have been done, notwithstanding the fact that on Dec. 7 he had received the letter from Father Rusher, but that on Jan. 23 Father

Craven, the administrator of another society for destitute Roman Catholic children, wrote to Mr. Beesley, stating that the mother was a Roman Catholic, and that the child had been so baptised. On Jan. 25, 1930, the applicant wrote to Mr. Beesley saying that she wanted the child back so that she could arrange for it to be brought up in its own religion, and asking him to let her know where she could find the child, and at what time she could arrange to have her back. Correspondence followed between the plaintiff and Father Craven and Mr. Beesley, and on Feb. 28, 1930, Mr. Beesley pointed out that the child was in the north of England, that he had assured the adopter and his wife that the child was given up entirely at the time when she was handed over to him, and that he did not know that the child had been baptised into the Roman Catholic Church at the time when he stipulated that it should be brought up in the Protestant evangelical faith. On March 11, Mr. Beesley wrote to the adopters telling them that a claim had been made to the child by the applicant, and, in reply, they refused to give up the child as she had gained their affection and they hers. The applicant then appeared to change her mind, for on March 24, she told Mr. Beesley that it would be best to keep the child where it was, and asked if her son Patrick, who was five and also illegitimate, could also be adopted. Shortly after, the applicant said that she would give up writing to Father Craven altogether, and again asked Mr. Beesley to assist Patrick. On March 28, Father Craven said that the applicant had again changed her mind and that she wished to recover possession of the child. This attitude she subsequently maintained throughout these proceedings, and, in her affidavit, dated May 6, 1930, she said that she

> "finds that she cannot be entirely separated from her daughter as would be the case if the arrangements made with the defendant society were to continue, that she has applied to the Rescue Society for Destitute Catholic Children to take care of the child for her, that if they take the child she will be given every opportunity of seeing the child from time to time, that if the child is left in the custody of the persons with whom she now is, she finds that the child will be brought up in a faith other than that which she professes, that the child was baptised as a Roman Catholic, and that it is her earnest desire that she should be brought up as one."

Two other affidavits, one by Father Craven and the other by a Mr. Carmody, explained what the Crusade of Rescue and Homes for Destitute Catholic Children were prepared to do for the child. In substance they said that the child, if handed over by the mother, would be taken under the care of that society; that she would be entrusted to the care of a foster-mother, carefully selected; that when she reached school age she would go to a home staffed by sisters of charity; that later opportunities would be given for her emigration if she and her mother wished; that, if the parent expressed a special wish, the society would take steps to find an adopter; and that while the child was in one of the homes or with foster-parents special facilities would be accorded to the parent to visit her. Subsequently, the child returned into the custody of the respondent society. The Divisional Court refused leave to issue the writ of habeas corpus. The applicant appealed.

Serjeant Sullivan, K.C., and *S. Seuffert* for the applicant.
Sir Thomas Inskip, K.C., and *E. G. Palmer* for the society.

Cur. adv. vult.

Dec. 2. The following judgments were read:

SCRUTTON, L.J.—Ellen Carroll, the mother of a child, Joan Margaret Carroll, now nineteen months old, hereafter called "the child," obtained a rule nisi for a writ of habeas corpus addressed to a society the full name of which is "Homeless Children's Aid and Adoption Society and F. B. Meyer Children's Home (Incorporated)," hereafter called "the society," calling on this society to show cause why a writ of habeas corpus should not issue to them directing them to produce the child to abide the order of the court as to its custody. When the case came before CHARLES, J., in chambers, after hearing affidavit evidence, he declined to make the order absolute. The Divisional Court on the same affidavit evidence affirmed the judge's order. The mother appeals to this court. The circumstances are changed to this extent. At the time of applying for the writ it is extremely probable that the child was not in the legal custody of the society, though she had been in that custody before the application for the writ. She was probably in the custody of two persons, husband and wife, who proposed to adopt her. The society had declined to give the mother the name of the adopting parent, though they offered to disclose it to the court. In these circumstances it was obvious, on the authority of the decision of the House of Lords in *Barnardo* v. *Ford*, *Gossage's Case* (1), that the writ could not issue against the society. This, however, would leave undecided the question which the parties wanted decided, namely, whether the custody should remain with the adopting parents or be transferred to the mother or persons nominated by her. Accordingly, to avoid another writ being applied for directed to the adopting parents, the society got back the child into their custody, so that the merits could be decided in the present proceedings, and two further affidavits were filed.

The facts of the case were as follows. The mother, Ellen Carroll, who at the age of twenty-seven had given birth to an illegitimate child named Patrick, had, on April 14, 1929, at the age of thirty-two, given birth to a second illegitimate child. The mother was a domestic servant and was at the time of the birth of Joan Margaret in the workhouse with her son Patrick. The mother was a Roman Catholic, and shortly after birth the child was baptised by a Roman Catholic priest in the rites of the Roman Catholic religion. It appears that the Roman Catholic authorities were proposing to find a Roman Catholic home for the child, but according to their set policy, which is not to make things too easy for the mothers of illegitimate children, lest such mothers should be encouraged to rely on an illegitimate child's being provided for as soon as born, they were not hurrying the matter. The mother, who desired to get out of the workhouse and work as a domestic servant, apparently became impatient, and, hearing probably from someone in the workhouse of the society and of Mr. Beesley, its secretary, wrote at the end of October, 1929, to Mr. Beesley, asking for help to get her little girl adopted. Mr. Beesley asked her to fill up a form, and she did so, stating that she wished the society to arrange for the adoption of the child. The form did not ask, and she did not disclose, her religion. The form did ask whether the child was baptised, but not in what religion. I think it is obvious that in the future it would be desirable that these societies, whether Roman Catholic or Protestant, should inquire into the religion of the parents, and into what religion, if any, the child has been baptised. On Nov. 28, 1929, Mr. Beesley wrote informing the mother that some friends wishing to adopt a little one would be at the society's office on a named day and, perhaps, might like to take the child back with them on a visit with a view to adoption. The letter stated that the mother must sign an agreement "giving baby up entirely for adoption," and also that the mother would not know the name and address of the adopting parents, but the society would report to the mother the child's health and progress.

Accordingly, on Dec. 3, the mother brought the child to the society's office. The adopting parents saw the child; the mother did not see the adopting parents, and, as Miss Violet Agar, assistant-secretary to the society, deposes in one of the fresh affidavits, the child was "handed over to the prospective adopting parents." These parents signed an agreement that the child should be brought up in the Protestant Evangelical faith. Up to this time the mother had not been informed by the society that according to the rules of the society the child would be brought up "in the Protestant Evangelical faith." There is no evidence whether she knew this or not; and the society did not know and made no inquiry what the religion of the parent was or into what faith the child had been baptised. At the interview with the mother after the child had been handed over, Miss Agar explained to the mother a "mother's guardianship agreement," and a "consent to adoption order." Miss

Agar says she explained to the mother that it was a permanent surrender of her A
maternal rights, and that the mother fully understood it. As the mother is by the poor law statutes under an obligation to maintain her child, it has been held that an agreement by her to surrender her rights to someone else is contrary to public policy and void: *Humphrys* v. *Polak* (2), a decision of the Court of Appeal. Such an effect can be produced only by an adoption sanctioned by the court under the Adoption of Children Act, 1926. The consent of the mother to such an order B
of the court is one of the matters that the court must investigate.

To prove such consent Miss Agar obtained the signature of the mother to a printed form of "consent to adoption order," none of the blanks in which was filled in. In particular, the name and address of the adopting parents were not filled in. In my opinion, this was a very unsatisfactory form of procedure. I do not think a form in which the mother consents to adoption by anyone nominated by the C
society, without knowing whom, should be acted upon by any court. A few days afterwards, on Dec. 7, the Roman Catholic priest, in charge of the mission which looked after the workhouse in which the mother was resident, wrote calling the society's attention to the fact that the mother was a Roman Catholic, and that the child was baptised in that faith, that the Roman Catholic mission were then trying to find a home for the child, and that the mother was anxious that it should D
be brought up in the faith of its baptism. Mr. Beesley does not seem to have answered this letter; one would have thought that when he discovered that he had unwittingly arranged for the child of a Roman Catholic mother, baptised with Roman Catholic rites, to be brought up in the Protestant Evangelical faith, he would have offered some explanation. As he did nothing, on Jan. 23, he received a telephone communication from Father Craven, the head of the Roman Catholic E
mission, in effect repeating the letter of Dec. 7; and also a letter from the mother saying that she had not taken into consideration the fact that she should have insisted on the child's being adopted by Roman Catholic people, and that she wanted the child back so that she could arrange for it to be brought up in its own religion. Mr. Beesley, to say the least, showed no eagerness to comply with the mother's request; he wrote that he would see the adopting parents when he went F
north at some later time, but that they had grown dotingly fond of the child. It may be remarked that between Dec. 3, the handing over, and Dec. 7, when Mr. Beesley learnt of the Roman Catholic parentage, the adopting parents had not much time to "grow dotingly fond of the child." Correspondence continued with no result, except that by Feb. 28, Mr. Beesley had made up his mind, very sensibly in my opinion, not to arrange for the adoption of any more children baptised into G
the Roman Catholic faith without communicating with Father Craven to see if there was any difficulty in the way. Father Craven also said that he found it a good practice to inquire not only the faith of the child, but also that of the parents: "This safeguards the rights of the child."

The next material change was that on March 24, the mother introduced a new complication by writing a letter of that date. Apparently she wanted the boy H
Patrick adopted as well, and as Father Craven, under his mission's policy, was not making it too easy for her, and was trying to get the girl back into Roman Catholic charge, she endeavoured to get the Protestant mission to release her. She wrote: "While I have Patrick, the guardians will not let either of us out, so would be very thankful if you would hurry things along." It appears from Father Craven's I
letter of March 28, that when advised again as to her duty as a Roman Catholic to her child by her religious advisers she withdrew her application as to Patrick and repeated her application for the girl. As the society refused to restore the girl or to give the name and residence of the adopting parents, the writ was applied for by the mother, who swore an affidavit in support of it, though, no doubt, the expenses of the eminent counsel who appear are provided by Roman Catholic organisations, as is also the cost of the eminent counsel on the other side by the society. It rather appears, as LORD ESHER said in a previous case, that the writ

of habeas corpus is being used not for the body, but for the soul of the child. The elder child Patrick is now in a Roman Catholic home.

Counsel for the society, while submitting his society to the directions of the court, put forward two matters for our consideration. First, he submitted that it was not clear that the mother really desired that the child should be brought up in the Roman Catholic faith. He expressly disclaimed arguing that she was of such bad character that her wishes for the religious and social education of the child should not be considered. Both this court and the court below only know the mother by her affidavits and actions. The opinion which I have formed of her is that when left to herself and pressed by the inability to get work by reason of the incumbrance of her two children, she is chiefly anxious to hand over their custody to anyone who will maintain them regardless of religion, but that, when the spiritual advisers of her religion point out to her that her duty is to bring up her children in the religion which she professes, she recognises that duty and is prepared to act on it and does so in applying for this writ. I take the same view of her as LORD HERSCHELL did, on very similar facts, of the mother concerned in *Barnardo* v. *McHugh* (3). That mother, originally a Roman Catholic, had had the infant baptised, both as a Roman Catholic and as a Protestant, had sent him to a Protestant school, and had signed an agreement by which Dr. Barnardo was to have the custody of the boy for twelve years, but then, coming into contact with Roman Catholic advisers again, "was persuaded that she was doing wrong in permitting her child, who had been originally baptised as a Roman Catholic, to be educated as a Protestant." LORD HERSCHELL said: "I therefore cannot regard the application for the habeas corpus as made otherwise than by her." I take the same view in this case. In the second place, counsel for the respondent society submitted that, on considering the proposals on either side for dealing with the child, that of the society was more to the advantage of the child than that of the mother. The mother's proposal, backed by the Roman Catholic rescue society, was that the child should be placed with a foster-mother, selected and controlled by the society, until she was of school age, when she would be transferred to the Roman Catholic schools managed by sisters of charity until she was sixteen, when she might either be emigrated with the mother's consent and placed in a suitable situation in the Dominions till she was twenty-one, or established in a similar situation in England. Her mother would have access to her. Her religious education would be in the religion of her mother and her baptism.

The society's proposal is that, if the court permits, she should be adopted by her adopting parents, whom the society certifies to be respectable and competent, but of whose position this court knows nothing. As to her future scheme of education this court knows nothing; it does not know whether at school age she will be a day scholar or will be educated away from home. The mother will have no access to her. She will be trained in the "Protestant Evangelical religion." It is not stated whether this means the Established Church of England on its evangelical side, or one of the Nonconformist denominations whose leaders are associated with the society. I am under the impression that many evangelical members of the Church of England would be much surprised to hear that their religion is the same as that of their Nonconformist brethren. Counsel for the respondent society laid great stress on the advantage of a "home" as compared with life in an institution. In *R.* v. *New* (4) this court removed a child from a "home" with a foster-parent who had looked after her "for many years," where she was attending a Church of England and a Baptist Sunday School and a Baptist Chapel, to an orphanage kept by Holy Cross Sisters (Anglican), because it was desired by the mother. I may add that it is not universally accepted that a "home" with no external education is the best thing for a child. Many home brought-up children are spoilt and deprived of independent initiative.

The question then is: What view is the Court of Appeal to take of these contending proposals and of the fact that two tribunals below have expressed an opinion in favour of the proposals of the Protestant society? In the case of the procedure by which the applicant for habeas corpus could go to each judge of the High Court in turn, Lord Halsbury, in *Cox* v. *Hakes* (5), states that each court or judge is bound to consider the question independently and not to be influenced by the previous decisions refusing discharge. We have recently held that the Court of Appeal has no original jurisdiction in habeas corpus, but can only act by way of appeal, and cannot even act then if the corpus has been discharged by the court below: see *Re Carroll* (6). The procedure is all in favour of the liberty of the subject, and I think the Court of Appeal must approach the matter independently and not as a matter determined by the discretion of the court below. But if it were otherwise, the court will always interfere with the exercise of discretion if it is of opinion that the court below has not attached sufficient importance to some question of law. I think in the present case the courts have not given sufficient attention to the question of the parent's right to control the religion of a very young child, too young to have any wishes of its own. As Lindley, L.J., said in *R.* v. *Barnardo, Jones' Case* (3):

> "Nor is it the duty of the court to insist that the child shall be brought up in the Protestant rather than the Catholic religion contrary to the wishes of the mother":

see also *Barnardo* v. *McHugh* (3).

While, after the Judicature Acts, the Court of King's Bench, which had previously acted on the strict common law views of parental rights, was enabled by the fusion of law and equity prevailing, to add to its powers the equitable view of the Court of Chancery representing the King as parens patriæ, the court still vigorously enforced the right of the parents, especially of the father, to control the religious education of a young child. The cases of *Re Agar-Ellis* (7) are a strong example of this. The conflict there was between Protestant father and Roman Catholic mother, the father asserting his rights in a way which the members of the court, as men, disapproved of. But in the latter case Cotton, L.J., expressed his view thus (24 Ch.D. 334):

> "It has been said that we ought to consider the interest of the ward. Undoubtedly. But this court holds the principle that when, by birth, a child is subject to a father, it is for the general interest of families, and for the general interest of children, and really for the interest of the particular infant, that the court should not, except in very extreme cases, interfere with the discretion of the father, but leave him the responsibility of exercising that power which nature has given him by the birth of the child,"

and Bowen, L.J. (24 Ch.D. at p. 337):

> "The court must never forget and will never forget, first of all, the rights of family life, which are sacred. I think all that could be said on that subject has been said far better than I could repeat it by Kindersley, V.-C., in the case of *Re Curtis* (8), and the cases to which he there refers. Those are as to the rights of family life. Then we must regard the benefit of the infant; but then it must be remembered that if the words 'benefit of the infant' are used in any but the accurate sense it would be a fallacious test to apply to the way the court exercises its jurisdiction over the infant by way of interference with the father. It is not the benefit to the infant as conceived by the court, but it must be the benefit to the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a court of justice can."

But in that case the court was so slow to decide anything as to religion adverse to the possible views of the parent that, whereas Malins, V.-C., had made an order that the children should be brought up as members of the Church of England, the Court of Appeal, while arriving at the same result, struck out the declaration, leaving the matter to the decision of the father. These cases, which excited strong feeling at the time owing to the rival claims of father and mother, were probably one of the causes which led to the insertion of s. 5 of the Guardianship of Infants Act, 1886, which provides:

> "The court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same or otherwise as to costs as it may think just,"

and s. 4 of the Custody of Children Act, 1891, which provides:

> "Upon any application by the parent for the production or the custody of a child, if the court is of opinion that the parent ought not to have the custody of the child, and that the child is being brought up in a different religion to that in which the parent has a legal right to require that the child should be brought up, the court shall have power to make such order as it may think fit to secure that the child be brought up in the religion in which the parent has a legal right to require that the child should be brought up. Nothing in this Act contained shall interfere with or affect the power of the court to consult the wishes of the child in considering what order ought to be made, or diminish the right which any child now possesses to the exercise of its own free choice."

I emphasise the passage

> "to secure that the child be brought up in the religion in which the parent has a legal right to require that the child should be brought up."

In the present case, unless the mother is of so bad a character that her wishes as to religion and education may be disregarded, a contention which was expressly disclaimed by counsel for the respondent society, in my view, the mother has a legal right to require that the child shall be brought up in her religion, in which the child has been baptised. As LORD COLLINS said in *R.* v. *New* (4) (20 T.L.R. at p. 584), the religious education of a child was a

> "question on which the mother had the right to decide. She was a member of the Church of England, and her view as to what sort of religious education she desired her child to have must prevail."

It was argued that the advantage of a home instead of an institutional training outweighed the disadvantage of the departure from the religion desired by the mother. It was said that an institution was "detrimental" to the child so that the parent's wishes might be disregarded. The passage in LORD ESHER's judgment in *R.* v. *Gyngall* (9) shows that the matter which entitles the court to disregard the parent's wishes on the ground that they are "detrimental" must not be merely one which the court thinks better than the proposal of the parent, but a matter of essential importance, "very serious and important." I cannot regard the difference between home training and training in a respectable institution, against which nothing can be said except that it is an institution, as sufficiently important to entitle the court to disregard the parent's wishes as to religion in the case of a child so young as to have no wishes of its own.

It is, I hope, unnecessary to say that the court is perfectly impartial in matters of religion, for the reason that it has, as a court, no evidence, no knowledge, no views as to the respective merits of the religious views of various denominations. But, in my opinion, it has the duty, where the character of the parent is not attacked, to give effect to the views as to religious education of the parent of a child too young to have intelligent views of its own. The responsibility for religious views is that of the parent, not of the court. The court should not sanction any proposal, excellent in itself, which does not give effect to the parent's views on education, religious and secular. Those views are none the worse because they follow from the teaching of the parent's religious advisers. This is, in my opinion, A the result of the cases to which we have been referred, and the court will, in my opinion, be undertaking a dangerous and impossible task if it substitutes its own wishes and responsibility for the wishes and responsibility of the parent in the matter of religion. The Lord Chief Justice (LORD HEWART) was apparently of opinion that there had been a change of thought and attitude in the last forty years towards the problem that we have been considering. Except that the B mother's views have been put on an equality with the father's, I can see no such change. The Act of 1886 seems to me similar to the Act of 1925, except that the equality of the parents is made more pronounced. We were not referred to any authority, and I have found none, where in the case of a young child the court has disregarded the views of the only parent, except where that parent has so neglected his or her duty as to cease to deserve consideration, and counsel for the C respondent society disclaimed such an attitude towards this mother. We were not asked to make any order under the Act of 1891 for the Roman Catholic education of the child while with its adopted parents. It is probable that both sides would strongly object to such an order, the Roman Catholic side because it desires the whole control of the child, the Protestant side because their society does not exist to rear children in the Roman Catholic religion. D

This case seems to me one in which, according to the whole tenor of the authorities, the court should give effect to the wishes of the mother as to the religion and education of her second child, her eldest child being already educated in a Roman Catholic institution. I should take the same view if it was proposed that the child of a Church of England mother, baptised in the rites of the Church of England, should be brought up in a Roman Catholic home or in the Roman Catholic faith, E and if the mother who originally assented now objected. The wishes of the mother should prevail. I trust that the two societies concerned in this case, now that the difficulties of adopting children of a different religion have been brought to their attention, will take precautions that they do not accept the custody of a child, who or whose parents are not of the religion with which they are associated, until they have ascertained that the society specially associated with the religion of the F parents does not wish to or cannot deal with the case. Both societies are doing a good work in their respective spheres and can divide the work between them without clashing or overlapping. The society which now has the custody of Joan Margaret Carroll has asked for directions from the court as to the method in which that child should be dealt with. In my opinion, the court should direct them to hand over the child to its mother or her authorised representative. The necessity for G these proceedings has partly been due to the vacillations of the mother, partly to the failure of the society to ascertain the religion of the child's parent and the facts as to the child's baptism before the society took action with regard to the child. In these circumstances there should be no costs of the proceedings here or below.

GREER, L.J.—This is an appeal from the judgment of the Divisional Court dis- H missing an appeal from CHARLES, J., who had refused to order that a writ of habeas corpus should issue directed to the Homeless Children's Aid and Adoption Society and F. B. Meyer Children's Home (Incorporated) to have the body of Joan Margaret Carroll, an infant, produced. If the order had been made, it would have still been possible for the society when they brought up the body of the infant into I court to contend that its custody ought not to be transferred to its mother, the applicant, and should remain where it was, but in order to save multiplicity of proceedings the learned judge dealt with the question whether the applicant had made out a sufficient case to justify an order that the child should be removed from the custody of the society, or those in whose custody the child then was, to the persons to whose custody the mother in her affidavit said she desired the child to be removed. The Divisional Court dealt with the question in the same way, and it was conceded on the hearing before us that it would be better to decide the question on this appeal rather than to make an order for the infant to be produced and leave the question of its custody to be determined after a return was made to the writ. Counsel's note of what CHARLES, J., said on the hearing of the application to him was read to us, and from this it appears that he refused to make an order because he was not satisfied that the application was really made on behalf of the infant's mother, Nellie Carroll, and was not being made in her name by the Incorporated Society of the Crusade of Rescue and Homes for Destitute Catholic children, of which Father Craven was administrator, and that he—the judge—was not satisfied that the mother, the nominal applicant, had herself any real desire that her child should be removed from the custody of the two respectable persons with whom she had been placed by the respondent society with a view to her adoption under the Adoption of Children Act, 1926. The Divisional Court decided to leave the child where she was, on the ground, as I understand the judgment, that the interests of the child would be best consulted by leaving her where she was, so that certain inchoate adoption proceedings should be continued, and, if an adoption order were made, the proposing adopters would then be invested with the legal rights and subjected to the legal duties of parents of the unfortunate illegitimate child of the applicant. The Divisional Court was also influenced by a doubt as to the real wishes of the mother.

The facts established by the affidavits before the court are as follows. The child was born on April 14, 1929, in the Warkworth House Infirmary. She was the illegitimate daughter of a domestic servant named Nellie Carroll, who had previously had another illegitimate child, a boy. There is nothing in the affidavits to show where the boy was born or whether the mother had shown the least anxiety with regard to the boy that he should be brought up in the Roman Catholic faith, nor was there any evidence to show that the Roman Catholic chaplain at the workhouse or anybody representing Father Craven's society had shown any anxiety to secure control over the boy's religious education, or had given the mother any advice about it, or that they had taken any steps to obtain the custody of either of the two children. For six months after the birth of Joan Margaret Carroll her mother remained in the workhouse hospital with her two children, and, apparently, she was unable to leave so long as her children were there. At the expiration of six months she, having heard of the respondent society, wrote a letter to them asking for their influence to get the child Joan adopted. They replied by sending her a form which requested information on certain particulars, and on Nov. 2, she appears to have filled up the particulars requested by the form, but without signing it. Then, on Nov. 28, she was informed that the society had found some friends wishing to adopt the child, and the society asked her to bring the child to their office at 93, Westminster Bridge-road and they would arrange for the friends to see the child, and they might like to take the child back with them on a visit with a view to adoption. On Dec. 3, the applicant brought the child to the respondent society's office. She was seen and approved by a respectable couple from the north of England, who were willing to adopt her. The applicant did not see the proposed adopting parents. It was, however, after the child had been handed over to the proposed adopters, explained to her that the child would be brought up as a Protestant. She then signed two documents, a consent to an adoption order being made, and a guardianship agreement. The names of the proposing adopters were not stated in either document, but there is no room for doubt that at this time the applicant was quite willing that her child should be handed over to the proposed adopters, and that in due course application should be made for legal adoption, and that the child should be brought up in the Protestant faith. The child was taken away by the proposed adopters. The next thing that happened was that on Dec. 7, a letter was received from the Rev. Francis Rusher, Roman Catholic chaplain of the workhouse hospital, stating that the child had been baptised by a Roman Catholic priest, and claiming that the child should be brought up as a Roman Catholic. He stated that the mother had acted without his knowledge, and that she was now anxious that it should be brought up in the faith of its baptism, but had forgotten that important point in her anxiety. On Jan. 25, 1930, the society wrote a friendly letter to Father Craven, who had telephoned to them, in which it was stated that the adopting parents had become devotedly attached to the child, and suggesting that for the present the matter should remain in abeyance. On the same date the applicant signed a letter, which appears to me from internal evidence not to have been composed by herself, in which she said that she now wanted her child back so that she could arrange for it to be brought up in its own religion. After some further correspondence, to which it does not seem necessary to refer, the child's mother by an undated letter written about Feb. 18, stated that she had just received a letter from Father Craven, and said: "he has a Catholic home waiting for little Joan, and wishes me to write to you to ask you if Joan is coming back." The letter concluded: "if she is coming back, please let me know where to fetch her, also what time and day, as I cannot leave here until I have her back." On March 8, Father Craven wrote to the society, saying:

> "I think you know that I cannot in conscience desist from *my efforts* to persuade the adopters to hand over the child at the very earliest possible opportunity to my care."

The italics are mine. And in a later letter of March 20, the reverend gentleman seems to base his application, not so much on the wishes of the mother, as on the very definite rights of the child. Then, on March 23, the mother writes the following letter:

> "Have kept you waiting for a reply, but have been thinking it would be best to keep Joan where she is and would be very grateful to you if you could fix my boy Patrick, who is five years old, into one of your homes, or if inconvenient to do that, could you get him adopted. Should be out of here months ago, but owing to my boy Pat I am unable to go. So will be very pleased if you would send me a reply back, stating about Joan and my boy Pat."

This letter was acknowledged by Mr. Beesley, the respondents' secretary, expressing satisfaction that the mother had agreed to the girl remaining where she was, but pointing out how difficult it was for them to do anything with regard to the boy in view of the feeling of Father Craven about these matters, and advising her to write to Father Craven again. The mother replied on March 26, saying that Father Craven was not going to help her with the boy unless she received Joan back, adding,

> "so we have come to the conclusion that it would be best to give up writing to Father Craven altogether. They have turned very disgusted towards me,"

and again requesting that they would put her boy on their list. The next thing that happened was a letter from Father Craven, saying that he had been to see the mother and had ascertained "her real sentiments in the matter," and saying that she had offered the child in a fit of pique because they would not immediately relieve her of her responsibilities. The child not having been returned to her mother or to the institution presided over by Father Craven, solicitors were consulted, and on April 17, 1930, they wrote a letter demanding the return of the child. Application was then made for a writ of habeas corpus, and various affidavits were filed setting out the facts, including an affidavit sworn by the mother in which she stated that she could not maintain the child with herself, but wished her to be handed over to the institution known as the Incorporated Society of the Crusade of Rescue and Homes for Destitute Catholic Children, on the ground that she did not want to be entirely separated from her daughter, and on the ground that it was her earnest desire that she should be brought up in the Roman Catholic religion. She was obviously a woman without means and incapable of paying solicitors' costs or of incurring the expense of the eminent counsel who represented her in the present proceedings.

It was contended on behalf of the applicant that the judgment of the court below did not attach adequate weight to the wishes of the mother, and that nothing was proved which would be sufficient in law to outweigh the primâ facie right of the mother of an illegitimate child to put the child in charge of those whom she desired to look after it. Several cases were cited, but I do not think there is any room for doubt as to what is the law relevant to the question that we have to determine. Before the Supreme Court of Judicature Act, 1873, the position in the common law courts was quite clear. The parents were entitled to the custody of their children unless it was proved that they had been guilty of misconduct which rendered them unfit to be entrusted with such custody, but the powers of the Court of Chancery were greater than the powers of the common law courts. As pointed out by Lord Esher in *R.* v. *Gyngall* (9) that court was placed in a position by reason of the prerogative of the Crown to act as supreme parent of children, and had to exercise its jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child. The jurisdiction of the court, it was pointed out, is not confined to cases where there had been misconduct on the part of the parents, but applies where it is clearly right for the welfare of the child in some very serious and important respect that the parents' right should be suspended or superseded. The effect of the judgment in *Gyngall's Case* (9) is clearly and, I think, accurately summarised by FitzGibbon, L.J., in *Re O'Hara* (10), where he says ([1900] 2 Ir.R. at p. 239):

> "The following principles appear to be settled: (1) At common law, the parent has an absolute right to the custody of a child of tender years, unless he or she has forfeited it by certain sorts of misconduct; (2) Chancery, when a separate tribunal, possessed a jurisdiction different from that of the Queen's Bench, and essentially parental, in the exercise of which the main consideration was the welfare of the child, and the court did what, on consideration of all the circumstances, it was judicially satisfied that a wise parent, acting for the true interests of the child, would or ought to do, even though the natural parent desired and had the common law right to do otherwise, and had not been guilty of misconduct; (3) The Judicature Act has made it the duty of every Division of the High Court to exercise the Chancery jurisdiction; (4) In exercising the jurisdiction to control or to ignore the parental right the court must act cautiously, not as if it were a private person acting with regard to his own child, and act in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded."

This statement in my judgment contains all the law relevant to the decision of this case. The question we have to decide is one of fact, not of law.

O'Hara's Case (10) was greatly relied upon by counsel for the applicant, but on its facts it is clearly distinguishable from the present case. The choice of the court in *O'Hara's Case* (10) lay between a good home provided for a legitimate child by strangers with whom the mother, when she had no home of her own, had made an agreement giving up her child to their custody, and an equally comfortable and respectable home provided by the mother in which she desired to have the control and upbringing of her child. It was not a contest, such as the present case, between a home, on the one hand, and institutional treatment, on the other. For my part, I am judicially satisfied, as the Divisional Court was, that the welfare of the child requires that, if possible, it should be brought up in the atmosphere of a respectable home under the control of respectable and kindly people who are willing to undertake the responsibility of parents to her, rather than that she should be brought up for a few years by a paid foster-mother, who may have other children to look after, and afterwards brought up in an institution. The applicant's counsel also relied very strongly on *R.* v. *New* (4). The facts of that case are also distinguishable from the present case. The question was not concerned with the custody and upbringing of a child of eighteen months, but with the custody and education of a child of twelve years of age, and there was in that case no possibility of the persons, in whose custody the child was, becoming adoptive parents of the child under the same liability in law of providing for it as if they were the real parents. That case is a decision on its facts, and, in my judgment, it does not compel this court to give a similar decision on the different facts of the present case. In *Barnardo* v. *McHugh* (3) the House of Lords had to consider the way in which the question should be approached with regard to an illegitimate child. In his speech in the House of Lords LORD HERSCHELL uses these words—after referring to the earlier case of *R.* v. *Nash* (11):

> "I think this case determines—and I concur in the decision—that the desire of the mother of an illegitimate child as to its custody is primarily to be considered. Of course, if it can be shown that it would be detrimental to the interest of the child that it should be delivered to the custody of the mother or of any person in whose custody she desires it to be, the court, exercising its jurisdiction, as it always does in such a case, with a view to the benefit of the child, would not feel bound to accede to the wishes of the mother."

I do not myself see any distinction between this proposition and the proposition that, if it be shown that it would be advantageous to the welfare of the child that it should be put into the custody of somebody other than its mother, the court would be entitled to refuse to hand the child over to its mother or to the persons in whose custody she desired it to be.

According to LORD ESHER's judgment in *R.* v. *Gyngall* (9) in order to justify an order interfering with the primâ facie right of the mother to determine the custody of her child, the court must find that it is "clearly right for the welfare of the child in some very serious and important respect that the parents' rights should be suspended or superseded." This is a question of fact, and, in my judgment, there was ample evidence in this case to justify the refusal of CHARLES, J., and of the Divisional Court to order the child to be delivered up to Father Craven's institution in accordance with the wishes expressed by her mother in her affidavit. It seems to be unnecessary to decide whether we agree with the view of CHARLES, J., that the application in this case is not really the application of the mother at all, but the application of the Incorporated Society of the Crusade of Rescue and Homes for Destitute Catholic Children. Even treating the application as one really made by the mother, and directing my attention to the question whether in serious and important respects the welfare of the child will be better secured by a decision which will make it possible for the proceedings for adoption to be continued, so that, if the court to which the application is made thinks right, an order will be made which will secure to the child all the benefits that she would have had if she had been the legitimate offspring of respectable and devoted parents, I still think the application for habeas corpus should be refused. If the court makes the order asked for by the applicant, the child will be put in charge of a paid foster-mother; she will be in the position of a lodger and will not be under the control of her mother, but no doubt will be under the supervision of some representative of the Crusade of Rescue. At the age of five, unless her mother changes her mind again, she will be put into an institution, where no doubt she will be wisely and kindly treated, but where she will inevitably miss the happiness and material advantages which are attendant on an upbringing in a good home. On the other hand, if the adoption proceedings result in an order, she will have all the advantages of home life, she will have two respectable persons to act in all respects as her parents, with all the legal rights and obligations of parents, and will be brought up in an atmosphere surrounded by affection which need not necessarily be inconsistent with wise discipline. In my judgment, the advantages to the welfare of the child are preponderantly in favour of leaving her where she is until it is ascertained whether an adoption order will be made. If no adoption order is made, the respondents' counsel took upon himself the responsibility of saying that the child would be delivered to the custody of those whom the mother says she desires to have charge of her child. In any event, the situation would be different from what it is at present, and if no adoption order is made, an application for habeas corpus might have a very different result from that which I think it ought to have at the present time. I do not think that we ought to decide in this appeal whether the court to whom the application for an adoption order will be made ought or ought not to make such order. There may be difficulties in the way of obtaining such an order. I do not think they are insuperable, but in any case I do not think we should say anything to pre-judge the question whether such an order ought or ought not to be made.

I have hitherto purposely made no reference to the question whether it is more or less advantageous for a child to be brought up in the Roman Catholic faith, or the Protestant Evangelical faith. This court ought to be quite neutral on a question of that sort, and should assume, as I do, that from a religious point of view the welfare of the child will be adequately provided for, whether she be brought up in the one faith or in the other. A point was made in the course of the argument, based on s. 4 of the Custody of Children Act, 1891, which refers to "the religion in which the parent has a legal right to require that the child should be brought up," and gives the court power where it thinks the parent ought not to have the custody of the child to make such order as it may think fit to secure that the child be brought up in the religion in which the parent has the legal right to require that the child should be brought up. It is to be observed that such an order is within the discretion of the court, but the court is not bound to make it. The reference to the legal right of the parent does not, in my judgment, mean that there is a legal right to have the child brought up in any particular religion independently of the parental rights as a whole. Obviously there is such a right in a parent as long as the parent is the guardian of the child and has its custody, but, in my judgment, it is not a separate and distinct right, and is only one of the rights which are included in the parental rights of the parent who is the guardian of, and has the custody of, his or her children, and in any event, if an application be made under s. 4 of the Act of 1891, the court is not bound to make such an order, but is only entitled to do so if in all the circumstances it thinks it right so to do. No application has been made to the court in the present case to make the order referred to in that section. It was said in the argument that the judgment of the Divisional Court delivered by the Lord Chief Justice was based on a misconstruction of the Guardianship of Infants Act, 1925. I do not think this is a justifiable criticism. In my opinion, all that the judgment was intended to convey was that actually the attitude of public opinion and the courts towards the powers of a parent over his children had become modified, and that nowadays less importance was attached to the rights of, and the wishes of, the parent, and more importance was attached to the welfare of the child, and the Act of 1925 was pointed out as an illustration of the modification, in one instance, of what at common law were the strict rights of a male parent. As the learned Lord Chief Justice says: "There seems to have been between 1891 and 1926 a certain development of thought in the matter."

For the reasons which I have given, I think we ought to agree with the decision of the Divisional Court, and that this appeal should be dismissed.

SLESSER, L.J., stated the facts as set out above and continued: It is a pleasant feature of this case that counsel on both sides admit that both Catholic and Protestant societies are satisfactory. Counsel for the respondent society urges that at present the child is living in a private home in happiness and affection, and this is not disputed by counsel for the applicant, nor does counsel for the society, on his side, dispute that the child would receive care and attention from the Catholic society. The criticism which counsel for the society makes is, in substance, that the child is now living with private persons of good character who were prepared actually to adopt the child, so that they would become legally responsible for it, whereas if the child is taken from the Protestant society and so, in effect, from the adopters, it will have to suffer institutional treatment of one kind or another, as the mother has admitted that she intends to hand over the child in such an event to the Catholic society, though retaining the right of access. The case has A received exhaustive argument and consideration, all of which are fully deserved, for there can be no more serious subject for the determination by a court than the disposition of a fatherless child, and, in coming to the conclusion which I shall express I am fully conscious of the gravity of the decision of the court in that it must, of necessity, affect the whole of this child's future well-being.

In my view, while the facts of every case must necessarily differ, we are not B without considerable guidance in the principles which should influence us in coming to a determination of this difficult problem. In my opinion, particularly having regard to the view expressed in the Divisional Court that recent legislation has invaded the old principles of law which used to determine these matters, this is a class of case where a somewhat close examination of the whole legal history of parental rights is not only justified but necessary. In the first place, it is well C to consider the present state of the law with regard to the jurisdiction which is here invoked. The matter is put with great clarity by FITZGIBBON, L.J., in *Re O'Hara* (10) as follows ([1900] 2 I.R. at p. 23):

> "At common law the parent has an absolute right to the custody of a child of tender years, unless he or she has forfeited it by certain sorts of misconduct; Chancery when a separate tribunal, possessed a jurisdiction different from that D of Queen's Bench, and essentially parental, in the exercise of which the main consideration was the welfare of the child, and the court did what, on consideration of all the circumstances, it was judicially satisfied that a wise parent acting for the true interests of the child would or ought to do, even though the natural parent desired and had the common law right to do otherwise, and had not been guilty of misconduct. The Judicature Act has made it the duty E of every division of the High Court to exercise the Chancery jurisdiction. In exercising the jurisdiction to control or ignore the parental right, the court must act cautiously, and not as if it were a private person acting with regard to his own child, and acting in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded." F

KAY, L.J., in *R.* v. *Gyngall* (9), similarly points out how, by reason of s. 25 of the Supreme Court of Judicature Act, 1873, the court can now exercise the original jurisdiction of the Court of Chancery as well as the old common law jurisdiction, and it is clear from these cases and from other authority that, on application by habeas corpus, the court, although the parent has not been guilty of any misconduct to disentitle him to the custody of the child, may now, under its Chancery G jurisdiction, if satisfied that it is essential for the welfare of the child, refuse to give the parent such custody. In *R.* v. *Gyngall* (9), LORD ESHER, M.R., says:

> "The court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of children, and must exercise that jurisdiction in the manner in which a wise, affectionate and careful parent would act for the welfare of the child. . . . The court may say in such a case that, although they H can find no misconduct on the part of the parent, they will not permit that to be done with the child which a wise, affectionate and careful parent would not do."

These observations were made in May, 1893, nearly two years after the decision of the House of Lords in one of the leading cases in this subject: *Barnardo* v. *McHugh* I (3). In that case, LORD HERSCHELL had taken a view similar to that of the Court of Appeal in *Gyngall's Case* (9). In *Barnardo* v. *McHugh* (3) LORD HERSCHELL says ([1891] A.C. at p. 398):

> "It is, however, no longer important to inquire what are the rights of the mother in relation to an illegitimate child at common law. All the courts are now governed by equitable rules, and empowered to exercise equitable jurisdiction. As was said by SIR GEORGE JESSEL, M.R., in *R.* v. *Nash* (11): 'In equity regard was always had to the mother, putative father, and relations on

> A the mother's side.' In that case the mother of an illegitimate child sought to have it delivered to her in order that it might be placed under the care of her sister. The child was in the custody of the wife of a labouring man, with whom it had been placed by the mother, who was living with another man as his mistress. The court, notwithstanding the opposition of the person in whose custody it was, ordered that the child should be delivered into the custody B desired by the mother. I think this case determines (and I concur in the decision) that the desire of the mother of an illegitimate child as to its custody is primarily to be considered. Of course, if it can be shown that it would be detrimental to the interests of the child that it should be delivered to the custody of the mother or of any person in whose custody she desires it to be, the court, exercising its jurisdiction, as it always does in such a case, with a view C to the benefit of the child, would not feel bound to accede to the wishes of the mother."

As the wishes of the mother are thus primarily to be considered, we have at the outset to give careful attention to the argument that the true wishes of the mother are not those expressed in her affidavits. I feel a great difficulty, in the absence D of all suggestion of coercion, duress, fraud, or any other element which would deprive the mother of the true exercise of her will, in coming to the conclusion that when an affidavit is sworn in so grave a manner as the present the deponent does not mean what she says. But in deference to the argument, I do not conclude the matter in my own mind by the affidavits, but consider other matters to which counsel for the society drew attention. First, he argued that the vacillation of E the mother, as appears from the evidence, in handing the child to the Protestant society, then desiring it back, then again asking the Protestant society to take it, together with its brother, and finally applying for a habeas corpus, show that the mother is exercising no true will. In *Barnardo* v. *McHugh* (3) a very similar state of uncertainty prevailed. LORD HERSCHELL, after reciting facts extremely similar to the present, saying that the mother was at one time indifferent whether the F child was brought up as a Protestant or Catholic, that the child was baptised in a Roman Catholic chapel and later baptised as a Protestant, that the mother afterwards caused the child to attend a Protestant school, and finally saying that it was manifest that the action of the mother proceeded from irritation, concluded: "I cannot regard the application for habeas corpus as made otherwise than by her."

G The second suggestion made on behalf of the society is that in reality Father Craven was voicing the opinion of the mother and not the mother herself. It may well be that Father Craven had influenced the mother in thinking that she was wrong in consenting to her child being brought up in a faith other than her own. Certainly, she appears to be illiterate, and many of the letters undoubtedly are phrased in language which suggests another hand and another mind, but, taking into account all these elements, I come back to the fact that she has herself sworn H that she desires access to her child, and desires that it should be brought up in her faith, and she desires it should be taken care of by the Catholic society. I think it would be unfair to Father Craven and the other priests of the society to assume that they have put forward her desires when they are not really her own. I prefer to believe her sworn testimony rather than to draw inferences on very I inadequate data to her detriment and to the detriment of those who are supporting her by affidavit in the present case: see the case of the *Hottentot Venus* (12) where the expressed wishes on affidavit of a female native of South Africa as to her liberation were regarded by the court against strong presumptions to the contrary. I assume, therefore, for the purposes of this case, that the mother does really desire to regain the power of disposition of her child, and says she has a right thereto. This alleged right she urges in substance on two grounds—first, her desire that the child should be brought up in her own religious faith, and, secondly, her desire for custody or access to it.

I propose to consider the question of religion first. This court is not concerned with the respective merits of religions when considering the welfare of a child, but it is concerned with the possible invasion of natural law (unless expressly authorised by statute) involved in bringing up a child in a religion different from that of its parent. In considering the principles of law which have here to be applied it is well first to examine the case of the child born in wedlock. Counsel for the applicant has drawn our attention to s. 4 of the Custody of Children Act, 1891, which speaks of the court having power to make such order as it may think fit to secure that the child be brought up in the religion in which the parent has the legal right to think that the child should be brought up. As regards the father, it was long a settled rule that, except in special circumstances, a child should be brought up in his father's religion: see *Re Agar-Ellis* (7); *Talbot* v. *Earl of Shrewsbury* (13); *Re Hunt* (*A Minor*) (14); *Re Austin, Austin* v. *Austin* (15); *Re Newbery* (16); *Hawksworth* v. *Hawksworth* (17). It has even been said that a father could not bind himself conclusively by contract to exercise, in all events, in a particular way, rights as to religion which the law gave him for the benefit of his children and not for his own: *Andrews* v. *Salt* (18). This parental right is recognised in the consolidated Poor Law Act, 1930: see s. 14 (2), 52, sub-ss. (1), (2), (5), s. 72 (3), s. 73 (1), (2), and s. 74, [repealed by the National Assistance Act, 1946]. The parent, it has been said, is guardian by nature and nurture—a view taken both by the Court of Chancery and courts of common law: see as to the former, *Ex parte Hopkins* (19); *Stileman* v. *Ashdown* (20); *De Manneville* v. *De Manneville* (21); *Re Marquis of Salisbury and the Ecclesiastical Comrs.* (22); as to the latter, *Ex parte Skinner* (23); *R.* v. *De Manneville* (24); *Re Hakewill* (25); *R.* v. *Greenhill* (26); *R.* v. *Clarke* (27); *R.* v. *Howes* (28); *Cartlidge* v. *Cartlidge* (29).

This doctrine of guardianship by nature and nuture would appear to be based upon the doctrine of natural justice as derived from antiquity:

> "Le pier ou la mier, mes un etranger ne peut justifier le pois d'un enfant per raison de norture." ("The father or the mother may take possession of a child by reason of nuture but not a stranger": per Danby, J., Year Book, 8 Edw. 4, Mich. Pl. 2.)

The early canon law with which equitable views are closely associated exhibits the same view:

> "Infans infidelium licite baptizatur, si parentes idest pater, mater, avus, avia vel tutores, consentant": Codex, Juris Canonici, Can. 750, paraphrased.

The Summa Theologica reveals the same mediæval attitude concerning the rights both as to religion and custody of parents over their children, in an extreme case, thus:

> "It is against natural justice if a child before coming to the use of reason were to be taken away from its parents' custody, or anything done to it against its parents' wish." "A son before coming to the use of reason is under his father's care" (Part II (second part), question 10, art. 12): as to religion "Contra justitiam naturalem esset, si pueri invitis parentibus baptizarentur": (Summa Theologica, 3, Question 68, art. 10).

The Statutes 11 & 12 Will. 3, c. 24, s. 7, and 1 Anne, c. 30, which penalised Catholic and Jewish parents respectively who refused to allow their children to be brought up as Protestants, have long since been repealed. The courts will now only deprive a father of the custody of his child on the ground of religious opinion when those opinions manifest themselves in conduct which the law regards as vicious and immoral: *Shelley* v. *Westbrooke* (30); *Re Besant* (31). As regards the married mother, under Statute 12, Car. 2, c. 4, if the father appointed testamentary guardians the mother had no right to interfere with them. Before that time a father could not appoint a guardian, and the right of a widow to the custody of her daughter was secured by statute: see 4 & 5 Ph. & M. c. 8, s. 4. By s. 1 of the Guardianship of Infants Act, 1886, the mother must be guardian either alone or jointly with others appointed by the father, but this was held not to affect the obligation of guardians after the father's death to see that the child was brought up in the father's religion (religio sequitur patrem): *Re Scanlan* (32); approved by the Court of Appeal in *Re McGrath* (33); *Re Grey* (34); *F.* v. *F.* (35). If the mother were sole guardian she had a legal right to the custody of her child: *R.* v. *Clarke, Re Race* (27). This rule is now modified in any proceedings before the court in consequence of the Guardianship of Infants Act, 1925, which was cited in the Divisional Court. Section 1 of that Act has the effect in proceedings before any court concerning the custody or upbringing of an infant that the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father or any other right at common law possessed by the father in respect of such custody or upbringing is superior to that of the mother, or the claim of the mother is superior to that of the father. So that, to-day, as between father and mother, the court may decide on the basis of the welfare of the infant which religious education it shall be given. This statute, however, in my view, has confined itself to questions as between the rights of father and mother which I have already outlined—problems which cannot arise in the case of an illegitimate child, and, respectfully, when we consider the whole history of the matter as I have endeavoured to do, it is difficult to see how that Act can affect the principles laid down in *Barnardo* v. *McHugh* (3) or how it can be said from a consideration of that statute that there has been a development of thought in the matter between 1891 and 1926 as was stated by the Lord Chief Justice in the Divisional Court. I apply the same observation to the Custody of Infants Act, 1891, to which the learned Lord Chief Justice refers in support of his opinion: see also in support of this view that the essential law is unchanged, *Re Kerrigan* (36); *Green* v. *Green* (37). In *Re Thain, Thain* v. *Taylor* (38) ([1926] Ch. at p. 691), SARGANT, L.J., in terms said: "Section 1 of the Guardianship of Infants Act, 1925, does not affect what was and what is the law."

These considerations as to the rights of the married father and mother are of great assistance when, as here, the special case of the illegitimate child falls to be determined. In the eye of the law, such a child is filius nullius and has no legal guardians: *R.* v. *Felton and Wenman* (39). The mother's legal rights as to custody are not entirely the same as those of the father of a legitimate child: *Barnardo* v. *McHugh* (3); *R.* v. *Walker* (40). Yet, nevertheless, while the child is under the age of nurture, the mother has a right to its possession; generally, in such a case, the court will prefer the mother to the putative father if there be conflicting claims: *Ex parte Knee* (41). Though the mother of an illegitimate child is thus not a legal guardian, her claim upon the child has always been recognised in equity. The mother has a natural right to its religious education and custody which will be regarded by the court: *R.* v. *Nash* (11); see BLACKSTONE'S COMMENTARIES (8th Edn.), vol. 1, p. 458. She has by law obligations imposed upon her in respect of the child: *Barnardo* v. *McHugh* (3). A contract between her and another person for the transfer to that person of her rights and liabilities is invalid: *Humphrys* v. *Polak* (2). In *R.* v. *New* (4) LORD COLLINS, M.R., said (20 T.L.R. at p. 584):

> "It was said that 'the religious education which the child would receive at this institution was objectionable.' But that was a question on which the mother had the right to decide."

It would appear, therefore, that so far as religious education is concerned, the authorities require the court to give the gravest consideration to the wishes of the parents—in the case of an illegitimate child—of the mother. In *R.* v. *Bolton Union* (42), CAVE, J., said:

> "The mother has forfeited her parental rights, but she has not forfeited the right of having her child brought up in the religion she desires."

Whether the legislature in applying the declaratory phrase "legal right" to the religious claims of the parent in s. 4 of the Custody of Children Act, 1891, has added anything to the effect of the authorities I doubt. But, in any event there A would appear to be an almost unbroken legal presumption through the ages that the mother of an illegitimate child is primâ facie entitled to have her child educated in her own faith, apart altogether from questions of custody—a right which the applicant specifically claims in her affidavits in this case. The creed of an illegitimate child is to be deemed to be that of the mother: *Re White* (43).

Secondly, as regards custody. In the present case we are told by both parties B that the machinery provided by s. 4 of the Custody of Children Act, 1891, will not avail—that is to say, that neither party is willing that the adopter should retain the custody of the child, and that the child should be brought up in the Catholic faith. Custody, therefore, and choice of religion cannot here be treated separately. Though custody in the strict sense is not claimed by the mother, accessibility—a kind of constructive custody—is claimed here. There is no reason to suppose that C if the child remains with the adopters the mother will regain custody even in this limited sense. Although the child may not find adopters through the Catholic society, the very fact that the Adoption Act will not be used, will preserve the legal rights of the mother over her child wherever that child may be, and the evidence is that the Catholic society will allow the mother reasonable access to her child. Bearing in mind the dictum of LORD HERSCHELL in *Barnardo* v. *McHugh* (3), which D I have quoted, it appears to me that the burden is upon the Protestant society to show that, at any rate, it would be detrimental to the interests of the child that it should be delivered to the custody of the mother or any person in whose custody she desires it to be.

The degree of what constitutes detriment in this connection has been considered in several cases. LORD ESHER in *R.* v. *Gyngall* (9) ([1893] 2 Q.B. at p. 242) quotes E KNIGHT BRUCE, V.-C., in *Re Fynn* (44) to the following effect:

> "Before this jurisdiction can be brought into action . . . [the court] must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shown himself to be a person of such a description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some F very serious and important respect, that his rights should be treated as lost or suspended—should be superseded or interfered with. If the word 'essential' is too strong an expression, it is not much too strong."

LORD ESHER continues ([1893] 2 Q.B. at p. 242):

> "That is a clear statement that the court must exercise this jurisdiction with G great care, and can only act when it is shown that either the conduct of the parent, or description of the person he is, or the position in which he is placed, is such as to render it not merely better, but—I will not say essential, but—clearly right for the welfare of the child in some very serious and important respect that the parent's rights should be suspended or superseded; but that, where it is so shown, the court will exercise its jurisdiction accordingly." H

In LORD ESHER's view, therefore, the test would appear to be: Is it clearly right for the welfare of the child in some very serious and important respect that the parent's rights should be suspended or superseded? In *R.* v. *New* (4) it is thus put by LORD COLLINS, M.R. (20 T.L.R. at p. 584):

> "Was there anything in the circumstances of the proposed new disposition of the child by her mother which was so clearly contrary to the benefit of the I child as to justify the court in overriding the wishes of the mother?"

In *Re O'Hara* (10) ([1900] 2 I.R. at p. 239), FITZGIBBON, L.J., says:

> "In exercising the jurisdiction to control or to ignore the parental right the court must act cautiously, not as if it were a private person acting with regard to his own child, and act in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded."

A These authorities appear to me to provide a sufficient guidance whereby we can consider the present case. In the first place, this child is under two years of age; its own wishes, therefore, cannot be considered. In *Gyngall's Case* (9), LORD ESHER said ([1893] 2 Q.B. at p. 243):

> "In a short time the child will be able to choose for herself . . . this child is not a mere infant, if she were only six or seven years old the case would be very B different."

In the present case, the only substantial argument in favour of leaving the child with its adopted parents is that it is better that it should remain in private hands rather than in an institution. These facts existed almost exactly in *R.* v. *New* (4), and, although, of course, the facts of one case do not bind us in another, yet, in con- C sidering LORD ESHER's words ([1893] 2 Q.B. at p. 242):

> "The court . . . can only act when it is . . . clearly right for the welfare of the child in some very serious and important respect that the parent's rights should be suspended or superseded,"

it is material to consider that in 1904, *Gyngall's Case* (9) and *O'Hara's Case* (10) having been cited to the court in *New's Case* (4), in a case where the mother desired D a certain religious education for the child at an institution, the court ordered the child to be taken away from a home where it had been adopted and resided for ten years to be placed in the desired institution. The facts there seem to me stronger in favour of the contentions of the respondents than in the present case. There the child had been for ten years with the adopters and was twelve years of age. If the court in *R.* v. *New* (4) did not consider that this formed "a very serious and E important reason why the parent's rights should be suspended or superseded," it is difficult to see how in the present case such very serious and important considerations arise. Moreover, in *New's Case* (4) the child was attending a Church of England day school and a Baptist sunday school, and it was desired that it should be placed with Anglican sisters. While I resolutely abstain from expressing any theological views in this case, one cannot but remember that the change in religious F education in *New's Case* (4)—the child was attending a Church of England day school and was going to an Anglican sisterhood—was far less than the parent desires in this case.

We were pressed by counsel for the society with the Adoption of Children Act, 1926. He said that it might well be if the court took no action that, on an application under that Act, the consent of the mother under s. 2 (3) might be given, and G that her present view might be changed, but I find it impossible to think, once I have arrived at the view that her present application is bona fide, that at the same time she would be prepared to consent to pass all legal rights in her child to the adopters, a course which would completely stultify all her expressed wishes in this case. Counsel also called our attention to the proviso to sub-s. (3) of s. 2 of the Adoption of Children Act which is as follows:

H

> "Provided that the court may dispense with any consent required by this subsection if satisfied that the person whose consent is to be dispensed with has abandoned or deserted the infant or cannot be found or is incapable of giving such consent or, being a person liable to contribute to the support of the infant, either has persistently neglected or refused to contribute to such support or is I a person whose consent ought, in the opinion of the court and in all the circumstances of the case, to be dispensed with."

It will be seen that the first three elements of this proviso relate to conditions which do not exist in the present case, for, following LORD HANWORTH, M.R., in *Thain's Case* (38), where he discusses s. 3 of the Custody of Children Act, 1891, in which substantially similar words occur, and on the authority of *O'Hara's Case* (10) and others, it is not possible to say here that the mother persistently neglected or abandoned or deserted the infant: see FITZGIBBON, L.J., ([1900] 2 I.R. at p. 243): " 'Abandon' or 'desert' imply in ordinary language a disregard of parental duty and carry with them an idea of moral blame": per Holmes, L.J., ibid., at p. 252. I think the words "or is a person whose consent ought, in the opinion of the court, and in all the circumstances of the case to be dispensed with" must be construed ejusdem generis with the remainder of the proviso, and that such a serious invasion of parental right (for the dispensation of consent by the court would mean that the rights and obligations of a parent under s. 5 of the same Act would be taken away and vested in the adopter) cannot reasonably be assumed to be within the competence of the court in the absence of abandonment or desertion, certainly not on the facts which exist in the present case. It is scarcely necessary to point out that the form of consent which has already been given by the mother with the name of the applicant absent is a nullity. It is clear from s. 2 (3) that parental consent can only be given to a specific adoption by a named adopter. I do not think that the remote possibility of an adoption order being made ought to influence the court in deciding this case.

Counsel for the society also argued that the refusal of the issue of the writ is a matter of discretion with which we should not interfere, but in matters of the liberty of the subject I think that this court should consider the matter de novo, as will one judge of the King's Bench, although another has here previously applied it: *Cox* v. *Hakes* (5), but, even if we are not to regard the previous exercise of discretion, I have the misfortune to differ from the Lord Chief Justice in an important matter of law on which he based his judgment, and I must hold that his opinion, with which the other members of the Divisional Court agreed, has taken the matter outside discretion in any event. The opinion to which I refer is this. His Lordship, after citing the passage in Lord Herschell's judgment in *Barnardo* v. *McHugh* (3) to which I have referred—which I believe still to be an accurate presentation of the law which we have to apply, says, in a passage which I have already quoted:

> "Then in contrast with that passage (of Lord Herschell) not merely some passages in the Custody of Children Act, 1891, but in the Guardianship of Infants Act, 1925, must be taken into consideration, there seems to have been between these few years—1891 and 1926—a certain development of thought in the matter."

As I have already indicated I am of opinion, first, that, as regards the authorities, *Barnardo* v. *McHugh* (3) and *R.* v. *Gyngall* (9) have as binding an effect as they had when they were delivered, and, secondly, that for the reasons I have already given, neither of the statutes cited by the learned judge has modified the considerations of the immemorial right of parents by nature and nurture which we have here to regard. I have already expressed my view as to the latter statute of 1925, that it is dealing merely with the respective rights of the father and mother, and I would only add that, if there be any ambiguity in the language, and if consequently, we are entitled to look at the preamble, that preamble in terms states:

> "Whereas Parliament, by the Sex Disqualification Removal Act, 1919, and various other enactments, has sought to establish equality in law between the sexes, it is expedient that this principle should obtain with respect to the guardianship of infants and the rights and responsibilities conferred thereby."

As regards the Custody of Infants Act, 1891, that Act, as pointed out by FitzGibbon, L.J., in *O'Hara's Case* (10) ([1900] 2 I.R. at p. 243) does not affect the jurisdiction formerly exercised by the Court of Chancery, and the surrender of a child to a foster parent, being an act of prudence or necessity under the pressure of present inability to maintain it, is an act done in the interests of the child and cannot be regarded as abandonment or desertion or even lack of parental duty within the meaning of the Act. Taking into consideration first, that before the passing of the Judicature Acts, a parent was held at common law to have as against strangers an absolute right to the custody of his or her child of tender years unless he or she had forfeited it by certain misconduct: see Holmes, L.J., in *O'Hara's Case* (10) ([1900] 2 I.R. at p. 250), and, further, having regard to the Chancery jurisdiction as stated in *Gyngall's Case* (9), which since the Judicature Acts is now to be exercised in either Division, I think that it is clear that in this case the parent has made out her case to regain the custody of her child and that, consequently, this appeal should be allowed and the writ as craved should issue.

I would only add that if it had been necessary to enforce the writ, the writ would have had to have been amended by adding to it the name of Mr. Beesley or some other responsible officer of the society. I am unable to find in the books any record of any case where habeas corpus has issued against a corporation, eo nomine. Crown Office Rule 55, which provides for a writ of mandamus directed to companies and corporations being served on such and so many persons as are competent to do the act required to be done, is silent with regard to habeas corpus. In principle, I see no difficulty in maintaining the writ against the corporation, seeing that a corporation may be liable in an action for false imprisonment: see *Goff* v. *Great Northern Rail Co.* (45), but difficulties might arise if no persons were served who were competent to obey or who might commit contempt by disobeying the order of the court: see *R.* v. *Poplar Borough Council* (*No. 1*) (46). In the circumstances of the present case, however, as counsel for the society has indicated that the society will act immediately on an intimation of the court of their view of the legal rights of the mother, this amendment becomes unnecessary, but I wish for the sake of any similar proceedings to place my view on record that the responsible officer ought to have been added to or substituted for the corporation. I agree with my Lord that this appeal should be allowed with the consequences as to costs stated by him.

Appeal allowed.

Solicitors: *Ellis & Willes* and *Ingpen & Armitage*; *Carter & Bell.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

Re HOOD. PUBLIC TRUSTEE *v.* HOOD

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), July 8, 1930]

[Reported [1931] 1 Ch. 240; 100 L.J.Ch. 115; 143 L.T. 691;
46 T.L.R. 571; 74 Sol. Jo. 549]

Charity—Religion—Advancement of Christian principles—Gift to spread principles and extinguish drink traffic—Dominant purpose—Benefit to community—Advancement of temperance.

By his will a testator directed that the residue of his estate should be held on trust as follows: "Whereas I believe in the universality of the Christian religion and that the remedy for all the unrest and disorders of the body politic will be found in the application of Christian principles to all human relationships And whereas I believe the drink traffic to be one of the most subtle and effective forces in preventing the successful application of these principles and I therefore hope and trust that active steps will be taken to minimise and ultimately extinguish this enemy of my country's welfare Now therefore I declare it to be my wish that my general beneficiaries shall hold the whole of my residuary trust estate together with the income thereof in spreading the Christian principles before mentioned and in aiding all active steps to minimise and extinguish the drink traffic."

Held: on the true construction of the provision the dominant and essential object of the gift was the advancement of the religious principles indicated, subservient to which was an indication of a means whereby the advancement might be carried out, and, therefore, the gift was for a charitable purpose and good. A

Re Scowcroft, Ormrod v. *Wilkinson* (1), [1898] 2 Ch. 638, applied.

Per **Curiam:** A bequest for the advancement of temperance would be a good charitable gift. B

Notes. Considered: *Bonar Law Memorial Trust* v. *I.R.Comrs.* (1933), 49 T.L.R. 220; *Tribune Press, Lahore (Trustees)* v. *Income Tax Comrs., Punjab, Lahore*, [1939] 3 All E.R. 469; *Oxford Group* v. *I.R. Comrs.*, [1949] 2 All E.R. 537. Referred to: *National Anti-Vivisection Society* v. *I.R. Comrs.*, [1947] 2 All E.R. 217; *Tenant Plays, Ltd.* v. *I.R. Comrs.*, [1948] 1 All E.R. 506; *Re Hopkinson, Lloyds Bank, Ltd.* v. *Baker*, [1949] 1 All E.R. 346; *Re Strakosch, Temperley* v. *A.-G.*, [1949] 2 All E.R. 6. C

As to charitable purposes, see 4 Halsbury's Laws (3rd Edn.) 213 et seq.; and for cases see 8 Digest (Repl.) 312 et seq.

Cases referred to:

(1) *Re Scowcroft, Ormrod* v. *Wilkinson*, [1898] 2 Ch. 638; 67 L.J.Ch. 697; 79 L.T. 342; 15 T.L.R. 4; 43 Sol. Jo. 11; 8 Digest (Repl.) 328, *109*. D

(2) *Hunter* v. *A.-G.*, [1899] A.C. 309; 68 L.J.Ch. 449; 80 L.T. 732; 47 W.R. 673; 15 T.L.R. 384; 43 Sol. Jo. 530, H.L.; 8 Digest (Repl.) 340, *227*.

(3) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, *1*. E

(4) *Morice* v. *Bishop of Durham* (1805), 10 Vez. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, *836*.

(5) *I.R. Comrs.* v. *Falkirk Temperance Café Trust*, 1927 S.C. 261; 11 Tax Cas. 353; Digest Supp.

(6) *I.R. Comrs.* v. *Temperance Council of Christian Churches of England and Wales* (1926), 136 L.T. 27; 42 T.L.R. 618; 10 Tax Cas. 748; Digest Supp. F

Appeal from an order of Bennett, J.

By his will, dated May 24, 1921, the testator, Joseph Hood, who died on July 12, 1922, gave his residuary estate to persons whom he called "general beneficiaries" and then disposed of it in these terms:

> "Whereas during my lifetime I have adopted certain principles which I now indicate and which I desire to be followed in giving effect to the dispositions herein contained And whereas I believe in the universality of the Christian religion and that the remedy for all the unrest and disorders of the body politic will be found in the application of Christian principles to all human relationships. And whereas I believe the drink traffic to be one of the most subtle and effective forces in preventing the successful application of these principles and I therefore hope and trust that active steps will be taken to minimise and ultimately extinguish this enemy of my country's welfare Now therefore I declare it to be my wish that my general beneficiaries shall hold the whole of my residuary trust estate together with the income thereof in spreading the Christian principles before mentioned and in aiding all active steps to minimise and extinguish the drink traffic And in pursuance thereof it is my wish and desire." G H I

By the present summons the next-of-kin of the testator sought a declaration that the gift to the general beneficiaries was not valid since it was uncertain and not a charitable gift and that there was an intestacy as regards the residue, in which case she would be entitled to a share thereof.

Bennett, J., in his judgment, said that it was not necessary to express any opinion whether the gift in aid of active steps to minimise or extinguish the drink traffic would or would not be a good charitable gift, because, in his view, the essential part of the gift was that part of it which dealt with the spreading and the application of Christian principles to all human relationships. He could not doubt that that gift in those terms only would be a good charitable gift. The case fell within the principles of Stirling, J.'s judgment in *Re Scowcroft* (1), the reference to steps to minimise and extinguish the drink traffic being only subsidiary to the main purpose which the testator had in mind, namely, the spreading and the application of Christian principles to all human relationships. The answer, therefore, to the question raised by the summons was that the testator's residuary trust estate exceeding £6,000 and the trust on which such residuary estate was directed to be held by the will were good and valid charitable trusts. The next-of-kin appealed.

W. P. Spens, K.C., and *Gerald Upjohn* for the next-of-kin.

The Attorney-General (*Sir William Jowitt, K.C.*) and *Stafford Crossman* for the respondents.

LORD HANWORTH, M.R.—This is an appeal from a decision of Bennett, J., given on an originating summons which was taken out before him for a declaration as to what was the right interpretation to be given to the terms of a clause in the will of Joseph Hood, who made his will on May 24, 1921, and died on July 12, 1922. The clause in his will concerns the destination of his residuary estate. At the time of his death he left a widow and two sons and two daughters, and there were also two children of another son who had predeceased him. One of those two children of the son who predeceased him, Nancy Hood, was the next-of-kin to her grandfather, and she did not come of age until Aug. 27, 1928. No arrangement, therefore, that might be made in reference to this question arising upon this clause in the will could bind her, and when she became of age she desired to have a proper declaration made by the court as to whether or not the bequest of the residuary estate, to which I will refer in a moment, was valid or not, or whether there was an intestacy in which she would have been interested. Her share would have been one-fifteenth. Bennett, J., decided that the bequest of the testator is a good and valid charitable bequest, and from that decision this appeal is taken by Miss Hood. We have, therefore, to determine whether we agree with the declaration which Bennett, J., has made—in other words, whether or not this is a charitable bequest.

The amount of residue exceeded a sum of £6,000, with the result that a proviso which was to take effect if the net value of the residuary estate exceeded £6,000 comes into operation. In that event, the testator said in the will:

> "and I direct that instead of such residuary estate passing to my wife and children as aforesaid it shall be paid to [certain "general beneficiaries"] to be held by them upon the trusts and provisions hereinafter declared and contained: Whereas during my lifetime I have adopted certain principles which I now indicate and which I desire to be followed in giving effect to the dispositions herein contained And whereas I believe in the universality of the Christian religion and that the remedy for all the unrest and disorders of the body politic will be found in the application of Christian principles to all human relationships And whereas I believe the drink traffic to be one of the most subtle and effective forces in preventing the successful application of those principles and I therefore hope and trust that active steps will be taken to minimise and ultimately extinguish this enemy of my country's welfare Now therefore I declare it to be my wish that my general beneficiaries shall hold the whole of my residuary trust estate together with the income thereof in spreading the Christian principles before mentioned and in aiding all active steps to minimise and extinguish the drink traffic."

It will be observed that after three recitals the testator introduces the operative clause of the will by the words "Now therefore," and then he makes a declaration as to his wish for what purpose the general beneficiaries should hold the residuary trust estate. Counsel for the next-of-kin points out that the subsequent passage has two limbs to it: The trust estate together with the income is to be held in A ''spreading the Christian principles before mentioned and in aiding all active steps to minimise and extinguish the drink traffic.'' He says that those words indicate two separate and distinct spheres of activity: (i) The spreading of Christian principles before mentioned, (ii) the aiding of active steps to minimise and extinguish the drink traffic. He argues that, while he would not contest that the spreading of Christian principles is a good and valid charitable purpose, the aiding of active B steps to minimise and extinguish the drink traffic may, and, perhaps, ought, to be construed as indicating the support of political and legislative steps for those purposes, activities which do not necessarily come within the tests applied by lawyers to what is charitable, and, if they do not come within those tests, then, in accordance with the well-known principle if the testator has indicated alternatives which may be followed, one of which is not charitable in the legal sense, then the C bequest cannot be held to be for an exclusively charitable purpose. Therefore we have to go back and consider what is the proper construction to be placed upon this provision.

There are three recitals: One, that the testator believes in the universality of the Christian religion, and that the remedy for all unrest will be found in the application of Christian principles to human relationships; then that the drink D traffic is one of the most subtle and effective forces in preventing the application of those principles; and, therefore, he expresses, thirdly, the hope that active steps will be taken to minimise and ultimately to extinguish the enemy of his country's welfare. Reading that, I think quite fairly, and as it is set out by the testator himself, without supplying words or subtracting words, but reading the provision in accordance with the canon which has been laid down by LORD HALSBURY in E *Hunter* v. *A.-G.* (2), it would seem quite plain that the first recital is of dominant force, namely, his belief in the universality of the Christian religion and that with the application of that religion and the Christian principles embodied in it, there will be advantages to the whole body politic. Next he believes a barrier to the advancement of that religion and those principles is interposed by the subtle and effective force of drink, and he wishes that steps should be taken for the advancement F of the Christian religion, and of Christian principles, by the withdrawal of the subtle and effective force which at the present time operates as a barrier against the advancement of the Christian religion and its principles. I think that is a paraphrase closely following the very words of the testator. It does not, therefore, appear that so far he has indicated anything but a purpose to advance the Christian religion and its principles. The direction is that the trust is to be held for the G purpose of spreading those Christian principles, which are illustrative of the Christian religion, and also in aiding active steps to get rid of this barrier which prevents its advancement; and, as ROMER, L.J., has pointed out, if you use the words which are in the second part, the operative part, ''minimise and extinguish,'' bearing in mind the words previously used, to minimise and ultimately extinguish, it would appear as if the purpose of the testator is little by little, step by step, to get rid of H this subtle and effective force which stands in the way of the advancement of the Christian religion.

I find it difficult, and, indeed, impossible, to accept the view presented by counsel for the next-of-kin. I do not think that two separate spheres of activity are indicated. I think that throughout the recitals, and in the operative part, a plain intention is indicated of the advancement of Christian principles, with a particular I method by which that advancement may take place, namely, by gradually extinguishing, or getting rid of and ultimately extinguishing, the drink traffic. I do not know that the word ''traffic'' has any reference to the legislature. It appears to be the system of selling and buying drink. In that construction it does not appear to me that the testator has done more than indicate that he desires to have a spread of Christian principles. Some criticism was directed to the learned judge's judgment in that he used the words ''The steps to minimise and extinguish the drink traffic being only subsidiary to the main purpose which the testator had in mind . . ." I think the intention and meaning of the learned judge is quite plain. Perhaps what I understand him to mean would be more aptly termed if the word "ancillary" was used instead of the word "subsidiary." I agree, however, with the construction which Bennett, J., has placed upon this clause.

Turning to one or two of the cases and authorities which have been referred to, it must be borne in mind that it is a principle of the law long established, that where there is an intention to devote property to charity, effect must be given to it. Unless, therefore, there is something in this clause which withdraws the effect of the user of these words, that is to say, his belief in the universality of the Christian religion, and the application of Christian principles, there is no doubt that there is a clear indication of a charitable intention. Lord Macnaghten, in the well-known classification which is found in *Income Tax Special Purposes Comrs.* v. *Pemsel* (3), and which principle is, in fact, still older, for it has been pointed out that the argument was presented in *Morice* v. *Bishop of Durham* (4), set out, as we all know, four categories, namely, "poverty, education, religion, or trusts for other purposes beneficial to the community not falling under the preceding heads." It will not be necessary for the present purpose, but I should have no hesitation in saying that I agree with the judgments and words used by Lord Blackburn and Lord Sands in *I.R. Comrs.* v. *Falkirk Temperance Café Trust* (5), namely, as Lord Blackburn puts it (1927 S.C. at p. 269):

> "I do not think it can be questioned that the object of reducing intemperance is one which is not only beneficial to those who may fall or have fallen under the curse of drink, but is also beneficial to society at large."

If, therefore, there are no cases to be found precisely upon the point I am inclined to attribute that lack not to any doubt, but rather to the general acceptance of that view by those who have been concerned to consider the terms of wills. I should be, therefore, quite ready to say that, if the clear intention had been to provide money for the purpose of the advancement of temperance, it would be a good charitable gift. I do not think that the six directions which are given in the will are to be taken as showing any reflex interpretation to be placed upon the operative clause to which I have referred. They are indicative of methods by which the advancement of temperance may gradually be secured, and I, therefore, come without hesitation to the same view as to what construction ought to be placed upon this clause as Bennett, J.

I will only add a word more as to two cases to which reference has been made. Rowlatt, J., in *I.R. Comrs.* v. *Temperance Council of Christian Churches of England and Wales* (6), came to the conclusion in that case that the council was not entitled to exemption from Income Tax under s. 37 of the Income Tax Act, 1918, because it was not established for charitable purposes only—those are the words that have to be complied with—but was established for political activities, and, therefore, could not bring itself within those exclusive words. But I agree with Bennett, J., that the reasoning of Stirling, J., in *Re Scowcroft, Ormrod* v. *Wilkinson* (1) is more helpful in the present case. In that case Stirling, J., had to determine whether a gift of a building to be maintained for the furtherance of Conservative principles and religious and mental improvement, and to be kept free from intoxicants and dancing, were words which were to be read distributively, so that they embraced purposes other than those which could be claimed to be charitable within Lord Macnaghten's last category. Stirling, J., held that:

> "In either case, the furtherance of religious and mental improvement is, in my judgment, an essential portion of the gift."

He held the gift to be valid. So here, I think that on the best construction one is able to place upon this clause, an essential object of this gift is the advancement of religious principles in the belief of the universality of the Christian religion as a dominant force, and for that purpose, and subservient to that purpose, there is an indication of a means whereby the advancement may be carried out, namely, by the withdrawal of what is a subtle and effective barrier to it, but always that withdrawal is to be made for the purpose of the successful application of the principles of the Christian religion. Having regard, therefore, to the view that that is the dominant purpose, it appears clearly that this is a bequest for a charitable purpose, and, accordingly, I agree with Bennett, J., and this appeal must be dismissed.

LAWRENCE, L.J.—The answer to the question raised by this appeal depends entirely upon the construction to be placed upon the particular language used by the testator to express his intention. In my opinion, there is little doubt as to the meaning of the bequest in question. As I read the will, the main object of the bequest is the application of Christian principles to all human relationships, and thereby to spread such principles. That object undoubtedly is, in my opinion, a charitable object, and if it had stood alone I think that counsel for the next-of-kin would not have contended the contrary. Then the testator, after stating that he believes the drink traffic to be one of the most subtle and effective forces in preventing the successful application of these main principles, expressed a hope and trust that: "Active steps will be taken to minimise and ultimately extinguish this enemy of my country's welfare," and in the operative part of his will authorises his trustees to spend his residuary estate, not only in the spread of the Christian principles he has referred to, but also in aiding all active steps to minimise and extinguish the drink traffic.

It is contended that the authority so conferred upon the trustees adds a further object to the main object which I have mentioned, which additional object is non-charitable, and, therefore, on the well-known principles, the whole gift fails. In my judgment, there are two answers to this contention. The first is that the added object relied upon by counsel for the next-of-kin is, in itself, charitable. I construe the words "in aiding all active steps to minimise and extinguish the drink traffic" as meaning the promotion of temperance. Temperance itself is undoubtedly a charitable object. It comes within the fourth class of objects which are charitable, because many people regard temperance as contributing to the moral improvement of mankind. The case decided by Rowlatt, J., of *I.R. Comrs.* v. *Temperance Council of Christian Churches of England and Wales* (6), to my mind, is distinguishable on the ground that in that case the gift was not for the promotion of temperance generally, but was for the promotion of temperance mainly by political means, and, therefore, taken out of the class of charitable objects to which I have referred. But there is a second answer. Even if the object of active steps to minimise and extinguish the drink traffic is non-charitable, I think that the learned judge was right in holding that it was not added as an independent additional object, but was pointed out by the testator as one of the ways by which his main object could be attained, and that the trustees were only authorised to spend money in minimising and extinguishing the drink traffic, in so far as they were furthering the main purpose of the bequest. That main purpose being charitable, it seems to me that it is none the less good because the testator has pointed out a means by which he thinks that that main object can best be obtained, which means in themselves may, or may not, be charitable if they stood alone. For these reasons I think that the judgment of Bennett, J., is right, and ought to be affirmed.

ROMER, L.J.—I agree. As I read the testator's will, the dominant object of this clause in which he disposes of his residue is to advance the application of Christian principles to all human relationships, and the testator appears to desire to bring about that end in two ways: (i) by spreading Christian principles, and (ii) by promoting temperance and gradually getting rid of intemperance which, as appears from one of the recitals, he regards as one of the gravest enemies of the object that he had in view. In my opinion, the testator's dominant object was most assuredly a charitable one, and of the two particular ways he indicated for the purposes of carrying out that dominant object the first is admittedly charitable. In my opinion, the second is also charitable for the reasons that have been given by the Master of the Rolls and Lawrence, L.J. But I agree with Lawrence, L.J., that, even if the second of those objects is not considered strictly to be charitable, yet one ought, in a case like this, to apply the method of construction that was applied by STIRLING, J., in *Re Scowcroft*, *Ormrod* v. *Wilkinson* (1), which is referred to by BENNETT, J., in his judgment. In that case STIRLING, J., had to deal with a gift which I need not repeat now, and he construed it as a gift for the furtherance of Conservative principles in such a way as to advance religious and mental improvement at the same time. Applying that to the present case, having regard to the dominant intention of the testator, one must regard the direction that the trustees are to aid all active steps to minimise and extinguish the drink traffic as being qualified by the words "for the purpose of advancing and bringing about the application of Christian principles to all human relationships." For these reasons I agree with the decision of BENNETT, J., and that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, for *Howard, Cant & Cheatle*, Birmingham; *Swepstone, Stone, Barber & Ellis*, for *G. T. Smith & Lyde*, Birmingham; *Treasury Solicitor.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re COLISEUM (BARROW), LTD.

[CHANCERY DIVISION (Maugham, J.), March 24, 25, 1930]

[Reported [1930] 2 Ch. 44; 99 L.J.Ch. 423; 143 L.T. 423; [1929–30] B. & C.R. 218]

Limitation of Action—Acknowledgment—Debt owing by company to director—Debt shown in balance sheet—Statute of Frauds Amendment Act, 1828 (9 *Geo.* 4, *c.* 14), *s.* 1.

For ten years before the date of the compulsory winding-up of a company the directors agreed to forego their fees, the amounts of which were shown in each year in the company's balance sheet. The balance sheets were duly signed by two of the directors, presented by the directors to the shareholders at annual general meetings, and passed. One of the directors submitted to the liquidator a proof in respect of fees owing to him at the date of the winding-up, but the liquidator rejected the proof so far as it related to fees due more than six years before the winding-up. The director contended that the statements in the balance sheets showing the fees due to the directors constituted a sufficient acknowledgment by the company of those debts within s. 1 of the Statute of Frauds Amendment Act, 1828 (Lord Tenterden's Act).

Held: an acknowledgment would keep a debt alive only if it amounted to a fresh promise to pay; in the present case the promise, if any, was a promise by the directors, acting on behalf of the company, to pay to themselves the amount of the fees; having regard to the position which a director occupied in relation to the company, it was not competent for the board, being interested in the matter, to authorise the giving of a promise to themselves; and, therefore, the statements in the balance sheets were not effective acknowledgments of the debts.

Per MAUGHAM, J.: Had the statement been made in the balance sheet that the company owed a specified sum to a shareholder to whom the balance sheet was sent in the usual way, that would have amounted to a sufficient acknowledgment of the debt.

Notes. Section 1 of the Statute of Frauds Amendment Act, 1828, and s. 13 of the Mercantile Law Amendment Act, 1856 (see infra), were repealed by the

Limitation Act, 1939. For the limitation of an action of simple contract, see now A
s. 2 (1) (a) of the Act of 1939; and as to acknowledgment, see s. 23 (4).

Distinguished: *Ledingham and Others* v. *Bermejo Estancia Co., Ltd., Agar and Others* v. *Same*, [1947] 1 All E.R. 749. Considered: *Jones* v. *Bellegrove Properties, Ltd.*, [1949] 2 All E.R. 198. Applied: *Re Transplanters (Holdings Co.), Ltd.*, [1958] 2 All E.R. 656.

As to acknowledgments, see 20 HALSBURY'S LAWS (2nd Edn.) 625 et seq.; and B
for cases see 32 DIGEST 352 et seq. For Limitation Act, 1939, see 13 HALSBURY'S STATUTES (2nd Edn.) 1159.

Cases referred to:

(1) *Re Beavan, Davies, Banks & Co.* v. *Beavan*, [1912] 1 Ch. 196; 81 L.J.Ch. 113; 105 L.T. 784; 24 Digest (Repl.) 362, *4303*.

(2) *Re Emmett, Jenkins* v. *Emmett* (1906), 95 L.T. 755; 23 Digest (Repl.) 361, C
4302.

(3) *Lloyd* v. *Coote and Ball*, [1915] 1 K.B. 242; 84 L.J.K.B. 567; 112 L.T. 344; 23 Digest (Repl.) 362, *4304*.

(4) *Lowndes* v. *Garnett and Moseley Gold Mining Co. of America, Ltd.* (1864), 3 New Rep. 601; 33 L.J.Ch. 418; 10 L.T. 229; 12 W.R. 573; 9 Digest (Repl.) 548, *3613*. D

(5) *Spencer* v. *Hemmerde*, [1922] 2 A.C. 507; 91 L.J.K.B. 941; 128 L.T. 33; 38 T.L.R. 869; 66 Sol. Jo. 692, H.L.; 32 Digest 364, *484*.

(6) *Stamford, Spalding and Boston Banking Co.* v. *Smith*, [1892] 1 Q.B. 765; 61 L.J.Q.B. 405; 66 L.T. 306; 56 J.P. 229; 40 W.R. 355; 8 T.L.R. 336; 36 Sol. Jo. 270, C.A.; 32 Digest 390, *716*.

(7) *Tanner* v. *Smart* (1827), 6 B. & C. 603; 9 Dow. & Ry. K.B. 549; 5 E
L.J.O.S.K.B. 218; 108 E.R. 573; 32 Digest 364, *490*.

(8) *Green* v. *Humphreys* (1884), 26 Ch.D. 474; 53 L.J.Ch. 625; 51 L.T. 42, C.A.; 32 Digest 361, *449*.

Adjourned Summons.

In August, 1913, a company was registered under the name of C. and M. F
Rutledge, Ltd. By a special resolution passed and duly confirmed at extraordinary general meetings held in February, 1928, its name was changed to the Coliseum (Barrow), Ltd. The company made trading losses during several years, and during that period the directors made cash advances to it, guaranteed its overdraft at the bank, and allowed their remuneration to stand over and to remain a debt due to them, the last occasion on which they received any fees being on March 31, 1919. G
On March 25, 1929, an order for the compulsory winding-up of the company was made. From 1919 until the date of the compulsory winding-up order the amounts due to the directors in respect of unpaid fees were shown from year to year in the company's balance sheets which were duly signed by two of the directors, presented by the directors to the shareholders at annual general meetings, and passed. The applicant, J. M. Monson, a director, who had been present at all the meetings at H
which balance sheets were adopted, submitted a proof for £950 to the liquidator in respect of directors' fees due and owing to him at the date of the winding-up. The liquidator rejected the proof to the extent of £350 on the ground that all directors' fees which had been due for more than six years before the date of the winding-up order, were barred by virtue of the provisions of the Statute of Limitations, 1623. The applicant by this summons asked that this decision might be reversed, and I
that the proof might be allowed for the full sum of £950. The last balance sheet of the company showed that a sum of considerably over £3,000 was due to directors in respect of unpaid fees; accordingly, it was agreed that the proofs of the other directors should stand over for the time being, and that this summons should be regarded as a test summons.

By the Statute of Frauds Amendment Act, 1828, s. 1 (after referring to existing statutes of limitation):

> "Whereas various questions have arisen in actions founded on simple

> contract, as to the proof and effects of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments; and it is expedient to prevent such questions. . . . Be it enacted, that in actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, . . . unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby. . . ."

Mercantile Law Amendment Act, 1856, s. 13:

> ". . . an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorised to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself."

Lavington, for the applicant, referred to Lord Tenterden's Act, 1828, s. 1; the Mercantile Law Amendment Act, 1856, s. 13; *Re Beavan, Davies, Banks & Co.* v. *Beavan* (1); *Re Emmett, Jenkins* v. *Emmett* (2); *Lloyd* v. *Coote and Ball* (3); *Lowndes* v. *Garnett and Moseley Gold Mining Co. of America, Ltd.* (4); *Spencer* v. *Hemmerde* (5); *Stamford, Spalding and Boston Banking Co.* v. *Smith* (6); *Tanner* v. *Smart* (7).

Wilfrid M. Hunt for the liquidator.

MAUGHAM, J.—There is no doubt that, apart from certain acknowledgments alleged to be contained in balance sheets of the company and relied upon by the applicant, the Statute of Limitations, 1623, would operate, and the rejection of his proof would be justified. The directors have behaved exceedingly well, and when the company was in difficulties they ceased to exact their fees. The balance sheets were duly passed by the company. The Statute of Limitations contains no provision keeping alive by acknowledgment a claim liable to be barred thereunder, but the courts have from time to time held—on grounds which have been criticised (see POLLOCK ON CONTRACTS (9th Edn.) at p. 694)—that, if there has been a promise to pay after the six years, or during the course of the six years, that promise to pay gives rise to a new cause of action, and that certain acknowledgments to creditors may, on their true construction, amount to promises to pay. It is now well settled that an acknowledgment will keep a debt alive only if it amounts to a fresh promise to pay (*Green* v. *Humphreys* (8)), and that the acknowledgment must be made to the creditor or to his agent. That is beyond dispute. In the present case the directors of the company, at various board meetings held from time to time, passed the balance sheets before them and two of them signed the balance sheets on behalf of the board, pursuant to s. 113 of the Companies (Consolidation) Act, 1908. Accordingly, had the statement been made in the balance sheet that the company owed a specified sum to a shareholder to whom the balance sheet was sent in the usual way, that would have amounted, I think, to a sufficient acknowledgment within the authorities. The difficulty in the present case is that the promise, if any, is a promise by the directors, as a board acting on behalf of the company, to pay to themselves the amount of the directors' fees, and it seems to me that this is not, in the circumstances, a promise to pay on behalf of the company. Having regard to the position which a director, as agent of the company, necessarily occupies in relation to the company, it would not have given competent action to the board, acting as a board, to authorise the giving of a definite promise to pay to themselves. They would all have been interested in the matter, and so would have been incapable of passing the resolution so as to bind the company. Accordingly, I must hold that the balance sheets in question do not amount to acknowledgments in writing within Lord Tenterden's Act, and the claim must fail.

Solicitors: *Barnard, Taylor & Douglas-Mann*; *Hugh V. Harraway*.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law*.]

FOWLER *v.* COMMERCIAL TIMBER CO., LTD.

[Court of Appeal (Scrutton, Greer and Slesser, L.JJ), April 30, 1930]

[Reported [1930] 2 K.B. 1; 99 L.J.K.B. 529; 143 L.T. 391]

Company—Managing director—Termination of appointment—Resolution for voluntary winding-up.

By an agreement in writing the plaintiff was appointed managing director of the defendant company for a term of five-and-a-quarter years at a fixed salary. During the currency of that agreement the company, with the assent of the plaintiff, passed a resolution that the company be wound-up voluntarily on the ground that it could not, by reason of its liabilities, carry on its business. The liquidators thereupon notified the plaintiff that his engagement as managing director had ceased. In an action claiming damages for wrongful dismissal and breach of contract,

Held: neither a term that, if the company should be wound-up voluntarily, the plaintiff's employment should cease, nor a term that, if the company should be wound-up voluntarily and the plaintiff should vote for that course being adopted, his employment should cease, could be implied in the agreement, and, therefore, the plaintiff was entitled to succeed.

Per Slesser, L.J.: The director of a company should be free to act for the company in the manner which is necessarily implied from the fact of his being a director, namely, bearing in mind his fiduciary obligations to the shareholders. The implication of a term such as the terms which had been suggested would necessarily involve that the plaintiff, as director, would be unable to give disinterested advice to the company on the question of going into liquidation.

Notes. Referred to: *Re Farrer* (*T.N.*), *Ltd.*, [1937] 2 All E.R. 505.

As to termination of appointment as managing director, see 6 Halsbury's Laws (3rd Edn.) 297, 298, 319 et seq.; and for cases see 9 Digest (Repl.) 556–558.

Cases referred to:

(1) *Lazarus* v. *Cairn Line of Steamships, Ltd.* (1912), 106 L.T. 378; 28 T.L.R. 244; 56 Sol. Jo. 345; 17 Com. Cas. 107; 12 Digest (Repl.) 686, *5277*.

(2) *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*), [1918] 1 K.B. 592; 87 L.J.K.B. 724; 118 L.T. 479, C.A.; 12 Digest (Repl.) 686, *5278*.

Appeal from an order of Acton, J.

The plaintiff, one Fowler, claimed damages for wrongful dismissal and/or repudiation of an agreement in writing dated Oct. 30, 1923, and entered into between himself and the defendant company. By that agreement, which recited that the plaintiff was to be entitled to subscribe for certain shares in the company and was to be appointed managing director of the company, the company appointed the plaintiff its managing director for five years and one quarter of a year as from July 1, 1923, at a salary of £1,500 per annum. Clause 8 of the agreement provided as follows:

> "If at any time Mr. Fowler shall cease to be a director or employee of the company, whether by reason of retirement, disqualified removal, dismissal, death or otherwise howsoever, the board of directors of the company may give to Mr. Fowler or his legal personal representatives notice requiring him or them to transfer all or any ordinary shares registered in his name and upon payment to him of the par value thereof. . . . Mr. Fowler or his legal personal representatives shall be bound to sell such shares to such person or persons as the board of directors shall nominate."

The plaintiff duly acted as managing director of the company until January, 1928, when it became apparent that the financial position of the company was such that it could no longer carry on business and that the only course open was to wind it up. A meeting of the directors was, accordingly, held on Jan. 24, 1928, and on the following day a resolution was passed for the calling of an extraordinary general meeting of the company on Feb. 3, 1928, for the purpose of

> "considering, and, if deemed expedient, passing as an extraordinary resolution the following resolution:
>
> > 'That it has been proved to the satisfaction of this meeting that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind-up the same, and accordingly that the company be wound-up voluntarily.' "

The plaintiff, as one of the directors, gave his vote in favour of that resolution. At the extraordinary general meeting of the shareholders, which was held on Feb. 3 and at which the plaintiff was present and voted for the resolution, the resolution set out above was proposed, seconded and unanimously carried. On the same day the joint liquidators of the company who had been appointed at the meeting handed to the plaintiff a letter in the following terms:

> "Dear Sir, This is a formal notice to inform you that, this company having gone into voluntary liquidation, we consider that your agreement with the company is now terminated, and, therefore, your services will not be required after this date."

The plaintiff repudiated the notice thus given and tendered his services at the office of the company on Feb. 4, but was told by the liquidators that his services were no longer required. He then brought the present action. By their defence the defendants pleaded, inter alia, that they were prevented from performing their contract with the plaintiff by reason of the winding-up of the company which had been brought about by, inter alia, the plaintiff as he had voted for the resolution to wind-up. The plaintiff was, therefore, not entitled to damages. ACTON, J., in giving judgment, said that the contention of the defendants that a term must be implied that, if the company went into voluntary liquidation with the assent of the plaintiff, the plaintiff would lose all right to recover damages for a breach of the agreement, could not prevail, and, therefore, the plaintiff was entitled to damages which the learned judge assessed at £303 14s. 8d. The company appealed.

R. A. Willes (*Eales, K.C.*, with him) for the company.
Valentine Holmes for the plaintiff.

SCRUTTON, L.J.—The plaintiff was appointed managing director of the defendant company under an agreement dated Oct. 30, 1923, for five years and one quarter as from July 1, 1923, at a certain salary. The company was never very successful, and in 1928 it was in such a state that, if it did not take proceedings for being voluntarily wound-up, it was tolerably clear that it would be compulsorily wound-up, and it was, therefore, in the interests of the shareholders and the company that it should not go on trading at a continuous loss. Accordingly, the directors of the company, including the plaintiff, came to the conclusion that it was desirable that the company should be wound-up voluntarily; and the plaintiff voted for that resolution. A general meeting of the company was then called at which the shareholders took the same view, and the plaintiff, as a shareholder, voted for the resolution that the company should be voluntarily wound-up. Next day the liquidators notified the plaintiff that his engagement as managing director had ceased and that he need not and must not any longer attend at the office. To that the plaintiff said, in effect, that he had a five-years' agreement, that the company could not terminate it, and that what had occurred was a breach of the agreement, which entitled him to claim damages.

While there was in the agreement a term providing for what was to happen if the plaintiff should die, it contained no term as to what should happen if the company killed itself. But it is suggested that, although there is no express term in the agreement dealing with that contingency, a term should be implied that if the company were wound-up voluntarily it should be under no further liability to the plaintiff for the unexpired period of the five-years' agreement. I am not going to repeat what I said in *Lazarus* v. *Cairn Line of Steamships, Ltd.* (1) and in *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*), *Ltd.* (2), but, broadly speaking, a term is only implied into a contract if it is such a reasonable one that, if the parties had thought of it, they must have agreed to it. In the present case I do not think a term can be implied into the agreement that, if the company should be wound-up voluntarily, the plaintiff's employment should cease, still less the much more complicated term that, if the company should be wound-up voluntarily and the plaintiff should vote for that course being adopted, the plaintiff's employment should cease. I think it is impossible to argue that. The two positions of the plaintiff as managing director, who claims damages for breach of the contract of employment, and as a director and shareholder of the company who thinks that in its own interests the company ought to stop business by so doing are quite consistent. A director and shareholder may think that the company ought not to continue carrying on business at a loss even if the consequences of that may be that it is liable to pay damages for breach of the contract of employment. In my view, the term suggested cannot be implied. I think Acton, J., was quite right, and the appeal must be dismissed.

GREER, L.J.—I agree. There is no doubt that an order for the compulsory winding-up of a company puts an end to the employment of the managing director, whether his engagement is for an indefinite time or for a fixed term, and in my judgment, the same result must necessarily follow where there is a resolution for the voluntary winding-up of the company which depends upon the company being unable to meet its obligations, but it is not necessary to determine that in this case because on the facts proved, if the resolution for winding-up of itself did not put an end to the employment of the plaintiff, the conduct of the liquidator, after the winding-up, was quite sufficient to put an end to the contract and give the plaintiff a right to claim damages if the company, which is an entity quite distinct from the directors and shareholders, was not then entitled to put an end to the contract. We are asked to say that a term should be implied in the contract which would prevent the plaintiff saying that his dismissal was a breach of contract of which he was entitled to complain. I see no ground for implying such a term as was suggested by counsel, namely, a term that, if at any future time the company should, with the managing director's assent and assistance, go into voluntary liquidation during the currency of the contract of employment, the managing director should not be entitled to damages for breach of contract. Counsel said that such a term should be implied because in the contract there are terms which contemplate that the managing director might be disqualified and that his employment might come to an end, but the presence of that express term seems to me to afford no ground for implying such a term, if the managing director did that which was really immaterial in the present case, namely, assent to the resolution for winding-up which would have been passed whether he assented to it or not. In my opinion, this appeal fails.

SLESSER, L.J.—I agree. Counsel does not suggest that if at any time the company should go into voluntary liquidation and thereby determine the power of the plaintiff to discharge his duties he should not be entitled to complain of the breach of his agreement except where the resolution for voluntary winding-up was passed with his consent. That would necessarily involve, if such a term as counsel contends should be implied, that the plaintiff, as director, would be unable to give disinterested advice to the company on the question of going into voluntary liquidation without affecting his own position as managing director. Applying to this case what was said by Scrutton, L.J., in *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*), *Ltd.* (2), that a term is to be implied only if it is necessary in a business sense to give efficacy to the contract, it is clear, to my mind, that in a business sense, the director of a company should be free to act for the company in the manner which is necessarily implied from the fact of his being a director, namely, bearing in mind his fiduciary obligations to the shareholders. Nor do I think that if the question were put as to what should happen if the company should go into voluntary liquidation, the company would have said to the plaintiff that, if he gave his consent to the resolution for voluntary liquidation, he should no longer have any rights under his contract. There is no express term in the contract on the subject and I can see no ground for introducing the term implied or expressed that the plaintiff's salary should cease to become payable upon the voluntary liquidation of the company.

Appeal dismissed.

Solicitors: *Andrew, Wood, Purves & Sutton*; *Ashurst, Morris, Crisp & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

HASKINS *v.* LEWIS

[COURT OF APPEAL (Scrutton, Greer and Romer, L.JJ.), December 10, 11, 1930]

[Reported [1931] 2 K.B. 1; 100 L.J.K.B. 180; 144 L.T. 378;
95 J.P. 57; 47 T.L.R. 195; 29 L.G.R. 199]

Rent Restriction—Sub-letting—Sub-letting of part of dwelling-house—Use of other part for business purposes—Landlord's right to order for possession of whole house.

The plaintiff was the landlord of premises consisting of a basement, ground floor, first floor and attic. In or about the year 1900 the entire premises were let to the defendant on a weekly tenancy at a rent which brought them within the limits of the Rent Restriction Acts. There was no evidence of any stipulation as to the user of the premises or of any prohibition against sub-letting. Till 1927 the defendant used the ground floor as a shop and lived with his family in the rest of the premises. In that year he sub-let the attic and basement, but retained possession of the remainder of the premises. The ground floor continued to be used by him as a shop, while one of the two rooms on the first floor was used by his son for sleeping in, and the other was used by the son for the purposes of a betting business, though there was no actual sub-letting. In an action by the landlord claiming possession of the entire premises from the tenant, the county court judge held that the portions sub-let, being no longer in possession of the tenant, were outside the protection of the Acts, and that the remainder of the premises was unprotected as being business premises. He accordingly gave the landlord possession of the entire premises.

Held: (i) there was evidence which justified the county court judge in finding that the first two floors were used for business purposes; (ii) the tenant was not occupying any part of the dwelling-house for residential purposes so as to make him a tenant under the Act, and, therefore, the landlord was entitled to an order against him for possession, the order being for possession of the whole house.

Per CURIAM: by virtue of s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the sub-tenants would be deemed to be the tenants of the landlord, and so entitled to the protection afforded by the Act.

Notes. Considered: *Fordree* v. *Barrell* (1931), 95 J.P. 141. Applied: *Skinner* v. *Geary*, [1931] All E.R.Rep. 302; *Hiller* v. *United Dairies (London), Ltd.*, [1933] All E.R.Rep. 667. Considered: *Williams* v. *Williams and Nathan*, [1937] 2 All E.R. 559; *MacMillan & Co., Ltd.* v. *Rees*, [1946] 1 All E.R. 675; *Brown* v. *Brash*,

[1948] 1 All E.R. 922; *Turner* v. *Baker*, [1949] 1 All E.R. 560; *Mitchell* v. *Barnes*, *Mitchell* v. *Allen*, [1950] 1 K.B. 448. Applied: *John M. Brown, Ltd.* v. *Bestwick*, [1950] 2 All E.R. 338. Referred to: *Gee* v. *Hazleton*, [1931] All E.R.Rep. 485; *Reidy* v. *Walker*, [1933] 2 K.B. 266; *Oak Property Co., Ltd.* v. *Chapman*, [1947] 2 All E.R. 1.

As to premises within the Rent Restriction Acts, see 20 HALSBURY'S LAWS (2nd Edn.) 312 et seq.; and for cases see 31 DIGEST (Repl.) 634 et seq. For the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, see 13 HALSBURY'S STATUTES (2nd Edn.) 981–1084.

Cases referred to:

(1) *Keeves* v. *Dean*, *Nunn* v. *Pellegrini*, [1924] 1 K.B. 685; 93 L.J.K.B. 203; 130 L.T. 593; 40 T.L.R. 211; 68 Sol. Jo. 321; 22 L.G.R. 127, C.A.; 31 Digest (Repl.) 694, *7865*.

(2) *Roe* v. *Russell*, [1928] 2 K.B. 117; 97 L.J.K.B. 290; 138 L.T. 253; 92 J.P. 81; 44 T.L.R. 278; 26 L.G.R. 145, C.A.; 31 Digest (Repl.) 695, *7868*.

(3) *Hicks* v. *Scarsdale Brewery Co.*, [1924] W.N. 189; 157 L.T.Jo. 366, D.C.; 31 Digest (Repl.) 658, *7605*.

(4) *Gidden* v. *Mills*, [1925] 2 K.B. 713; 95 L.J.K.B. 1; 134 L.T. 21; 24 L.G.R. 27, D.C.; 31 Digest (Repl.) 649, *7530*.

(5) *Prout* v. *Hunter*, [1924] 2 K.B. 736; 93 L.J.K.B. 993; 132 L.T. 193; 40 T.L.R. 868; 69 Sol. Jo. 49; 22 L.G.R. 746, C.A.; 31 Digest (Repl.) 639, *7467*.

Appeal from an order of the Divisional Court (SWIFT and ACTON, JJ.) in an action for possession of premises known as 14, Johnson Street.

The material facts are fully set out in the headnote.

The tenant appealed to the Divisional Court who allowed the appeal, holding that there was no evidence before the county court judge which justified him in finding that the original character of 14, Johnson Street as a dwelling-house had ever been altered. It was let as a combined dwelling-house and business premises, and it remained such until the end. There was no such alteration in its character, or any evidence of any such sub-letting, as justified the judge in coming to the conclusion that there was a different tenant of the basement or of the top floor from that of the rest of the house. The landlord appealed.

H. H. Edmunds for the landlord.

Doughty, *K.C.*, *H. Salter Nichols*, and *J. Single* for the tenant.

SCRUTTON, L.J.—This case, like all cases in my experience under the Rent Restriction Acts, is of a most bewildering character. The reason for that bewilderment comes, I think, from this, that when the Acts were drafted—and I think this applies practically to all the Acts that have so far been passed—those who drew them, and those who passed them, had not made up their minds what was the nature of the privilege that they were conferring on the tenant. One view to be taken was that the tenant was to be given something in the nature of property which he could pass on to other people; another view was that he was not being given property but a privilege personal to himself which he could not pass on to other people. The construction of the Acts by the court is made difficult by the fact that when temporary difficulties—difficulties which only raise some small point—have been called to the attention of those framing amending Acts, clauses have been put in to meet those isolated difficulties without any particular regard to the question whether they fitted into one theory or the other. The Acts have been passed without those framing them having had any clear idea whether they were conferring property on the tenant or whether they were conferring a privilege of personal occupation, and the court has very slowly—and has not finished yet, I think—been trying to frame a consistent theory of what must happen. To begin with, in *Keeves* v. *Dean* (1) the court had to face the question: Can the tenant assign his right? and they decided that he could not. But they expressly reserved the question whether he could sub-let, and in *Roe* v. *Russell* (2) the court had to face the question whether he could sub-let part of the premises, the Act of 1923 having in the meanwhile provided that if he sub-let the whole of the premises he lost whatever rights he had in the tenancy. The only reason why s. 5 (1) (h) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as substituted by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923 [see now Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sched. I (d) as amended by the Rent and Mortgage Interest Restrictions Act, 1939, Sched. I], which raises the question of sub-letting the whole of the premises, was not referred to in *Keeves* v. *Dean* (1), was the very good reason that it was not in force at the time when the facts which gave rise to *Keeves* v. *Dean* (2) occurred.

We come now to a case where it is necessary in more detail to work out some of the consequences of those two principles. The facts in this case are these. A Mr. Lewis, with a family, lived in this particular house. He originally had a tailor's shop on the ground floor. He had been living in the house for nearly thirty years; during those thirty years one of his sons started a betting business on the first floor, and after three years that son gave way to another son who, at the time this case came on, had been carrying on the betting business on the first floor for seven years. In 1927 the Lewis family, because of improved circumstances or for other reasons, moved to another house where Mr. Lewis and his family resided. I am not mentioning that as settling a question which is coming. What was left then at the house which is the subject-matter of this action? The father had apparently stopped his tailor's business on the ground floor and the daughter carried on a drapery business there. It is quite obscure how exactly she was there; the evidence is that she carried on the business, and whether she paid any rent or whether she was a tenant at will, or whether the father had any interest in the business is left quite obscure, but at any rate the ground floor was used entirely for business purposes. On the first floor there was still this betting business; there was a large room used apparently for twenty or thirty people to come at a time, wanting to bet and making their bets and talking about bets, and carrying on that particular form of industry, and a small room which is spoken of by one of the witnesses as a small office, but which is spoken of by the defendant's son as the place where he slept. Two other tenancies were, apparently, then created, a residential tenancy in the basement to one sub-tenant, and a residential tenancy in the attic to another sub-tenant. Then came the question which the landlord asked himself: "This house was originally let as a dwelling-house with a shop to the tenant; he is not residing there at all now, and two of his floors are purely business premises; can I not terminate the contractual tenancy which has existed for thirty years by notice to quit, and can I not resist any attempt of the tenant to stay there on the ground that he is protected by the Rent Restriction Acts?"

The first question to be decided is a question of fact which, if decided one way, would render all the rest of the argument unnecessary. But I have to remember that it is very important continually to bear in mind in these appeals that the county court judge is the judge of fact and there is no appeal from his finding of fact if there is any evidence on which he could come to that finding of fact. What is said, as part of the argument for the tenant is this. The county court judge has found, or must have found, that the first floor was used purely for business purposes; there is no evidence on which a reasonable judge could find that. The son who carries on the betting business comes and says that he has a bed in the small office in which he sleeps, and that this room is residential, and, in a sense he supports that by saying: "When I go to my father's house I sleep in the sitting-room, so I may as well sleep in an office as in a sitting-room." On the other hand, the plaintiff and his witnesses say that on two occasions certainly they have been there and there has been no trace of a bed, and they speak of this small room at the back of the large room as a small office. The county court judge has seen those witnesses, and has made up his mind which he believes, and he must have disbelieved the son when he says he sleeps there and that there is a bed in the office. Supposing he disbelieves the son, is it possible to say that the fact that two people on behalf of the landlord have seen no bed when they have been there, and that the large room is admittedly used as a large room for people to come and bet and that the small room is spoken of as a small office, is evidence of the finding of the county court judge, and can we disturb what must have been his finding that the first floor is used entirely for business purposes? I quite agree that the evidence is slight, but it is of great importance to the general working of this court that this court or the Divisional Court should not interfere with the findings of fact of a county court judge unless there is a clear case. It will enormously increase the number of appeals and the work of the court if there is to be continual inquiry into exactly how much evidence there was and whether it is enough to justify a county court judge who sees the witnesses—and this court does not—in coming to a finding of fact. I, therefore, have the courage to resist the temptation that has been suggested, and to continue this case on the finding that the first two floors are now used solely for business purposes.

Then it is said that, if that is so, the sub-tenants are residing in the other parts of the original dwelling-house, and you will find in s. 5 of the Act of 1920, as substituted by s. 4 of the Act of 1923 [see now Rent and Mortgage Interests Restrictions (Amendment) Act, 1933, Sched. I] no clause which entitled the judge to make an order for possession when those are the facts. I think that is a misunderstanding of the position under the section. When you have a contractual tenancy which has never been terminated, the first thing to do to terminate it is to give the contractual notice to quit. If the tenant resists that and says: "I am holding on by virtue of the Rent Restriction Acts," he must show that at that date, when the contractual tenancy terminates, the premises are within the Rent Restriction Acts. If at the time when the contractual tenancy terminates two floors of the building are business premises, separately occupied from the rest of the building, it is quite clear that the Act does not apply to those two floors. They are business premises, and the Act does not apply to them. On the form of the pleadings a difficulty is raised here, but the argument before the county court judge seems entirely to have proceeded on the position of the four rooms—the two rooms on the ground floor and the two rooms on the first floor. I treat the case, as I gather it was treated at the trial, as if the business premises, if it was found that there was no residence, were the two floors. So one has got this far that, at any rate, the landlord is entitled to an order for possession of the two floors used for business purposes.

The next step, in my view, is—and I am stating this in a little detail because it is difficult, and other minds might take different views of the way in which the same results should be arrived at—to consider the basement and the attic, which are occupied by sub-tenants. One fact is quite clear, that the original tenant is not residing on those floors; somebody else is his sub-tenant, and is residing on each of them, and the consequence is that you have the position that the original tenant is not occupying any part of the original dwelling-house, so as to make him a tenant under the Act. He is not occupying the ground floor and the first floor as a residence, he is occupying them for business purposes; he is not occupying the attic and the basement as a residence, somebody else is occupying them; he is not in personal occupation at all of any dwelling-house. That being so, he appears to me to come within the fundamental principle of the Act, namely, that it is to protect a resident in a house, not to protect a person who is not residing in a house but is making money by sub-letting it. That, I understand, is the principle which SWIFT, J., intended to lay down when he decided *Hicks* v. *Scarsdale Brewery* (3).

The result is, therefore, in my view, that for those reasons the landlord is entitled to say: "The whole of your title to these premises has gone." I think that effect can be given to that by the court making an order for possession, and if it is said: "Oh, but an order for possession will enable the bailiff to come and turn out the sub-tenants," I think the answer is that the operation of s. 15 (3) of the Act of 1920 shows that the result cannot happen. That subsection provides:

> "Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

There is a very similar provision, except that it does not contain the statement about being deemed to be the tenant of the landlord, contained in s. 5 (5) of the Act of 1920, as substituted by s. 4 of the Act of 1923:

> "An order or judgment against a tenant for the recovery of possession of any dwelling-house or ejectment therefrom under this section shall not affect the right of any sub-tenant to whom the premises or any part thereof have been lawfully sub-let before proceedings for recovery of possession or ejectment were commenced, to retain possession under this section, or be in any way operative against any such sub-tenant."

The consequence is that I think one can make an order for possession of the whole premises in favour of the landlord against the tenant which will result in determining the tenant's interest in the whole of the dwelling-house, and that any suggestion that the order for possession will entitle the bailiff to turn the sub-tenants out of the part of the premises they occupy is met by the provision that as they are tenants of the landlord under the Act, and not tenants of the original tenant, the bailiff, by reason of s. 15 (3) will not be able to have such power.

In my view, therefore, the learned county court judge came to the right conclusion. I have not dealt in any detail with the numerous cases to which we have been referred because, in my view, there is nothing inconsistent with the result I arrive at, except that possibly I think an order might have been made in *Gidden* v. *Mills* (4) for the whole premises on the lines I have suggested, instead of, as it was in that case, an order only for possession of a part of the premises carried on as a garage. For these reasons, in my opinion, the appeal must be allowed, and the judgment of the county court judge restored, with costs here and below.

GREER, L.J.—So far as the substance of the order which my Lord has decided should be the order of this court upon this appeal, I am in agreement with him. There is a purely academic question whether the order ought to be an order for possession of the two floors which are used as business premises, or an order for possession of the whole of the premises. In either event, the order will not affect the rights of the sub-tenants who are in possession of the top floor and the basement and are protected by the terms of the Act of Parliament.

As I view this case, it turns on these considerations. Since the decision in *Prout* v. *Hunter* (5) the law is that something that the tenant has done, and with which the landlord has had nothing to do, may alter the status of the premises so as to take them out of the protection of the Act. It seems to me that it follows from that, that if the whole of the premises were let by the tenant as business premises he would have so altered the status of the premises that the Act did not apply to them. Whether by reason of another provision of the Act it would again come to apply, if they afterwards became a dwelling-house, it is unnecessary to decide. At any rate, for the time being the tenant in possession may alter the status of the premises, so as to deprive the occupier for the time being of the protection of the provisions of the Act of Parliament with which we are dealing. I think he may do that not merely as to the whole of the premises, but also as to a distinct and defined part of the premises, whether that is definable by physical alteration or only by evidence as to the portion of the premises which is taken out of the Act as being used for purposes other than those covered by the Act of Parliament. When the tenant in the present case, having sub-let the upper portion of the premises to one tenant and the basement to another tenant, went out of possession himself of the whole of the house, and used the ground floor and the first floor entirely for business purposes, and, as the county court judge has found, not in any respect for residential purposes, he, in my judgment, changed the status of the two floors from being part of a dwelling-house used for business premises into a separate dwelling-house used for business premises in respect of which no protection is given by the Act which was in operation at the relevant time. That being so, what is the position of the tenant? In my judgment, he is in the position of a man whose contractual tenancy can be determined by notice, and if that notice is given his contractual tenancy comes to an end, and you cannot find in the provisions of the Act of Parliament anything that will protect him and enable him to say: "I am a statutory tenant" of any portion of the premises.

The difficulty that I felt in *Gidden* v. *Mills* (4) I still feel with regard to the question whether an order can be made for possession of the whole of the premises, because whether the action in the county court is an action for ejectment under s. 59, or an action for possession under s. 138, of the County Courts Acts, 1888 [see now s. 48 (1) of the County Courts Act, 1934, as amended by Sched. I, Part II, para. 4, of the County Courts Acts, 1955], it is an action which appears to me to be an action claiming the right to be put into physical possession of the premises, and the warrant which is provided for under the statutory rules of the county court is a warrant directed to the officer of the court to put the plaintiff into possession of the premises in question. That means, surely, to put him into physical possession of the whole of those premises. If it comes to the knowledge of the court that there are in parts of the premises persons who are entitled to say under the Act of Parliament: "We are entitled to remain in possession," then the judgment for possession cannot be executed because it is a judgment for possession of the whole of the premises, and the officer of the court cannot give possession of the whole of the premises. Whether that be right or not, it was the view I took in *Gidden* v. *Mills* (4) and a view of which I still feel the force. But it is an academic question, because, whether it is right to give judgment for possession or not, it cannot be effectively carried out. Third parties have rights under the statute, so that whether or not the judgment is only for possession of that part of the premises with which the rights of third parties are not concerned, does not matter, because, in any event, the effect of a judgment for possession of the whole of the premises would be that the landlord can take possession of the business part of the premises and cannot take possession of the other part of the premises. Whether it is right to say that the rights of the sub-tenants have to be considered before you give judgment for possession, or whether they have only to be considered after the warrant for possession is put into the hands of the officer of the court, is a matter of no consequence, having regard to the fact that they are in fact protected in either case. If this case depended solely on my judgment I should have confined the order to an order for possession of the ground floor and the first floor, but, inasmuch as my brothers think differently and agree with the view of a very experienced judge in these matters, SWIFT, J., I should have considerable hesitation in giving effect to the view which otherwise would have commended itself to me.

ROMER, L.J. -I agree that this appeal must be allowed. Assuming, as for the reasons given by SCRUTTON, L.J., we are bound to do, that the finding of fact of the learned county court judge was correct, that the ground floor and first floor are being used solely for business purposes, it follows that the only part of the premises originally demised of which the tenant is now in possession is occupied by him solely for business purposes. It has frequently been pointed out in the courts, and it has been pointed out once more by SCRUTTON, L.J., in the judgment that he has just given, that the principal object of the Acts was to protect a person residing in a dwelling-house from being deprived and turned out of his home. Where, therefore, when a contractual tenancy comes to an end, it is found that the tenant is not in physical possession of any part of the premises, there is nothing in the Acts which enables him to resist the claim of his landlord to possession, whether he has gone out without sub-letting the premises or whether he has sub-let the premises as a whole. Where he has sub-let the premises as a whole I think that he has ceased thereby to be entitled to the protection otherwise afforded him by the Acts, and I think this was so even before the introduction by the Act of 1923 of cl. (h) into sub-s. (1) of s. 5 of the Act of 1920 [see now Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sched. I (d), as amended by the Rent and Mortgage Interest Restrictions Act, 1939, Sched. I], a clause which I think was introduced by the Act of 1923 really for the purpose of quieting any doubts which may previously have existed on the subject. If it be right, as I think it is, to say that a tenant who has given up possession of the whole of the premises, or has sub-let the whole of the premises, is not entitled to the protection of the Acts when his contractual tenancy comes to an end, it is equally true that where the contractual tenancy has come to an end and the tenant has given up possession of the whole of the residential portion of the premises and only remains in possession of part of the premises used for business purposes, he is outside the protection afforded by the Acts. For these reasons it appears to me that the learned county court judge was right in holding, as in effect he did, that in the circumstances the tenant was not entitled to any protection afforded by the Acts, and that the landlord, as against him at any rate, was entitled to an order for possession.

As regards the question whether an order for possession in those circumstances could be made against sub-tenants who, of course, are entitled to the protection afforded to them by the Act, I recognise to the full the difficulty that has been pointed out by GREER, L.J., and which he pointed out in *Gidden* v. *Mills* (4). On the other hand, it is to be observed that the Act in terms contemplates that, notwithstanding the existence of sub-tenancies and the possession of sub-tenants, an order may be made against the original tenant for possession. That is contemplated by s. 5 (5), by s. 15 (3), and indeed by s. 5 (1) (h) of the Act of 1920 [see now Sched. I (d) (as amended) of the Act of 1933]. There is this further, I think, to be observed. Section 15 (3) provides that in certain cases the relationship of landlord and tenant shall subsist between a landlord and a sub-tenant where an order for possession has been made against the tenant, and in the present case, if no order be made in favour of the landlord, giving him possession of the whole of the premises, I myself foresee great difficulty in the landlord's hereafter saying that the relationship of landlord and tenant has been created between him and the sub-tenant by virtue of s. 15 (3). Of course, making an order for possession of property where somebody else is in possession other than the defendant in the ejectment action, is in a way anomalous, but that is an anomaly which I think has to be faced. Even if we make an order for possession of part only of the premises, we are creating an anomaly, because it is an anomaly to give to a landlord in an action for possession against his tenant possession of only part of the premises.

I want only to add this. Speaking entirely for myself, I am by no means satisfied that where a tenant grants a sub-lease of part of demised premises, there is then, as between himself and his own landlord, a substitution of two dwelling-houses for one. That by the granting of the sub-lease he does create, as between himself and his sub-tenant, a new dwelling-house, must be admitted, but I am by no means satisfied, as I have said, that he creates a new dwelling-house of that part of the premises which he has sub-let as between himself and his landlord. Where, therefore, the tenant sub-lets the business part of the premises and retains possession of the rest of the property for his own residential purposes, I should require a good deal more argument before I came to the conclusion that the landlord then became entitled to possession of that part of the premises which was used for business premises only. However, that question does not now fall to be determined.

Appeal allowed.

Solicitors: *Edward Mackie*; *Schultess-Young, Warren & Bird.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

OAKLEY *v.* LYSTER

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), November 13, 1930]

[Reported [1931] 1 K.B. 148; 100 L.J.K.B. 177; 144 L.T. 363]

Conversion—Defendant not in possession of converted property—Need to prove denial of plaintiff's right.

Dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion, provided that it is also established that there is an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right. Where a person is not in possession of the property alleged to have been converted he cannot be held liable in trover unless he has denied the plaintiff's right.

Dicta of ATKIN, J., in *Lancashire and Yorkshire Rail. Co., London and North-Western Rail. Co., and Graeser, Ltd.* v. *MacNicoll* (1) (1918), 118 L.T. at p. 598, and of KELLY, C.B., in *England* v. *Cowley* (2) (1873), L.R. 8 Exch. at p. 131, approved and applied.

Notes. Referred to: *Caxton Publishing Co., Ltd.* v. *Sutherland Publishing Co., Ltd.*, [1938] 4 All E.R. 389.

As to acts which amount to conversion, see 33 HALSBURY'S LAWS (2nd Edn.) 52 et seq., and for cases see 43 DIGEST 469 et seq.

Cases referred to:

(1) *Lancashire and Yorkshire Rail. Co., London and North-Western Rail. Co., and Graeser, Ltd.* v. *MacNicoll* (1918), 88 L.J.K.B. 601; 118 L.T. 596; 34 T.L.R. 280; 62 Sol. Jo. 365, D.C.; 8 Digest (Repl.) 166, *1071*.

(2) *England* v. *Cowley* (1873), L.R. 8 Exch. 126; 42 L.J.Ex. 80; 28 L.T. 67; 21 W.R. 337; 43 DIGEST 470, *100*.

Appeal from an order of MACKINNON, J.

The plaintiff, who was a demolition contractor, bought an aerodrome in 1925 for the purpose of pulling it down and selling the material. The demolition was completed in 1926, and the plaintiff agreed to reinstate the land upon which the aerodrome had stood. In order to provide storage accommodation for the large quantity of material which had to be removed from the site the plaintiff took on lease from the tenant of a farm on the opposite side of the road three and a half acres of land to be used as a "dump" for 8,000 tons of hardcore and tar macadam which had become the property of the plaintiff. Subsequently portions of this material were sold, leaving a balance of some 4,000 tons still undisposed of in January, 1929, when the defendant purchased the freehold of the farm on which this material was stacked. Shortly afterwards the plaintiff discovered that some portions of the material had been removed, whereupon he interviewed the defendant, who informed him that he had purchased the land in question and that the material stacked thereon belonged to him (the defendant). On July 9, 1929, the defendant's solicitors wrote to the plaintiff as follows:

> "We would inform you that Mr. Lyster purchased this farm in January last, and the hardcore stacked thereon of course belongs to him. . . . You must not, therefore, attempt to remove any of the hardcore, otherwise you will become a trespasser on our client's land."

Further correspondence followed, but at the trial it was admitted by the defendant that the plaintiff was at the material time lawfully in occupation of the three and a half acres and that the material stacked thereon was his property. A proposed sale of part of the material to a Mr. Edney fell through in view of the claim put forward by the defendant that payment should be made to him, and the plaintiff brought the present action claiming a declaration that the hardcore was his property, and damages for the conversion of a portion of it which, it was alleged, had been removed on the defendant's instructions. The defendant denied conversion.

MACKINNON, J., gave judgment for the plaintiff upon the ground that the defendant was exercising a physical control over the plaintiff's goods and thereby depriving him of their possession; and he assessed the damages at £300. The defendant appealed.

H. Bensley Wells for the defendant.

Marks, for the respondent, was not called upon.

SCRUTTON, L.J.—Four or five hundred years ago a person who desired to obtain justice from the King's court was obliged to obtain a particular form of writ, and if he chose the wrong one there was an end of the matter, whatever the facts might be. It was much the same before the Common Law Procedure Act and the Judicature Acts. It was incumbent upon the plaintiff to express his claim in a legally accurate form, and, if he did not, a demurrer would put an end to the action, whereby frequently great injustice was caused. The courts have gone far beyond that now; they find out the facts, and, having done so, endeavour to give a right judgment upon those facts.

In the present case, therefore, I begin by finding out the facts in order to see whether the form of remedy claimed by the plaintiff is the right one. The facts are these: There was a government aerodrome near the Winchester and Salisbury road, the need for which disappeared with the armistice in 1918. The plaintiff undertook to clear away the structure from the land upon which it stood, and he became thereby entitled to some 8,000 tons of hardcore and tar macadam which he endeavoured to dispose of by sale. In order to remove the stuff from where it was he had to find some place upon which he could put it until such time as he could sell it. Accordingly, he took a lease of land comprising some three and a half acres on the other side of the road and deposited the stuff there. He sold a large portion of it, but at the material time had some 4,000 tons left. While the lease was still subsisting the defendant purchased the freehold of the property, and for some reason he conceived the idea that he had an immediate right of occupation of the land which had been let to the plaintiff, that the hardcore and tar macadam was his, and that the plaintiff had no right to remove it. It was admitted by counsel that the defendant was quite wrong in his ideas and that he was under a mistake as to his legal position. It is clear from the evidence that he used some of the material himself. The plaintiff having heard that someone was carrying his property away and using it, went to the defendant, and the defendant admitted that some of the material had been carted away by his orders. The next thing that happened was that one Edney, who had a large contract with a railway company for some 2,000 tons of the hardcore, proposed to carry out his contract by buying from the plaintiff, who was quite ready to sell it to him. But the defendant refused to allow the stuff to be removed. His position is made clear by the letter which his solicitors wrote on July 9, 1929, in these terms:

> "Our client Mr. G. J. Lyster has handed us your letter to him of 5th inst. We would inform you that Mr. Lyster purchased this farm in January last, and the hardcore stacked thereon of course belongs to him. . . . You must not, therefore, attempt to remove any of the hardcore, otherwise you will become a trespasser on our client's land."

It is quite clear that that was all wrong; the defendant did not own the hardcore; he was only a reversioner upon the determination of the plaintiff's lease; he was taking away some of the material and he stopped Edney taking it away; and by his solicitors' letter he was claiming the sole right to dispose of it. These assertions of right on his part were mistaken, and were bad in law, hence the present action claiming damages for the conversion of the hardcore. The grounds of the plaintiff's claim were (i) the removal of the hardcore by the defendant's order, and (ii) the claim put forward by the defendant to be entitled to the whole of the hardcore.

Those are the facts. Upon being asked whether the defendant had done any wrong his counsel hesitated, and then said that while his client might have been mistaken as to his right to the hardcore, his (counsel's) contention was that what had been done by the defendant did not amount to conversion. The question, therefore, is: Did this amount to conversion? The law of conversion has been very much extended in recent years. In early days an action was begun by a writ for trover. That not being sufficient, it was followed by a writ on the case framed on the special facts and extending the writ for trover. All these remedies have now been labelled conversion. I take the modern definition of trover from the judgment of Atkin, J., in *Lancashire and Yorkshire Rail. Co., London and North-Western Rail. Co., and Graeser, Ltd.* v. *MacNicoll* (1), where he says (118 L.T. at p. 598):

> "It appears to me plain that dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion, provided that it is also established that there is an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right."

It was argued on behalf of the defendant that there could be no conversion if the defendant was not in possession of the thing alleged to have been converted, and in support of that proposition *England* v. *Cowley* (2) was cited, but I find that in that case Kelly, C.B., said (L.R. 8 Exch. at p. 131):

> "Apart from mere dicta no case, so far as I am aware, can be found where a man not in possession of the property has been held liable in trover unless he has absolutely denied the plaintiff's right."

In this case the defendant has denied the plaintiff's right to remove the hardcore, which, he says, is his own, and he backed his claim by stopping the plaintiff and his purchaser from removing the material. That brings this case amply within the definition of conversion given by Kelly, C.B., and Atkin, J., in the cases I have referred to, and damages were rightly claimed in an action for conversion. It is said that the plaintiff is not entitled to damages, but should only be allowed to remove the hardcore from the land. I am happy to say that this contention also fails. In dismissing this appeal I think we are carrying out the modern idea of doing justice irrespective of the form of the writ.

GREER, L.J.—I agree that this appeal should be dismissed. There can be no doubt whatever as to the merits of the case. I think the plaintiff was entitled to deal with his hardcore without interference on the part of anybody. He had agreed to sell it at a time when there was a good market for it, and by the act of the defendant he was prevented from putting its value into his pocket. The remedy he has chosen to put on his pleading is a claim for damages for conversion, and a vigorous contention was put forward by the defendant to the effect that there cannot be a judgment for conversion unless it has been established that physical possession has been taken of the property in question. What happened in this case was this. The defendant bought the farm on which the material in question was deposited, and the only way in which he could assert his title to it was by saying that nobody else should remove it without his permission, that he alone could give the right of removal. In these circumstances it is right to say that he was in possession of the material and was exercising rights over it in derogation of the rights of the true owner. I am not satisfied that the contention of counsel for the defendant is correct, because the cause of action depends upon whether the defendant has interfered with the rights of property of the plaintiff, which rights include rights of possession, and if the defendant is proved to have interfered with the rights of the plaintiff and to have prevented him from exercising those rights the plaintiff clearly has a cause of action. Whether a century or so ago such an action would have been called trover or an action on the case is immaterial. A cause of action has been proved because there has been an interference by the defendant with the rights of the plaintiff. It may be that trover is not the right name for that, but I agree that the language of Kelly, C.B., in *England* v. *Cowley* (2) supports the view that even in a case where the defendant has not taken possession of the property, but all that has happened is that the defendant claims to exercise rights of ownership in respect of the property as against the plaintiff, that is sufficient to give rise to an action for conversion. Whether that be so or not, on the facts of this case a good cause of action is disclosed which is recognised in the year of grace 1930.

SLESSER, L.J.—I agree, but even on the narrowest construction for which the defendant contends, I think the evidence shows quite clearly that the defendant was exercising dominion over the property inconsistent with the rights of the true owner. In his letters the defendant stated quite clearly that he was the owner of the hardcore, and intended to use it as he felt disposed. This case is quite different on its facts from *England* v. *Cowley* (2), where the interference complained of was a statement by the landlord of the house that he did not intend to allow the goods of the tenant to be removed. In the present case there is a claim to ownership of the property and a statement that none of the core is to be removed unless the defendant was paid for it, which is, in effect, a claim by the defendant to be owner of the goods. I think this case was properly decided on the evidence in favour of the plaintiff and that this appeal therefore fails.

Appeal dismissed.

Solicitors: *Johnson, Jecks & Colclough*, for *Down, Scott & Down*, Dorking; *Maples, Teesdale & Co.*, for *Cumberland, Brown & Shearman*, Luton.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

LONG ACRE PRESS, LTD. *v.* ODHAMS PRESS, LTD. AND ANOTHER

[CHANCERY DIVISION (Maugham, J.), May 13, 1930]

[Reported [1930] 2 Ch. 196; 99 L.J.Ch. 479; 143 L.T. 562]

Company—Dividend—Profits "available for dividend"—Available after setting aside of sum to reduce debit.

In 1927 the plaintiff company issued £100,000 convertible notes carrying 8 per cent. per annum. By condition 2, which was endorsed on the notes, it was provided (a) that when the profits of the company available for dividend in any year exceeded the amount required to pay a dividend at the rate of 8 per cent. on the ordinary shares, the company should, by way of interest additional to the 8 per cent. provided for the notes, pay to the holders of the notes a sum equal to one half of the aforesaid excess. By the articles of association of the company a declaration by the directors as the amount of the profits available for dividends was conclusive, and the directors had power, before recommending any dividend, to set aside out of the profits such sums as they thought proper as a reserve fund, to be applicable, at their discretion, for the liquidation of any debt or liability of the company. At the end of 1927, there was a debit to the profit and loss account of the company of £49,000, and for the following year a profit of £18,000. The directors decided to apply that sum in reduction of the debit of £49,000, but the noteholders claimed that they were entitled to half the sum remaining after deduction from the £18,000 of the £8,000 required to pay the dividend on the ordinary shares.

Held: the words in condition 2 (a), "available for dividend," meant available for dividend after the making of any reserve or other similar application of the profits which the directors in good faith thought it was their duty to make in the interests of the company, and, therefore, the £18.000 was not a sum of the nature of profits available for distribution in the year in question within the condition. A

Notes. Applied: *Re Buenos Ayres Great Southern Rail. Co., Ltd.* v. *Preston and Another*, [1947] 1 All E.R. 729. Referred to: *Stewart* v. *Sashalite, Ltd.*, [1936] 2 All E.R. 1481.

As to the declaration and payment of dividends, see 6 HALSBURY'S LAWS (3rd Edn.) 396 et seq., and for cases see 9 DIGEST (Repl.) 643 et seq. B

Cases referred to:

(1) *Fisher* v. *Black and White Publishing Co.*, [1901] 1 Ch. 174; 71 L.J.Ch. 175; 84 L.T. 305; 49 W.R. 310; 17 T.L.R. 146; 45 Sol. Jo. 138; 8 Mans. 184, C.A.; 9 Digest (Repl.) 645, *4291*.

(2) *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.*, [1902] 1 Ch. 146; C 71 L.J.Ch. 158; 85 L.T. 652; 50 W.R. 177; 18 T.L.R. 161; 46 Sol. Jo. 121; 9 Mans. 56; 19 R.P.C. 69, C.A.; 9 Digest (Repl.) 644, *4286*.

(3) *Evling* v. *Israel and Oppenheimer*, [1918] 1 Ch. 101; 87 L.J.Ch. 341; 118 L.T. 99; 34 T.L.R. 109; 9 Digest (Repl.) 632, *4221*.

(4) *Ammonia Soda Co.* v. *Chamberlain*, [1918] 1 Ch. 266; 87 L.J.Ch. 193; 118 L.T. 48; 34 T.L.R. 60; 62 Sol. Jo. 85, C.A.; 9 Digest (Repl.) 146, *858*. D

(5) *Stapley* v. *Read Bros., Ltd.*, [1924] 2 Ch. 1; 93 L.J.Ch. 513; 131 L.T. 629; 40 T.L.R. 442; 68 Sol. Jo. 519; 9 Digest (Repl.) 646, *4295*.

Originating Summons.

The defendant company held more than three-fourths of the share capital of its subsidiary company—the plaintiff company, which was incorporated in 1925 with a capital of £100,000 in 100,000 shares of £1 each, mainly for the purpose E of acquiring, printing and publishing a newspaper called *The People*. The plaintiff company, at first, was not very successful. In 1927 8 per cent. convertible notes of £100, £50, and £20, to the aggregate of £100,000, were issued; and in 1928 there was a further issue of £50,000. The conditions or clauses endorsed thereon were identical, the company agreeing to pay to the duly registered holders of the notes interest at the rate of 8 per cent. per annum by half-yearly payments, and F that until repayment of the principal moneys a registered holder should be entitled to additional interest pursuant to the conditions endorsed thereon, and to exchange the note for preference shares. The conditions endorsed were, inter alia: Condition 2:

> "Until payment of the principal moneys hereby agreed to be paid (a) whenever G the profits of the company available for dividend in respect of any year or other accounting period exceed the amount required to pay the fixed dividends on the pre-ordinary shares (if any) for the time being issued, and a dividend at the rate of 8 per cent. per annum upon the capital for the time being paid up or credited as paid up on its ordinary shares, the company shall, by way of interest additional to the interest at the fixed rate above mentioned, pay to the registered holders of the notes of this series for the time being outstanding rateably H in proportion to the principal moneys outstanding in respect of the notes held by them respectively, a sum equal to one-half of the excess aforesaid less such proportion thereof as would have been payable to the noteholders who have converted their notes into preference shares as hereinafter provided if no such conversion had taken place: Provided always that no holder of any of the said notes shall in any event be entitled in any year or other accounting period to I additional interest exceeding interest at the rate of 4 per cent. per annum on the principal moneys outstanding in respect of the notes held by him. A declaration by the directors of the company as to the amount of the profits at any time available for dividend shall be conclusive."

By art. 137 of the articles of association, it was provided that:

> ". . . the profits or other moneys of the company which shall be available for distribution and which it shall from time to time be determined to distribute

> by way of dividend shall be applied in payment of dividends upon the shares of the company. . . ."

By art. 138:

> "The directors may . . . from time to time declare dividends, but no such dividend shall . . . be payable otherwise than out of the profits of the company. . . . A declaration by the directors as to the amount of the profits or other moneys at any time available for dividends shall be conclusive."

By art. 141:

> "Before recommending any dividend, the directors may set aside out of the profits of the company such sum or sums as they think proper as a sinking fund for the redemption of any outstanding debentures of the company, and may pay over any moneys so set aside to the trustees for the holders of any such debentures, and also may set aside out of such profits such sum or sums as they think proper as a reserve fund or reserve funds, which shall at the discretion of the directors be applicable for meeting contingencies and the gradual liquidation of any debt or liability of the company, or for repairing or maintaining any works connected with the business of the company, or shall with the sanction of the company in general meeting, be as to the whole or any part applicable for equalising dividends, or for distribution by way of special dividend or bonus, or for any other purpose for which the profits of the company may lawfully be applied. . . ."

For and up to the year ending Nov. 31, 1927, there was a total debit to the profit and loss account of £49,072 15s. On Jan. 1, 1929, after payment of interest on the debentures and the 8 per cent. convertible notes there was a sum of £17,803 16s. 8d., representing profit made by the company during the year ended on Dec. 31, 1928. The directors decided to retain the whole of that sum and applied it in reduction of the debit of £49,072 15s. On July 19, 1929, the solicitors for the noteholders, represented by the second defendant, representing the noteholders, wrote claiming, in addition to the fixed interest payable under the notes, 50 per cent.—£4,901 18s. 4d.—of the net profits for the year 1928 after deducting therefrom the amount—£8,000—requiring to pay a dividend of 8 per cent. on the ordinary shares. The writ in the present action was issued on Feb. 4, 1930, and this summons raised the following questions: Whether, upon the true construction of the notes and in the events which had happened, the plaintiffs (i) were bound to apply the profits, remaining after meeting all charges and deducting a sum equal to a dividend at the rate of 8 per cent. per annum on the shares, in or towards additional interest on the notes in the manner mentioned in condition 2 (a); or, (ii) were at liberty to carry those net profits or any portion thereof as the directors should think fit to a reserve account, or retain the same in diminution of any loss standing to profit and loss account, or otherwise as the directors should think fit.

Waite, for the plaintiffs.

Gavin Simonds, K.C., and *D. H. Cohen*, for the defendant company, referred to *Fisher* v. *Black and White Publishing Co.* (1); *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (2); *Evling* v. *Israel and Oppenheimer* (3).

Cohen, K.C., and *Cecil Turner*, for the noteholders, referred to *Ammonia Soda Co.* v. *Chamberlain* (4); *Stapley* v. *Read Bros., Ltd.* (5).

MAUGHAM, J.—The question which is submitted to me, and the question of construction on the originating summons, is whether the sum of £17,803 16s. 8d. is to be treated as the profits of the company "available for dividend" in respect of the year ending Dec. 31, 1928. The materiality of it is this. The directors consider that it is in the best interest of the company to retain in the business the whole of that apparent profit of £17,803 16s. 8d., and they have applied it in reduction of the debit balance of £49,072 15s., so as to reduce that debit balance to the sum of £31,268 18s. 4d. I have to bear in mind, on the one hand, the fact that the contract, including, of course, condition 2, is a contract which is made between the company and a lender of money to the company who is not primâ facie concerned with the ultimate success of the company, and who, therefore, is not in the same position as a shareholder. On the other hand, some weight is to be attached to the circumstance that condition 2 (a) begins with a reference to dividends without any such qualification as "whether the same shall be paid or not." Reading the whole sentence, omitting unnecessary portions, and omitting the reference to pre-ordinary shares which were never created, in substance the condition begins thus:

> "Whenever the profits of the company available for dividend exceed the amount required to pay 8 per cent. upon the 100,000 shares of £1 each being the share capital of the company for the time being."

That event having happened, the company then becomes bound by contract with the lender to pay by way of additional interest a sum to be ascertained as the condition requires; and the question which I have to determine here is, treating the preliminary words of the condition as being those I have mentioned, what is the meaning of the words "profits available for dividend?"

I ask myself the question: When will the profits available for dividend exceed the amount required to pay 8 per cent. upon 100,000 ordinary shares? Do they so exceed that amount, that is, the sum of £8,000, in a case where the directors consider it their bounden duty to make such a provision under art. 141 of the articles of association as will reduce the sum available for dividend to something less than the sum of £8,000. There are two alternatives, I think. One is that the words "profits available for dividend" refer to the sum that can be distributed without the directors being held liable as for an ultra vires act, and the other is that the words refer to the sum which can be properly distributed after the directors have performed on behalf of the company the duties which are imposed upon them by the articles of association.

In my opinion, that question is resolved by the decision of the Court of Appeal in *Fisher* v. *Black and White Publishing Co.* (1). It is true that the question there was simply one of the true construction of the memorandum and articles of association, and was not complicated by the circumstance that there was a contract entered into between the company and the lender. Nevertheless, there the Court of Appeal did put a construction upon the words which I have to construe here—"the profits . . . available for dividend." There, there was a clause that profits so "available for dividend" should be applicable in a specially defined way. There was also a provision in one of the clauses of "Table A" which was applicable, giving the directors power to set aside out of the profits of the company a reserve fund. The Court of Appeal held that the words "profits available for dividend" meant the net profits after making any deductions which the directors could properly make for reserve, and that the directors were entitled to set aside a sum as a reserve before paying a dividend to the ordinary shareholders, and none the less because of the mandatory form of the memorandum, which provided that the profits available for dividend should be applicable in a particular way. That case has been more than once followed in somewhat similar cases. In particular, the same view was expressed by SIR ROBERT ROMER, L.J., in *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (2).

Assuming, then, in favour of counsel for the second defendant, that as the result of *Ammonia Soda Co.* v. *Chamberlain* (4) and *Stapley* v. *Read Bros., Ltd.* (5), the directors would have been fully justified in paying a dividend out of the profits for the year 1928, notwithstanding the fact that there was a large debit to the balance of the profit and loss account, I must, nevertheless, come to the conclusion that the words "available for dividend," must be taken to mean available for dividend after making any reserve or other similar application which the directors in good faith, acting on behalf of the company, think it is their duty to make in the interests of the company, and that the sum of £17,803 16s. 8d. was not a sum of the nature of "profits available for dividend" in that year. Accordingly, the question asked by summons must be answered in the negative.

Solicitors: *Bull & Bull*; *Last, Riches & Fitton.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

ROBERT A. MUNRO & CO., LTD. *v.* MEYER

[KING'S BENCH DIVISION (Wright, J.), March 20, 21, April 11, 1930]

[Reported [1930] 2 K.B. 312; 99 L.J.K.B. 703; 143 L.T. 565; 35 Com. Cas. 232]

Sale of Goods—Repudiation of contract—Sale by description—Clause that goods to be "taken with all faults and defects"—Failure to give delivery not to cancel contract—Goods delivered not of contract description—Measure of damages—Sale of Goods Act, 1893 (56 *&* 57 *Vict., c.* 71), *ss.* 13, 14 (2) *and* 31 (2).

By a contract dated Aug. 26, 1927, the plaintiffs agreed to sell and the defendants agreed to buy some 1,500 tons of meat and bone meal described as the Smithfield Animal Products Co.'s production. Delivery was to be made in equal monthly instalments of 125 tons throughout 1928. The contract contained the following provisions: "Each delivery or shipment shall be treated as a separate contract and the failure to give or to take any delivery or shipment shall not cancel the contract as to future deliveries or shipments. The goods to be taken with all faults and defects; damaged or inferior, if any, at valuation to be arranged mutually or by arbitration." In April, 1928, owing to financial difficulties in Germany affecting farmers an agreement was arrived at by the parties by which instalments were postponed, and some 400 tons were kept in store by the sellers to be delivered as required. In June, 1928, the financial difficulties still continuing, the buyers asked the sellers to cancel the balance due under the contract, some 782 tons, and the sellers agreed to do so on receiving a payment of £1 per ton payable in four quarterly instalments commencing from Aug. 1, 1928. The buyers paid two instalments under this agreement, and some 100 tons remained for delivery out of the 400 tons stored on their behalf under the agreement of April, 1928. In February, 1929, under instructions from the buyers, 20 tons of the balance of 100 tons in store were invoiced to Germany. On receipt of this parcel its appearance caused an analysis to be taken, and it was found to be adulterated to the extent of 5 per cent. by cocoa husks. Subsequently, it was discovered that all the meal delivered to the buyers under the contract similarly did not correspond with the contract description and so might have been rejected by the buyers. For this adulteration the sellers were in no way to blame, as they had purchased the bone meal from the S.A.P. Co. and the adulteration could only have been made during manufacture. On a claim by the sellers for a balance of £386 10s. payable under the agreement of June, 1928, and a counterclaim by the buyers for rescission of the agreement and repayment of the money paid under it, and also for damages for breach of contract,

Held: (i) where a breach of contract was as serious and had continued as persistently as the breach in this case the buyer was entitled to treat the whole contract as repudiated, and that was so despite the clause in the contract that the goods were to be "taken with all faults and defects . . . ," for that clause only applied to goods which answered the trade description and did not shut out the overriding warranty or condition implied under s. 13 of the Sale of Goods Act, 1893; (ii) the clause in the contract that failure to give or take any delivery should not cancel the contract as to future deliveries could not be construed so as to defeat the rights of the buyers to treat the whole contract as repudiated under s. 31 (2) of the Sale of Goods Act. 1893, but in the circumstances it was doubtful whether the buyers would have elected to treat the contract as at an end, and for that reason the contract would not be set aside; (iii) the buyers were entitled to damages in respect of the meal delivered, it not being of the contract description, and those damages were to be based on the difference in value between meal of the contract quality and the adulterated article delivered and not on the intrinsic difference in value; (iv) as to the remaining 80 tons of the 100 tons in store, on the facts the sellers had retained the jus disponendi within s. 19 (1) of the Sale of Goods Act, 1893, and the buyers were not bound to take delivery of them because the property in them had not passed and there was no ground for treating the delivery and acceptance of the 20 tons as a notional acceptance of the whole 100 tons; (v) the sellers were entitled to the £80 paid by them as a deposit in respect of the 80 tons; and, therefore, there would be judgment for the sellers on the claim and for the buyers on part of the counter-claim.

Notes. Considered: *Maple Flock Co.* v. *Universal Furniture Products (Wembley), Ltd.*, [1933] All E.R.Rep. 15. Applied: *Champanhac & Co., Ltd.* v. *Waller & Co., Ltd.*, [1948] 2 All E.R. 724. Referred to: *Smyth & Co., Ltd.* v. *Bailey, Son & Co.*, [1940] 3 All E.R. 60.

As to sales by description and implied terms as to quality, see 29 HALSBURY'S LAWS (2nd Edn.) 59 et seq.; and as to delivery by instalments, see ibid. 131 et seq. For cases see 39 DIGEST 432 et seq., 567–573. For Sale of Goods Act, 1893, see 22 HALSBURY'S STATUTES (2nd Edn.) 985.

Cases referred to:

(1) *Millar's Karri and Jarrah Co.* (1902) v. *Weddel Turner & Co.* (1908), 100 L.T. 128; 11 Asp.M.L.C. 184; 14 Com. Cas. 25; 2 Digest (Repl.) 601, *1284*.

(2) *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; 53 L.J.Q.B. 437; 51 L.T. 637; 32 W.R. 989, H.L.; 12 Digest (Repl.) 378, *2966*.

(3) *Taylor* v. *Oakes Roncoroni & Co.* (1922), 127 L.T. 267; 38 T.L.R. 517; 66 Sol. Jo. 556; 27 Com. Cas. 261, C.A.; 39 Digest 593, *1923*.

(4) *Couturier* v. *Hastie* (1856), 5 H.L.Cas. 673; 25 L.J.Ex. 253; 28 L.T.O.S. 240; 2 Jur.N.S. 1241; 10 E.R. 1065, H.L.; 12 Digest (Repl.) 414, *3222*.

(5) *Scott* v. *Coulson*, [1903] 2 Ch. 249; 72 L.J.Ch. 600; 88 L.T. 653; 19 T.L.R. 440, C.A.; 35 Digest 103, *100*.

(6) *Cooper* v. *Phibbs* (1867), L.R. 2 H.L. 149; 16 L.T. 678; 15 W.R. 1049, H.L.; 22 Digest (Repl.) 156, *1411*.

(7) *Bingham* v. *Bingham* (1748), 1 Ves. Sen. 126; 27 E.R. 934; 40 Digest (Repl.) 390, *3113*.

Action in the Commercial Court tried before WRIGHT, J.

The facts appear in the headnote and the judgment. His Lordship ruled that the burden of proof was on the defendant.

James Dickinson, K.C., and *J. W. Morris* for the defendant.

Le Quesne, K.C., and *G. R. Mitchison* for the plaintiffs.

Cur. adv. vult.

April 11.—**WRIGHT, J.**—The plaintiffs are merchants dealing in cattle foods, carrying on business in London and Glasgow. The defendant is a merchant in similar material carrying on business in Hamburg. The matters in dispute arise out of a contract made between the plaintiffs and the defendant, dated Aug. 26, 1927, for the purchase and sale of "about 1,500 tons of meat and bone meal (Smithfield Animal Products Co.'s production) packed in new bags of 110lb. each gross.

Guaranteed analysis: Albuminoids, 40–45 per cent.; oil and/or fat, 10–12 per cent.; phosphates, about 30 per cent.; at £13 14s. per ton of 2,240 lb. c.i.f. Hamburg. 125 tons monthly, January to December, 1928, to be shipped in about equal weekly quantities. Net cash against documents on presentation in Hamburg by London bankers' cheque. Each delivery or shipment shall be treated as a separate contract, and the failure to give or take any delivery or shipment shall not cancel the contract as to future deliveries or shipments. The goods to be taken with all faults and defects; damaged or inferior, if any, at valuation to be arranged mutually, or by arbitration." There is a general arbitration clause:

> "Any dispute arising under this contract shall be settled in London under the rules for the time being of the London Court of Arbitration."

The actual claim is made on an agreement for the cancellation of that contract for sale. The plaintiffs, before making the contract for sale, had already made an earlier agreement, dated June 15, 1927, with Poynter and Tobias, the representatives of the Smithfield company, for about 1,800 tons of meat and bone meal, described in identical terms with those in the contract with the defendant at a price of £12 10s.; delivery in approximate equal monthly quantities, January to December, 1928, inclusive. That contract also contained an arbitration clause for arbitration in London.

The plaintiffs proceeded to make deliveries, and these were accepted by the defendant from time to time; but as the year 1928 went on the defendant was somewhat behindhand in taking his deliveries, because there had been financial difficulties in Germany affecting the farmers, who were unable to buy this meat and bone meal, which is a cattle food, and in Germany is very largely used for the feeding of pigs. Owing to these difficulties, in June, 1928, some 780 tons of the meal were still due for delivery, even after an arrangement had been made in the previous April for the postponement of certain quantities. It will be convenient if I refer at once to that arrangement, which leads up to an agreement in June. There was a considerable correspondence, but eventually at an interview an arrangement for postponement was come to as to part of the contract, and is embodied in a letter of April 25, 1928, from the plaintiffs to the defendant, which is signed both by the plaintiff and by the defendant. It is in these terms:

> "With reference to the conversation to-day, in view of the unfortunate market conditions at present prevailing in Germany, we have come to an arrangement to store up to 400 tons, you having agreed to pay expenses thereby incurred over c.i.f. Hamburg, such as into warehouse, rent, plus overdraft interest at the rate of 6 per cent. per annum from date of shipment until date of delivery. You will also pay £1 per ton on shipment, which we shall place to the credit of your account. We note that you find storage charges in Hamburg and Bremen cheaper than in London, and we shall ship to your instructions to either of these ports, where we shall store, receiving store warrants in our name. We shall instruct our bankers in Hamburg to deliver to you as required against payment. . . . The goods to be cleared from store by end of April, 1929, at latest."

To summarise the position, 300 tons out of the 400 tons were shipped to Hamburg, duly delivered, and paid for by about the end of 1928, and that left 100 tons which were put in store in London, and remained there until the beginning of 1929.

In June difficulties in taking delivery had not diminished, and the result was the agreement of June, 1928, on which the present claim is brought. That agreement is either contained in, or evidenced by, certain letters. The first is dated June 13, 1928, and it says this:

> "The writer [Mr. Holley, of the plaintiff company] had a conversation in our London office on Monday, the 11th inst., with Mr. Pintus [representing the defendant] when he informed us you were willing to carry out your agreement with us dated April 25, 1928, only provided we agree to cancel the remaining quantity, about 782 tons, at an indemnity of £1 per ton, payment of which to

> be made quarterly, as follows: Aug. 1, 1928; Nov. 1, 1928; Feb. 1, 1929; May 1, 1929. This is a very one-sided agreement in your favour, as the market price to-day in Hamburg cannot be stated to be more than £12 per ton. We understand from Mr. Pintus that you are taking the market value at £12 10s., and on that basis you are paying to him £1 per ton, his contract being £13 10s. On equal treatment we ought to receive £1 4s. per ton. . . . We have now received from Mr. Pintus your banker's cheque in our favour for £400, this being £1 per ton deposit against the 400 tons to be stored under agreement of the 25th April, 1928. Of this quantity, as you already know, 100 tons are stored in London."

Then he dealt with the remaining 300 tons and with payment. There was an acknowledgment by the plaintiffs on June 13 in these terms:

> "We acknowledge receipt of your two letters of the 12th inst., accompanied by bankers' cheque value £400 from Mr. Martin Meyer, Hamburg, which we have accepted as a deposit under our agreement with him of April 25, 1928, and beg to confirm our acceptance of his proposal to cancel the remaining 782 tons meat and bone meal on contract of Aug. 26, 1927, at £1 per ton payable as stated in your letter. We have written to our bankers to give delivery as required of the 400 tons at the rate of £12 14s. per ton, Mr. Meyer having of course to pay the charges incurred from c.i.f. up to the date of delivery. As stated by the writer at our interview, we consider the arrangement a very one-sided one in favour of Mr. Meyer, but in order to assist him we have accepted in the making of this agreement a part of his loss for our own account."

There was another letter of June 12, from Mr. Pintus to the plaintiffs, pointing out that there were 1,182 tons still to be taken, and after deducting 400 already shipped or about to be shipped to Hamburg, there were 782 tons still to be taken. The agreement was confirmed by letter accepting it, which also contained these words, referring to the 400 tons:

> "All warehousing charges to be for Meyer's account and the goods in store at Hamburg to remain your [the plaintiffs'] property until such time as deliveries are taken and payments are made against them."

Under the agreement certain instalments were payable and were paid to the extent of the first two, namely, £195 10s. on or about Aug. 1, and £200 on or about Jan. 17, 1929. That left payable under the agreement £386 10s., which was due for payment by instalments on Feb. 1 and May 1, 1929. The present action is brought claiming these two instalments, which have not been paid.

I must now refer to events which took place between June, 1928, and March, 1929, when the dispute arose. As I have already said, 300 of the 400 tons were taken and paid for, and the remaining 100 tons still remained in the warehouse in London. The parcel of 100 tons had been invoiced under two invoices of April, 1928, which stated that the goods were stored at Fisher's Wharf in the name of the plaintiffs. The invoices, which said "Delivery ex store as required," dealt in an anticipatory way with the 100 tons. In February, 1929, on the defendant's instructions, the plaintiffs shipped and invoiced to him out of the 100 tons, 20 tons. The invoice, which was dated Feb. 6, 1929, is for 20 tons of meat and bone meal, according to the specification at £13 14s. per ton—that is, £274 9s. 9d., less £1 per ton already paid, leaving £254 9s. 9d. To that was added the various charges for storage, rent, insurance, and interest amounting to £28 5s. 6d., and the total invoice was £282 15s. 3d.,

> "per steamship *Hermia* from London to Hamburg c.i.f. Hamburg ex 100 tons lot stored London. Contract dated Aug. 26, 1927. Payment nett cash against documents on presentation in Hamburg by a London bankers' cheque."

These goods were duly delivered and paid for, but something in their appearance caused inquiries to be made. Up to that time the German farmers had taken the various deliveries from the defendant without any protest and without any claim to abate the price which was payable to him for the goods. The appearance of the parcel was somewhat repellant, and it was eventually analysed, and was found, as a result of the analysis, to be adulterated to the extent of something like 5 per cent. with an entirely foreign substance, namely, cocoa husks. The cocoa husks could not, according to the evidence, have got into the meal by accident during the process of manufacture, but must have been put in deliberately by the manufacturers, the Smithfield Animal Products Co. Whereas the contract price of the meat and bone meal was £13 14s. a ton, the value of these cocoa husks was put at something like £2 10s. per ton. The result was that the article delivered cost much less to manufacture and, in my judgment, was not an article such as the contract between the plaintiffs and the defendant called for. It is true that the analysis of meat and bone meal answered the specification, but I think the article actually delivered was not within the contract description, because it was not meat and bone meal, but was a mixture of meat and bone meal and cocoa husks, an entirely alien substance in quantities which might vary from something in the nature of 3 per cent. to something in the nature of 5 per cent. That was a serious matter. By the law in force in Germany through the whole of 1928 it was a penal offence to deliver as meat and bone meal an adulterated substance containing such a proportion of alien matter. In England also it was a penal offence, at least from the middle of 1928, under the Fertilisers and Feeding Stuffs Act, 1926. I am quite satisfied that this stuff—and I am now only dealing with the 20-ton lot—did not answer the contract description and might have been rejected, notwithstanding the clause of the contract, which provided:

> "The goods to be taken with all faults and defects, damaged or inferior, if any, at valuation to be arranged mutually or by arbitration."

That clause, in my opinion, only applies to goods which answer the trade description, and does not shut out the overriding warranty or condition implied by the law under s. 13 of the Sale of Goods Act, 1893, which says that where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description. I think these goods as delivered to the plaintiffs did not correspond with the contract description, and equally as delivered by the plaintiffs to the defendant did not any more correspond with the contract description. The plaintiffs knew nothing about this, and so far as they were concerned were quite blameless and were victimised in the transaction; but under their contract with the defendant they were bound to deliver goods answering to the contract description. I need not refer to authority, because it has been frequently laid down that a seller cannot justify delivering goods which to a substantial extent are of the contract description but are mixed with other goods which do not answer the contract description. In this case, when an examination was made of the samples which had been retained out of all the parcels dealt with between the plaintiffs and the defendant, it was found that the amount of adulteration—that is to say, the quantity of cocoa husks—amounted to no less than 3·66 per cent. on the average. That is a very substantial matter. Some of the deliveries showed a percentage of 5 per cent.—that means that whenever a delivery was made of a ton purporting to be meat and bone meal there were only 19 cwt. of meat and bone meal in it, and 1 cwt. of inferior substance; and the same applies with a slight abatement to the other cases where the quantity of cocoa husks was somewhat less. In my judgment, the stuff delivered did not answer the description called for by the contract, and, therefore might have been rejected. But up to the date when the sampling took place, which was about March, 1929, neither the plaintiffs nor the defendant had any suspicion that the goods dealt with were not what they purported to be, and ought to have been. The whole thing was due to the conduct of the Smithfield company, which had deliberately adulterated these deliveries.

The defendant, having discovered as a result of analyses the character of the deliveries which he had taken, claimed that he was not bound by the agreement of June, 1928, on which this action is brought. In his defence he summarised the position which he had taken up as follows:

> "The agreement was made by the plaintiffs and the defendant under a mutual mistake of fact in that the plaintiffs and the defendant contracted in the belief that the goods which were being supplied by the plaintiffs to the defendant were goods which were in accordance with the contract, that the said 782 tons which the plaintiffs had in readiness to deliver were goods which were in accordance with the contract which the defendant would be bound to accept."

That is the mistake on which the defendant relies; and he counter-claims that the agreement ought to be set aside and rescinded ab initio, and that he should have returned to him the moneys which he had paid under the agreement and be released from any obligation to make the two remaining payments. So far as the precise allegation in the points of defence is concerned, the facts do not support it, because the plaintiffs had not got the 782 tons in readiness for delivery. On the contrary, as to a large part they were awaiting delivery in due course during the remainder of the year from the Smithfield company under the contract to which I have referred, and, therefore, so far as the letter of the pleading goes, the defence and counter-claim on this point must fail.

I think, however, that I ought to consider the question from a larger point of view. The way in which the case is put by the defendant is that he would not have entered into that agreement to pay £782 for cancelling the balance of the contract if he had known that the contract was not enforceable against him, and the reason on which he bases that contention is that, if he had known the condition of the stuff delivered or appropriated up to June, 1928, he would have been entitled to treat the contract as repudiated for the future and to refuse to be bound thereby any more or take further deliveries. It turns on his ignorance of the character in fact of the deliveries, but that in itself would be immaterial unless it carried with it the right to treat the contract as ended.

That raises several questions of some nicety and difficulty. The first question is whether the imperfect deliveries justified the defendant in saying that he was no longer bound by the agreement, because it had been repudiated by the plaintiffs. The question turns upon s. 31 of the Sale of Goods Act, which deals with instalment deliveries. Subsection (2) says:

> "Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated."

There are two cases which throw some light upon this section; one is *Millar's Karri and Jarrah Co.* (1902) v. *Weddel, Turner & Co.* (1), where it was decided that an arbitrator was entitled to hold that the contract could be cancelled by the buyer because one parcel out of the two provided for by the contract was not in accordance with the terms of the contract. BIGHAM, J., in giving judgment, said (14 Com. Cas. 29):

> "If the breach is of such a kind, or takes place in such circumstances as reasonably to lead to the inference that similar breaches will be committed in relation to subsequent deliveries, the whole contract may there and then be regarded as repudiated and may be rescinded. If, for instance, a buyer fails to pay for one delivery in such circumstances as to lead to the inference that he will not be able to pay for subsequent deliveries; or if a seller delivers goods differing from the requirements of the contract, and does so in such circumstances as to lead to the inference that he cannot, or will not, deliver any other kind of goods in the future, the other contracting party will be under no obligation to wait to

> see what may happen; he can at once cancel the contract and rid himself of the difficulty."

WALTON, J., agreed with that judgment.

In the present case the whole 631 tons delivered were found to be of the adulterated character which I have described. It is true that the plaintiffs were unaware of the facts; on that an argument has been based that the seller can only be deemed to repudiate if he so intends in fact, so that s. 31 cannot be relied on as giving the buyer the right to treat the whole contract as repudiated where there is no knowledge and no intention on the part of the seller to deliver defective articles. In cases like *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (2) the question is put whether or not the seller or the party in default had an intention no longer to be bound by the contract. The question was thus stated in one case: Did he evince an intention no longer to be bound by the contract? No doubt the plaintiffs here had no intention to break the contract, but, in my opinion, in such a case as this, where there is a persistent breach, deliberate so far as the manufacturers are concerned, continuing for nearly one-half of the total contract quantity, the buyer, if he ascertains in time what the position is, ought to be entitled to say that he will not take the risk of having put upon him further deliveries of this character, and will not accept the position that he must always be watchful and analyse the goods that are delivered to see whether or not they answer the contract. My conclusion is that in such circumstances the intention of the seller must be judged from his acts and from the deliveries which he in fact makes, and, that being so, where the breach is substantial and as serious as the breach in this case and has continued so persistently, the buyer is entitled to say that he has the right to treat the whole contract as repudiated.

Two further questions are raised—one is that, if the trouble had been discovered while the contract was current and notice had been given to the Smithfield company by the plaintiffs, the Smithfield company would have mended their ways; in support of this reference was made to the fact that though the plaintiffs refused to complete their contract with the Smithfield company after March, when they discovered the trouble, they did in fact take a small delivery of 24 tons, which was found—the company having been warned—to be in accordance with the contract. The plaintiffs relied upon some expressions of GREER, J., in *Taylor* v. *Oakes Roncoroni & Co.* (3), where the learned judge said (127 L.T. at p. 268):

> "No complaint had in fact been made, and non constat that if the defendants had asked for a better compliance with the contracts the plaintiffs might not have been able to improve their further deliveries so as to make them a strict compliance with the contracts. The defective deliveries, though they did not strictly comply with the contract description, were not far short of the quality required by that description."

On that ground the learned judge refused to say that the contract had been repudiated and could be put an end to. But I think that is a different case from the present one; the breach of contract in this case is very substantial, and I think it would be a very large assumption to assume that it could have been put right or that there was any guarantee as to what would happen in the future. It must be remembered that the goods had to be obtained from the Smithfield company because they were the only people who manufactured goods which would be a compliance, as regards that part of the description, with the contract.

The next contention of the plaintiffs is based upon the provision in the contract that

> "Each delivery or shipment shall be treated as a separate contract, and the failure to give or take any delivery or shipment shall not cancel the contract as to future deliveries or shipments."

That is a clause which is often found in contracts of this description and is very difficult to construe, or at least to apply to all possible emergencies. It seems to me, however, that whatever effect it may have—and I am not going to attempt to exhaust the possibilities of this clause—it cannot be construed so as to defeat the rights of the buyer under s. 31 of the Sale of Goods Act. The matter can be tested by a very simple illustration. Suppose the seller in the middle of performing the contract said in terms that he would not in any circumstances make any further deliveries, would the buyer then be bound to wait until each delivery became due, and then only—if and when it was not delivered—only be entitled to bring his action? In my opinion, this clause could not operate so as to prevent the buyer in such circumstances from bringing his action, if he were so minded, so soon as the complete and positive refusal to fulfil the contract was expressed. The rule under s. 31 (2) of the Sale of Goods Act is only a method of giving effect to the same principle as would arise in the case of a definite and express refusal; because the acts of the seller in such a case are treated as being equivalent to declaring that he will not fulfil the contract—that is, a refusal. It appears to me, therefore, that this clause, whatever it may mean, has nothing to say to the particular question at issue here.

But that is only one step in the argument which was put before me, because that only leads to the contention that if the defendant, as buyer, had known all the facts in June, 1928, he had the right to cancel the contract without any payment, and, if he had known that he was not bound by the contract, would not have agreed to pay £1 per ton to cancel the remaining 782 tons, and hence under the doctrine of mistake the court should declare the contract rescinded ab initio. The mistake as to the condition of the deliveries was mutual, and both parties must have been of opinion that the contract of sale was binding on them. There are certain cases in which at common law a mistake prevents a supposed contract from being a contract at all; there is the appearance of a contract, but the contract, as it is sometimes said, is void. Such a mistake is illustrated by s. 6 of the Sale of Goods Act, which deals with the case where there is a contract for the sale of specific goods, and the goods, without the knowledge of the seller, have perished at the time the contract was made; the contract is void, that is to say, there is no contract, and any money paid under such a contract is simply money paid for a consideration that has failed, so that the money is recoverable. Such a case is *Couturier* v. *Hastie* (4), and, to take another illustration, where the claim applied not to a chattel, but to a chose in action, there is *Scott* v. *Coulson* (5). In that case there was contract for the sale and purchase of a policy of insurance on a life, but it was afterwards ascertained that the assured person had died. The Court of Appeal there held that the contract entered into between the parties rested upon the basis of the assured person being still alive, and, that basis not existing, there was no contract.

In these cases it is clear that anything done under the belief that there is a contract is simply a nullity; moneys paid can be recovered, because no rights can possibly arise out of the mere appearance of a contract, there being in fact no contract. There are, however, certain other cases which are not so clear as those to which I have referred, in which a court of equity has exercised jurisdiction to declare, on the ground of some material and vital mistake, that the contract is rescinded ab initio, but the court has only exercised that equitable jurisdiction if satisfied not only that there was a mistake, but also that the circumstances were such that the mistake could be undone, and ought to be undone, and that there might be a restitutio in integrum. Probably one of the most striking cases of that type is *Cooper* v. *Phibbs* (6), where the curious position was that the party made a contract to acquire a right of fishery and to pay for it, not knowing that he was in truth himself entitled to the fishery, and it was held that the application of the rule of the court of equity was not limited to ignorance of a mere specific fact, but would extend to ignorance of a matter of private right, that is to say, not ignorance of the general law of the country which everybody is presumed to know and about which nobody can be mistaken in law, but of a private right of ownership, which may be treated for this purpose as a matter of fact, though it is in a sense also a matter of law. LORD WESTBURY said (L.R. 2 H.L. 170):

> "If parties contract under mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded on a common mistake."

In such a case there is no mistake of so precise and specific a character as the case in common law to which I have referred; there is an existing thing or chose in action which may be the subject of the contract, but the contract is liable to be set aside, because it was entered into by both parties on a misunderstanding such as LORD WESTBURY explained. Similarly, in *Bingham* v. *Bingham* (7), where a man had made a contract to purchase property of which he was owner, he went to the court of equity, where it was held that the contract should be rescinded. In the present case, however, it seems to me that I should not be justified in saying that this contract can be set aside. No doubt, if I am right in the conclusion I have expressed, the defendant, if he had been so minded and had ascertained all the facts relating to the past deliveries, would have had the right to elect to treat the contract as at an end, but it is not at all clear that he would have taken that course. The questions of law involved were difficult and doubtful—in particular, the question whether under the terms of this contract there was that right under s. 31. In addition, what decision would have been given if the matter had gone to arbitration under the contract may, perhaps, be even more doubtful than if the matter had gone to a decision in law.

There is also the clause of the contract as to the separate deliveries, which adds further confusion. In all the circumstances I do not think I am justified in finding as a fact that the defendant would have elected to risk an arbitration and to claim that the contract was rescinded. I think it practically certain that he would have attempted to compromise the matter by seeking a release on terms of compensation, and the actual compromise would have been not very, if at all, different from the terms of the agreement actually arrived at, because the agreement, as is pointed out in the letters, was very favourable to the defendant. I think there is no precedent for setting aside a contract in such circumstances, because I am unable to find that the making of the contract was conditioned by the mistake. I further think that, even if there was such a mistake as to induce the court otherwise to rescind the contract, the court would still have to consider if it could restore the parties to their original position. I do not say that the restitutio in integrum, the possibility of which is essential to the jurisdiction of the court of equity, means that the parties would be put in the same position as if they had never made the contract. In a sense, that could never be done. I further think that it is impossible, by looking at various cases in which this principle has been discussed, to ascertain any precise rules which limit definitely the application of it. The courts of equity have exercised a certain discretion, but the cases have mainly been cases of a comparatively simple character, cases of the delivery-up of possession and the payment of money; payments of sums paid with compensation for occupation, if there has been occupation, of property, and possibly with an indemnity against liabilities incurred under the assumed contract, namely, the contract which is set aside—in these cases there has been a sufficient restoration of the position. But in the present case it is not merely a question of repaying certain money. Nor do I think it is right to say that regard ought not to be had in this connection to the action of the plaintiffs in settling, as they actually did with the Smithfield company, and paying them the sum of £500 for the cancellation of a considerable part of the undelivered quantity. I think that there was a course of conduct on the part of the plaintiffs which must be taken to have been within the contemplation of the defendant as a business man, because it was a natural thing for the plaintiffs, when they had cancelled their contract with him, to seek to cancel, if they could, and as far as they could, their corresponding contract with the Smithfield company. On the whole, therefore, I think that this defence fails, and the counter-claim on this matter also fails.

That, however, still leaves certain questions to be considered. The quantity delivered under the contract was 631 tons. These deliveries were all, as I have found, deliveries which did not correspond to the contract description, and, that being so, the defendant in his counter-claim claims damages in respect of the 631 tons. To my mind, he is entitled to those damages. The only question is: What is the measure of damage? That was very much debated in the evidence. Apparently, the intrinsic difference in the value between 20cwt. of meat and bone meal and 19 cwt. of meat and bone meal, plus 1 cwt. of cocoa husks, is something like 11s., that is to say, taking 5 per cent. for convenience, as the amount of adulteration, there would be a difference in intrinsic value of that amount. But the question is: What is the difference in value between the pure meat and bone meal and the adulterated article as marketable commodities? The cocoa husks, apparently, are not poisonous to pigs or cattle; they may have some little feeding value, but the trouble is that, having regard to the Fertilisers and Feeding Stuffs Act, 1926, and even apart from the Act, no honest merchant would go to his customers, knowing the constitution of this stuff, and offer it as meat and bone meal. He would have to state its true composition, both in Germany and in this country, or he would be subject to penalties. An honest trader would have to say that he was tendering and offering for sale an adulterated article, and the evidence before me of very reliable and trustworthy witnesses is that that would affect marketability of the article to a very large extent, and would make it very difficult to sell that article, so that it could only be sold, if at all, under the inducement of a very considerable reduction in price. I have had all sorts of estimates before me, and it seems to me on the whole that I ought to allow £3 5s. per ton on each ton actually delivered of the adulterated stuff. I reject the contention that the damage is limited to the intrinsic difference of 11s. I treat as immaterial the fact that the defendant's customers accepted the stuff without complaint.

That leaves only one more question in this very lengthy case, and that is the question with reference to the 80 tons which remained out of the 100 tons, because, as I pointed out, 20 tons of the 100 tons which had been stored in London under the agreement of 1928 had been delivered, leaving 80 tons still in store. As to that there is a counter-claim on the part of the defendant that he is not bound to take delivery of the 80 tons, or that, if he is bound to take delivery, he is entitled to damages, because they are of inferior quality. I have come to the conclusion that the defendant cannot be compelled to take the 80 tons, because, in my judgment, the property in them had not passed, and, if the property had not passed, then, if they had tendered the goods to him and he inspected them, he would have found that they did not answer the contract description, as I have already explained, and that being so, for reasons which I have already given, he would be entitled to reject them.

Counsel for the plaintiffs, however, argued that there had been an appropriation, so that the property had passed, though the sellers had a lien under s. 41 of the Sale of Goods Act. It is true that those 80 tons have been set aside in a warehouse and are in bags which bear the defendant's mark, and had been invoiced, as I have pointed out, in April; but it seems to me that the terms of that invoice show, when taken with the other circumstances of the case, that the seller was retaining the jus disponendi under s. 19 (1) of the Sale of Goods Act, which provides that:

> "where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled."

The section goes on to deal with the specific case of goods shipped where the bill of lading is taken in the name of the seller. These particular goods, as the invoice shows, were stored in the name of the plaintiffs as sellers, and they were not to be delivered until they had been shipped c.i.f. Hamburg, and unless and until there had been payment of the invoice amount, less £1 per ton. Therefore, under the agreement to which I have referred, payment was to be made before the goods were transferred. I need not elaborate the point; in my opinion, in the circumstances there was a jus disponendi reserved to the seller by the contract. It was expressly agreed that the goods stored in Hamburg were to remain the property of the sellers, and that applies a fortiori to that part of the 400 tons which was stored in London and which the plaintiffs under their contract when required had to ship to Hamburg. This confirms the view which I have formed from the whole of the transaction, namely, that the plaintiffs as sellers had reserved the jus disponendi. No property passed, and therefore, the defendant is entitled to refuse to take delivery of those 80 tons, because they do not agree with the contract description.

A further point was made by counsel for the plaintiffs, namely, that because delivery of 20 tons out of the 100 tons had been taken, bulk had been broken, and there was a notional acceptance of the whole of the 100 tons as an indivisible bulk. I see no foundation for that contention. The 100 tons were to be taken as required, the 20 tons were taken as a separate delivery, and further the defendant is entitled to rely on the clause of the contract as to each delivery or shipment being treated as a separate contract. I think that clause does apply to such a case as a separate delivery of that 20 tons, but in any case, in my judgment, there is no ground at all for treating this delivery and acceptance of 20 tons as a notional acceptance of the whole 100 tons. I think it was a delivery and acceptance of 20 tons, no more and no less, and left the remaining 80 tons still subject to the contract in all respects. There is only one other thing that I ought to mention, and that is there is also a claim by the defendant for the return of £80 being £1 a ton paid. I think that £80 must be repaid by the plaintiffs to the defendant, because it is merely a deposit and a prepayment of £1 per ton, being part of the contract price, and, therefore, it can be recovered, in my judgment, as a payment made in respect of which there has been a failure of consideration because the defendant is now entitled to refuse to take the 80 tons. There must be judgment for the plaintiffs on the claim and part of the counter-claim and for the defendant on part of the counter-claim.

Judgment accordingly.

Solicitors: *Gasquet, Metcalfe & Walton*; *Cosmo, Cran & Co.*

[*Reported by* R. A. YULE, ESQ., *Barrister-at-Law.*]

Re LAIDLAW. WILKINSON *v.* LYDE

[Chancery Division (Eve, J.), July 23, 1930]

[Reported [1930] 2 Ch. 392; 99 L.J.Ch. 463; 143 L.T. 761]

Will—Legacies and annuities free of death duties—Duties accruing after death of testator.

By his will made in 1914, the testator, who died in 1915, bequeathed a number of legacies and annuities which, he declared, were to be satisfied, paid, and enjoyed free of death duties.

Held: the duties, other than the legacy duties (the whole of which, present and future, on the authorities fell to be discharged out of residue), from which the legatees were relieved were those payable on the death of the testator and not those which would accrue in the future.

Rule in *Re Wedgwood* (1), [1921] 1 Ch. 601, applied.

Re Stoddart (2), [1916] 2 Ch. 444, distinguished.

Notes. Applied: *Re Howell, Drury* v. *Fletcher*, [1952] 1 All E.R. 363. Referred to: *Re Shepherd, Public Trustee* v. *Henderson*, [1948] 2 All E.R. 932.

Cases referred to:

(1) *Re Wedgwood, Allen* v. *Public Trustee*, [1921] 1 Ch. 601; 90 L.J.Ch. 322; 125 L.T. 146, C.A.; 21 Digest 36, *226*.

(2) *Re Stoddart, Bird* v. *Grainger*, [1916] 2 Ch. 444; 86 L.J.Ch. 29; 115 L.T. 540; 60 Sol. Jo. 586; 21 Digest 37, *232*.

(3) *Re Duke of Sutherland, Chaplin* v. *Leveson-Gower*, [1922] 2 Ch. 782; 92 L.J.Ch. 113; 128 L.T. 246; 67 Sol. Jo. 11; 21 Digest 21, *121*.

(4) *Re Jones, Lampert* v. *Colbourn*, [1928] W.N. 227; Digest Supp.

(5) *Re Snape, Elam* v. *Phillips*, [1915] 2 Ch. 179; 84 L.J.Ch. 803; 113 L.T. 439; 59 Sol. Jo. 562; 21 Digest 35, *219*.

Adjourned Summons.

By his will, dated July 7, 1914, the testator, after appointing executors and trustees, set aside a trust fund of £140,000 in priority to all other bequests for the benefit of his widow for life, and then directed the trustees to divide the corpus into seven parts which were to be held for the benefit of children and step-children, and he gave additional legacies to his three daughters and step-daughters. These gifts were settled. By cl. 10 he declared that all legacies and annuities should be satisfied, paid, and enjoyed free of death duties, and by cl. 11 all the residue was given upon trust to pay funeral and testamentary expenses, death duties (including estate duty and increment duty), and debts, and, if the net residue exceeded £25,000, which it did, to pay to each of his brothers and sisters and sisters-in-law, legatees, an additional legacy of £1,000 free of duty, and invest the balance and pay the income to his wife and afterwards to divide among certain charitable institutions. The testator died in 1915 and the will was duly proved, the residue being sworn at over £500,000. On the death of the widow in 1929 it was £700,000. All the children and step-children were of full age and alive. The question raised was whether the operation of cl. 10 was limited to the duties payable on the death of the testator or extended to legacy and estate duties which would become payable on the determination of various limited interests -in this case life interests created in the settled legacies.

H. S. G. Buckmaster for the summons.

Gover, K.C., and *Mark Potter*, for beneficiaries entitled to settled legacies and annuities, referred to *Re Duke of Sutherland, Chaplin* v. *Leveson-Gower* (3); *Re Jones, Lampert* v. *Colbourn* (4); *Re Snape, Elam* v. *Phillips* (5); *Re Wedgwood, Allen* v. *Public Trustee* (1); and *Re Stoddart, Bird* v. *Grainger* (2).

L. Cohen, K.C., and *Andrewes Uthwatt* for other such beneficiaries.

Jenkins, K.C., and *Wilfrid Hunt* for charities interested.

Gavin Simonds, K.C., and *Alan Ellis* for other charities.
Stafford Crossman for the Attorney-General.

EVE, J.—The question raised is one which frequently arises, and has already been the subject of several reported cases. So far as the legacy duties are concerned it may be taken, I think, as established that under such a direction the whole of these duties present and future fall to be discharged out of the residue, but in the case of the estate duty the presumption is that the testator only intended to provide for such duties as were payable on his own decease, and this presumption will not be rebutted unless on the construction of the whole will a clear intention on the part of the testator to provide for these future duties is disclosed.

On behalf of those who assert that in this case there is established an intention on the part of the testator to extend the operation of the clause to future duties reliance is placed on the language of cl. 10 itself, and, in particular, on the use of the expression "and enjoyed" after the word "paid." In support of this argument they rely strongly on the decision of SARGANT, J., in *Re Stoddart* (2). In that case, on the construction of the will he was there considering, the learned judge expressed himself thus:

> "I cannot help feeling impressed by this, that, if the testator had desired that the pecuniary legacies settled on his relations should be enjoyed by them absolutely and entirely net, it would have been very difficult for him to have used any more comprehensive words than those which are to be found in his will."

On behalf of those interested in the settled legacies here it is urged that the language of cl. 10 is quite as emphatic and comprehensive as that with which the learned judge was dealing, and that the wording of the respective clauses is practically indistinguishable; "enjoyed free of death duties" is, it is argued, not less effective than "enjoyed free of all death duties." I think, however, when one reads SARGANT, J.'s judgment, it indicates that there were other words on which he relied for the expression of opinion which I have read. In the will there were two material clauses, Nos. 7 and 8. Clause 8 contained a direction by the testator that his trustees were to hold the proceeds of his residuary estate, upon trust, among other things, "to pay my funeral and testamentary expenses and debts and pay or provide for the legacies and annuities hereby or by any codicil bequeathed and the duties thereon." In his judgment the learned judge read cl. 8 before turning to cl. 7, and, applying a well-known rule of construction that as far as possible one must give effect to each expression used in the will, asked himself what was the meaning to be attached to the words "or provide for" and answered the query in these terms: "It is quite clear from the use of the words 'pay or provide for' in cl. 8 of the will that the testator is contemplating the relief of the settled legacies from some duties which have not to be paid immediately on his death."

I agree that according to the report the learned judge was at that time applying his mind to the question more particularly of legacy duty, and it may be said that this is sufficient to account for the passage that I have just read, but it is quite obvious that both in the case of the legacy duty and the estate duty the learned judge approached the construction of the will with this in mind, that there was an expression used in cl. 8 indicative of an intention on the part of the testator to relieve certain legacies from some duties which were not to be paid immediately on his death. When once you have reached the conclusion that the testator was contemplating the payment of future duties, it does not require much more to extend the benevolent intention so as to include not only legacy duty which could be paid but was not necessarily payable on his death, but also estate duty which could not be paid on his death. I am bound to bear in mind that there was that expression in cl. 8 of that will. Then SARGANT, J., says ([1916] 2 Ch. at p. 448):

> "Here the language of the testator in cl. 7 of his will is extraordinarily wide and general. Mr. Austen-Cartmell has asked me to read it as meaning that

> the legacies referred to in it are to be free of all duties arising in consequence of the testator's death. So to read the clause would be unduly limiting its clear words. It will be sufficient for the pecuniary legatees if the words 'free of all death duties' are limited so as to mean 'free of all death duties arising by virtue of the dispositions made by my will'; and I see no reason for limiting them, if I limit them at all, to any greater extent."

The learned judge does not make any direct reference to, or, indeed, say anything about, the word "enjoyed" in his own judgment beyond reading the words and commenting on their wide effect, but he, in fact, construes cl. 7 in that will, which is in pari materia with cl. 10 in this will, as meaning "free of all death duties arising by virtue of the dispositions made by my will."

The conclusion at which I have arrived is that cl. 10 contains an ambiguous expression. It is capable, and if it stood alone it might be capable only, of being construed as meaning the duties arising by virtue of the dispositions made by my will. If there are indications in the will that the testator intended it to be limited to the death duties payable in consequence of his own death, it is capable also of that construction, and what I have to ask myself is whether, with this ambiguous expression in cl. 10, there is anything in the rest of the will assisting a possible construction one way or the other. There were in *Re Stoddart* (2) indications which certainly went to support the construction which SARGANT, J., put on the corresponding expressions there. There was the express inclusion of settled legacies in the direction; there was the use of the words "to pay or provide" in the residuary clause. I do not think we have the same indicia here in support of a construction similar to that arrived at in *Re Stoddart* (2). On the contrary, I think there is in this will a provision with regard to the residuary estate which turns the balance the other way, in that it indicates that the testator contemplated and intended that the quantum of his residuary estate would be ascertained within a very reasonable time after his death, probably within the executor's twelve months. It is rather a remarkable provision in the will of a testator whose property is of a value exceeding half a million and whose residuary estate after providing for very large sums for legacies, both settled and otherwise, is of a very substantial amount, but in cl. 11 he bequeaths a series of additional pecuniary legacies to certain relatives contingently upon his net residuary estate amounting to £25,000. The provision has been relied upon by both sides, and those who appear for the settled legatees point to it as a proof that the testator must have contemplated a very much larger liability for duties than could have arisen if the payments out of residue had been confined to the duties payable on his own decease. On the other hand, it is said that this is mere supposition, that there is nothing to support it in the will, and that the one thing it does establish is that the testator did not contemplate the amount of his net residue remaining an uncertain quantity for a wholly uncertain length of time.

I think the argument on behalf of those protecting the residue prevails, and that the testator contemplated and intended that within the ordinary executor's year the estate would be free and the residue would be capable of ascertainment. That obviously could not be if there were these future unknown duties to be provided at various unascertainable dates. I hold, therefore, that in this case the rule in *Re Wedgwood* (1) must apply, and that the duties, other than the legacy duties, from which the legatees are relieved are the duties payable on the death of the testator and not those which will accrue in the future.

Solicitors: *Kimber, Bull, Howland, Clappé & Co.*; *Barlow, Lyde & Yates*; *Coward, Chance & Co.*; *Sanderson, Lee & Co.*; *Birkbeck, Julius, Edwards & Co.*; *The Treasury Solicitor.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

Re STRATTON. KNAPMAN *v.* ATTORNEY-GENERAL

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), November 7, 1930]

[Reported [1931] 1 Ch. 197; 100 L.J.Ch. 62; 144 L.T. 169; 47 T.L.R. 32; 74 Sol. Jo. 787]

Charity—Religion—Bequest to vicar for time being to be distributed among parochial institutions or purposes.

The testatrix, who died on Feb. 23, 1929, by a codicil to her will gave part of the proceeds of the sale of a house in trust for the vicar for the time being of the parish of M. "to be by him distributed at his discretion among such parochial institutions or purposes as he shall select." She also, by a second codicil, gave £1,000 to the vicar for the time being "to be by him distributed at his absolute discretion among such parochial institutions or for such parochial purposes as he shall select." On the question whether those bequests were valid charitable gifts,

Held: a trust could not be modified or limited in its scope by reference to the position or character of the trustee, nor was every parochial purpose charitable in law; the only limitation here was that what was done should have something to do with the parish; there was no indication that the money of the trust was to be applied for religious purposes; and, therefore, the gifts did not constitute good charitable trusts.

Notes. Considered: *Re Ashton's Estate, Westminster Bank, Ltd.* v. *Farley*, [1938] 1 All E.R. 707. Referred to: *Re Eastes, Pain* v. *Paxton*, [1948] 1 All E.R. 536; *Ellis* v. *I.R. Comrs.* (1949), 93 Sol. Jo. 678.

As to gifts for religious purposes, see 4 HALSBURY'S LAWS (3rd Edn.) 221 et seq.; and for cases see 8 DIGEST Repl. 331 et seq., 389 et seq.

Cases referred to:

(1) *Dunne* v. *Byrne*, [1912] A.C. 407; 81 L.J.P.C. 202; 106 L.T. 394; 28 T.L.R. 257; 56 Sol. Jo. 324, P.C.; 8 Digest (Repl.) 392, *858*.

(2) *Re Bain, Public Trustee* v. *Ross*, [1930] 1 Ch. 224; 99 L.J.Ch. 171; 142 L.T. 344; 45 T.L.R. 617, C.A.; 8 Digest (Repl.) 391, *849*.

(3) *Re Barclay, Gardner* v. *Barclay, Steuart* v. *Barclay*, [1929] 2 Ch. 173; 98 L.J.Ch. 410; 141 L.T. 447; 45 T.L.R. 406, C.A.; 8 Digest (Repl.) 332, *137*.

Appeal from an order of BENNETT, J. ([1930] 2 Ch. 151) in favour of the residuary legatees.

The gift in question in the will is set out in the headnote and the facts are stated in the judgment of the Master of the Rolls.

BENNETT, J., held that the gifts were not good charitable gifts as they were not confined to ecclesiastical institutions or purposes, nor were they gifts for public purposes. The vicar appealed.

Norman Daynes for the vicar.
A. J. Belsham for the executors and trustees of the will.
H. B. Vaisey and *Leslie Mumford* for residuary legatees.
Stafford Crossman for Attorney-General.

LORD HANWORTH, M.R.—One approaches this case with a sincere desire to give effect to the intentions of the testatrix as far as is possible according to the rules of law. We may be satisfied that the testatrix was a strong supporter of the church and did desire to leave money by her will to be placed in the hands of the vicar to carry on work in which she was interested, and one would gladly give effect to her desires as expressed in her will if we could, but we must comply with such limitations as the law has made applicable to such bequests. It is not every object which in common parlance is charitable, which is recognised by the law as charitable. Further, if a trust is to be constituted it must be in such terms as the court, if appealed to, would be able to carry out, and it cannot give effect to a trust constituted in loose words.

We are, therefore, brought back to whether the terms in which this gift has been expressed are sufficient to create a good charitable trust. The gift in the first codicil is to

> "The vicar for the time being of the parish of Mortlake in the county of Surrey to be by him distributed at his discretion among such parochial institutions or purposes as he shall select."

In the second codicil the terms are very similar:

> "To the vicar for the time being . . . to be by him distributed at his absolute discretion among such parochial institutions or for such parochial purposes as he shall select."

There is no difficulty in identifying the present vicar and a discretion to select is given to him and his successors in the office of vicar. But, as regards his counsel's argument that the nature of the trust may be deduced from the fact that he was vicar, LORD MACNAGHTEN in *Dunne* v. *Byrne* (1) ([1912] A.C. at p. 410) said:

> "It is difficult to see on what principle a trust expressed in plain language, whether the words used be sufficient or insufficient to satisfy the requirements of the law, can be modified or limited in its scope by reference to the position or character of the trustee."

It is not without significance that the words of the gift are "to be distributed by him at his discretion among such parochial institutions or purposes as he shall select." The attention of the court has been directed to the various Mortlake parochial activities which are shown in the parish magazine as existing, very excellent in themselves, but the words of the gifts impose no restriction as to those activities to which the trust might be applied, nor was there any limitation to the vicar's discretion. The only limitation was that what was done should have something to do with the parish; that might be something connected with the church or it might not.

Then comes the real difficulty in the case. In law every parochial purpose is not deemed to be charitable, and if merely benevolent or humanitarian, it is not necessarily charitable in the legal sense. Where can we find in this gift any words limiting the vicar's powers to such purposes as are in law deemed charitable? We can find no such words of limitation. In *Re Bain, Public Trustee* v. *Ross* (2) it is true that LAWRENCE, L.J., and I found on the facts that the vicar in that case was limited to applying the gift to objects in connection with the church, so that the activities of the trust were thereby limited to things connected with religion which the law holds to be charitable, and we, therefore, held in that case that there was a good charitable trust, but it should not be overlooked that RUSSELL, L.J., who was very experienced in that class of case, took a different view. In the other case of *Re Barclay, Gardner* v. *Barclay* (3), there was an indication that the moneys there given were to be applied for public religious purposes. In the present case there are no words to limit the gift to any such purposes, and we are hedged round by rules which it is our duty to follow, and we find ourselves in the same position as BENNETT, J., who held that he could not find support for this gift being a good charitable trust.

LAWRENCE, L.J.—I entirely agree.

ROMER, J.—I agree.

Appeal dismissed.

Solicitors: *Jaques & Co.*; *Charles Robinson & Son*; *Treasury Solicitor.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

A

SWADLING *v.* COOPER

[HOUSE OF LORDS (Lord Hailsham, Lord Dunedin, Lord Buckmaster, Lord Warrington and Lord Thankerton), May 26, 27, 29, 30, July 28, 1930]

[Reported [1931] A.C. 1; 100 L.J.K.B. 97; 46 T.L.R. 597; 74 Sol. Jo. 536; 143 L.T. 732]

B

Negligence—Contributory negligence—Liability remaining on defendant—Last negligent act—Failure to take extraordinary precaution.

To succeed in a running-down case the plaintiff must establish that the defendant was negligent and that that negligence caused the collision of which C he complains. If it is established that the plaintiff could have avoided the collision by the exercise of reasonable care, then the plaintiff fails because his injury is due to his own negligence in failing to take reasonable care. If, although the plaintiff was negligent, the defendant could have avoided the collision by the exercise of reasonable care, then it is the defendant's failure to take that reasonable care to which the resulting damage is due and the D plaintiff is entitled to recover. Mere failure to avoid the collision by taking some extraordinary precaution does not in itself constitute negligence. The plaintiff has no right to complain if in the agony of the collision the defendant fails to take some step which might have prevented a collision unless that step is one which a reasonably careful man would fairly be expected to take in the circumstances.

E **Notes.** The above headnote, which is based on a passage in the opinion of the House (infra), must be read in the light of the Law Reform (Contributory Negligence) Act, 1945, which provides, by s. 1 (1), that where any person suffers damage as the result partly of his own fault and partly of the fault of another person, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall F be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

Considered: *McLean* v. *Bell*, [1932] All E.R.Rep. 421; *Flower* v. *Ebbw Vale Steel, Iron and Coal Co., Ltd.*, [1934] 2 K.B. 132; *Kiley* v. *Garnsey* (1940), 84 Sol. Jo. 274. Referred to: *The Eurymedon*, [1938] 1 All E.R. 122; *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; *Hutchinson* G v. *London and North Eastern Rail. Co.*, [1942] 1 All E.R. 330; *Sparks* v. *Edward Ash, Ltd.*, [1943] 1 All E.R. 1; *Davies* v. *Swan Motor Co. (Swansea), Ltd.*, [1949] 1 All E.R. 620.

As to contributory negligence, see 23 HALSBURY'S LAWS (2nd Edn.) 679 et seq.; and for cases see 36 DIGEST (Repl.) 169 et seq. For the Law Reform (Contributory Negligence) Act, 1945, see 17 HALSBURY'S STATUTES (2nd Edn.) 12.

H Cases referred to:

(1) *Butterfield* v. *Forrester* (1809), 11 East, 60; 1 Man. & G. 571 n; 103 E.R. 926; 36 Digest (Repl.) 177, *939*.

(2) *Davies* v. *Mann* (1842), 10 M. & W. 546; 12 L.J.Ex. 10; 7 J.P. 53; 6 Jur. 954; 152 E.R. 588; 36 Digest (Repl.) 177, *945*.

(3) *Bridge* v. *Grand Junction Rail Co.* (1838), 3 M. & W. 244; 1 Horn & H. 26; I 150 E.R. 1134; sub nom. *Armitage* v. *Grand Junction Rail. Co.*, 6 Dowl. 340; 36 Digest (Repl.) 193, *1019*.

(4) *Admiralty Comrs.* v. *S.S. Volute*, [1922] 1 A.C. 129; 91 L.J.P. 38; 126 L.T. 425; 38 T.L.R. 225; 66 Sol. Jo. 156; 15 Asp.M.L.C. 530, H.L.; 41 Digest 780, *6417*.

Appeal by the defendant from an order of the Court of Appeal (SCRUTTON, GREER and SLESSER, L.JJ.), reported [1930] 1 K.B. 403, setting aside a verdict and judgment for the defendant and ordering a new trial in an action tried by HUMPHREYS, J., with a special jury at Cambridge Assizes.

The action arose under the Fatal Accidents Act, 1846, and it was brought by Mrs. Cooper on behalf of herself and her daughter claiming damages in respect of the death of her husband, William Cooper, as the result of a collision between the motor bicycle which he was riding and the defendant's motor car. The deceased, who was a linesman in the employment of the General Post Office, was riding home from his work on July 18, 1928, from Saffron Walden to Cambridge, and was approaching the point at which the Saffron Walden road crossed the main road from Newmarket to London. His speed was about ten miles an hour, and he was approaching the crossroads in a north-westerly direction. About the same time the defendant in his motor car was approaching the same point in a south-westerly direction at a speed of about thirty miles an hour. A collision took place, and William Cooper received injuries as the result of which he died. Evidence was given that the defendant put on his brakes about 11 yards from the scene of the collision, but failed to avert the accident. The jury, acting under the direction of the learned judge, returned a verdict for the defendant. The plaintiff appealed. The Court of Appeal held that, the learned judge having omitted to tell the jury that if the deceased man was guilty of negligence, but the defendant, by the exercise of reasonable care might subsequently have avoided the collision, then it was not a case of contributory negligence on the part of the deceased man, it was, therefore, a miscarriage of justice within the meaning of R.S.C., Ord. 39, r. 6, and the plaintiff was entitled to a new trial. The defendant appealed.

R. P. Croom-Johnson, K.C., *John Flowers, K.C.*, *Montague Berryman* and *D'Arcy Edmondson* for the appellant.

Charles Doughty, K.C., and *A. Aiken Watson* for the respondent.

Cur. adv. vult.

July 28. **LORD HAILSHAM** read the following opinion of the House.—This is an appeal by the defendant from an order of the Court of Appeal setting aside a verdict and judgment for the defendant and ordering a new trial in a case which was tried before Humphreys, J., and a jury at Cambridge Assizes. The action was brought by the respondent as the administratrix of William Cooper, deceased, to recover damages under the provisions of Lord Campbell's Act for loss occasioned to her and to her infant daughter by the death of William Cooper which was alleged to be due to the negligence of the appellant while driving a motor car along the road from Newmarket to London on July 18, 1928.

The negligence alleged in the statement of claim was: driving at an excessive speed, failure to give proper warning, failure to slow down on approaching a crossroad, failure to keep his motor car under proper control or to apply his brakes so as to slow up or stop and so avoid colliding with the deceased. The appellant, by his defence, denied that he was guilty of any negligence, and, alternatively, alleged that the deceased contributed to the accident by his own negligence. At the trial evidence was given that the Newmarket–London road is crossed at right-angles by a road leading from Saffron Walden to Cambridge. The Newmarket–London road is between 18 ft. and 19 ft. wide and there is a grass verge on each side. On the evening of the accident the appellant was proceeding in his motor car from Newmarket towards London, and was driving his motor car about 3 ft. from his near side of the road at a speed of between thirty and thirty-five miles per hour. The deceased was proceeding westwards from Saffron Walden to Cambridge on a motor cycle; and the car and the cycle came into collision at the crossroads at a spot about 4 ft. into the Newmarket–London road and opposite the south side of the Saffron Walden–Cambridge road. The appellant gave due warning of his approach to the crossroads; no witness on either side heard any warning from the deceased. The distance from the position of the appellant's car, when he first became aware of the presence of the deceased, to the spot of the collision was not more than 11 yards. After the accident the motor cycle fell on the east side of the Newmarket–London road, about 20 yards south of the collision, the motor car came to a stop on the west side of the road about 30 yards from the spot of the collision.

The learned judge began his summing-up on the law in these terms:

> "If you find that the injuries from which this man undoubtedly suffered were not caused by negligence on the part of the defendant, then there is an end of the case, because you must find a verdict for the defendant, since the plaintiff has to satisfy you that the plaintiff is entitled to damages—the onus is on the plaintiff. Then there is another possibility. Supposing you find that the defendant was negligent, and that it was to some extent his negligence which caused the injuries from which the deceased man died, if you should also come to the conclusion that it was substantially also owing to the negligence of the deceased man himself that the accident occurred, so that both parties were—I will not say equally, but substantially—to blame for the accident, then again you must find a verdict for the defendant because the law is that even if you are injured by somebody else's negligence, yet, if you substantially contribute to those injuries by your own negligence, you cannot recover damages from the other person. Now, that is the issue you have to try. You have got to consider, first of all: Are you satisfied that the defendant was negligent, negligent in such a way as to cause this collision which caused the injuries? If so, are you of opinion that the deceased man, who would under ordinary circumstances have been plaintiff himself, was guilty of contributory negligence?"

The learned judge then proceeded to review the evidence in language to which no exception was taken on either side, and he concluded his summing-up on this part of the case with these words:

> "That is the evidence, and it is upon that evidence, as it seems to me, that you will have to make up your minds upon the two things which I have told you are really the material questions in this case: Was the accident caused by the negligence of the defendant? If so, was the accident contributed to by the negligence of the deceased man?"

After a considerable interval the jury returned into court and by their foreman asked the judge whether he could give them any help as to what he meant by substantial contributory negligence. In reply to that request the learned judge said:

> "Assuming that you found that the defendant was negligent and that he was so negligent that you could say that the accident was caused by his negligence; but if you also come to the conclusion that the plaintiff was so negligent that you can say that the accident was really caused by the negligence of both of them, then that is negligence which contributed to the accident. I do not think I can really help you more than that, because I may tell you this: If the defendant was negligent and the plaintiff was negligent, but the plaintiff's negligence was only to this extent, that he did not do the absolutely right thing at the moment, that would not be contributory negligence. It really comes to this: If you find that the accident was due to the negligence of both parties substantially, then that would be contributory negligence on the part of the plaintiff. I do not know that I can help you further than that; it is a question which a jury have to decide. There is no real definition of 'contributory negligence'; it is a question which a jury have to decide, and I think you will agree it really comes to a matter of common sense. It may be you think that the plaintiff did not do everything that was absolutely right; that would not be sufficient to disentitle him to damages. But if you say that although the defendant was negligent, so was the other man, so that they were both to blame, then you could not find for the plaintiff, you would have to find for the defendant."

In response to an invitation from the learned judge, junior counsel for the plaintiff asked: "Does not the element enter into it, who was guilty of the last act of negligence?" to which the learned judge replied: "Not necessarily. Whose

negligence was it that substantially caused the injury?" The jury again retired A
and after a few minutes returned with a verdict for the defendant and the learned judge entered judgment accordingly. The Court of Appeal have ordered a new trial on the ground that the learned judge ought to have directed the jury in plain terms: If you think the deceased was negligent, but that the defendant, after the deceased was negligent, by taking reasonable care could have avoided him, such negligence of the deceased is not, as a matter of law, negligence which contributes B
to the accident so as to prevent the plaintiff from recovering. The Court of Appeal held that the omission to give such a direction may have misled the jury, and, therefore, that the verdict cannot stand. It is from this decision that the present appeal is brought.

The law in these collision cases has long been settled. In order to succeed the plaintiff must establish that the defendant was negligent and that that negligence C
caused the collision of which he complains. If it is established from his own evidence, or by evidence adduced on behalf of the defendant, that the plaintiff could have avoided the collision by the exercise of reasonable care, then the plaintiff fails because his injury is due to his own negligence in failing to take reasonable care. If, although the plaintiff was negligent, the defendant could have avoided the collision by the exercise of reasonable care, then it is the defendant's failure to D
take that reasonable care to which the resulting damage is due and the plaintiff is entitled to recover. Mere failure to avoid the collision by taking some extraordinary precaution does not in itself constitute negligence. The plaintiff has no right to complain if in the agony of the collision the defendant fails to take some step which might have prevented a collision unless that step is one which a reasonably careful man would fairly be expected to take in the circumstances. All this E
is familiar law and is commonly illustrated in textbooks by contrasting *Butterfield* v. *Forrester* (1) and *Davies* v. *Mann* (2).

In *Butterfield* v. *Forrester* (1) the defendant had erected an obstruction in the highway and the plaintiff rode against it and was hurt, and BAILEY, J., directed the jury that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding F
along the street extremely hard and without ordinary care, they should find a verdict for the defendant, and this direction was upheld. In *Davies* v. *Mann* (2) the plaintiff negligently turned a donkey into the highway, hobbled, and the defendant's wagon ran over it and killed it. ERSKINE, J., directed the jury that if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver the action was maintainable and that if they thought the acci- G
dent might have been avoided by the exercise of ordinary care on the part of the driver they should find for the plaintiff. The Court of Exchequer upheld this direction. PARKE, B., quotes and affirms his own previous statement of the law in *Bridge* v. *Grand Junction Rail. Co.* (3) in these terms:

> "The rule of law is laid down with perfect correctness in the case of *Butterfield* v. *Forrester* (1); and that rule is, that, although there may have been negli- H
> gence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong."

In both these cases there was a substantial interval of time between the initial negligence of the defendant or of the plaintiff respectively and the negligence which I
was the proximate cause of the injury; and the crucial question, upon which liability depended, was whether either party could by the exercise of reasonable care have avoided the consequences of the other's negligence; if he could, then that party is legally responsible for the accident. But there are other cases in which the negligence of the parties is contemporaneous or so nearly contemporaneous as to make it impossible to say that either could have avoided the consequences of the other's negligence, and in which both have contributed to the accident. (A discussion of this class of case is to be found in *Admiralty Comrs.* v. *S.S. Volute* (4).

A These plain principles have been discussed and elaborated in a long series of cases, but I do not think that those discussions have in any way qualified or lessened the authority of the earlier decisions. It is manifest that a full discussion of these cases and of the judgments delivered in them would be wholly inappropriate in a summing-up and would inevitably tend to confuse and bewilder the jury. In a summing-up it is essential that the law should be correctly and fully stated, but B it is hardly of less importance that it should be stated in simple and plain terms so that a jury unskilled in the niceties of legal phraseology may appreciate the direction which is being given to them. Such direction should be adapted to the special circumstances of the case. It is not the whole law of negligence that needs exposition in every case, but only that part of it which is essential to a clear understanding of the issue which the jury has to determine. The question here is C whether, having regard to the facts of this case, the law was sufficiently stated to the jury. Counsel for the respondent, in a very able and candid argument, admitted that the utmost limit of time between the moment when the defendant could have become aware of the deceased's approach and the moment of the impact was not more than one second. It is common ground that the defendant applied his brakes at once; the only suggestion made against him is that he ought also to D have swerved into the middle of the road, a suggestion which we are told was argued before the jury, although it does not appear to have been pleaded in the statement of claim. On these facts was there any room for the application of the doctrine which was illustrated in *Davies* v. *Mann* (2)? The crucial question was that stated by the learned judge in his concluding sentence: "Whose negligence was it that substantially caused the injury?" That question the jury answered in E favour of the defendant. The jury may well have thought that the defendant was negligent in approaching the junction of the roads at too rapid a pace; they must also have thought that the deceased was negligent in the way in which he came out into the road, either by reason of the pace at which he proceeded or by reason of his position in the road. On this view of the facts it seems clear that from the moment when the parties became aware of their respective positions there can F have been no time for the defendant to do anything to avoid the impact and therefore that the negligence of each party contributed to the collision. In these circumstances it appears to me that the learned judge did sufficiently explain to the jury what on the facts of this case were the considerations to which they had to apply their minds and what was the law applicable to the facts. It follows that the appeal must be allowed and the judgment of the trial judge restored, and that G the appellant must have the costs of the proceedings here and below, and I move your Lordships accordingly.

Appeal allowed.

Solicitors: *Berrymans*; *William Easton & Sons.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re TONG. HILTON *v.* BRADBURY

[COURT OF APPEAL (Lord Hanworth, M.R., Romer, L.J., and Eve, J.), November 26, 1930]

[Reported [1931] 1 Ch. 202; 100 L.J.Ch. 132; 144 L.T. 260]

Administration of Estates—Order of application of assets—"Property of deceased undisposed of by will"—Lapsed share of income of residue—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *Sched. I, Part II, para.* 1.

A testator, who died in March, 1929, bequeathed part of the income of "the remainder" of his estate to his sister for her life. The sister's husband attested the will, and, accordingly, under s. 15 of the Wills Act, the gift was null and void. On a question whether the lapsed share of income became property undisposed of by the will within para. 1 of Part II of Sched. I to the Administration of Estates Act, 1925, and as such primarily liable for the payment of the funeral, testamentary and administrative expenses of the deceased, or whether those expenses should be primarily paid out of the corpus of the residuary estate,

Held: "property of the deceased" in para. 1 of Part II of Sched. I to the Administration of Estates Act, 1925, which, by s. 55 (1) (xvii) of the Act, included "any interest in property," was to be given a wide significance and included income of the estate of a deceased person, the right to which was an equitable interest in the corpus; "undisposed of by will" in para. 1 included property the disposition of which was rendered null and void by the Wills Act, 1837; on construction, the word "remainder," as used by the testator, did not mean what was left after the testator's debts and funeral and testamentary expenses and duties and legacies had been paid and threw no light on how, as between the persons having beneficial interests in the remainder, the liability for expenses and debts was to be apportioned; and, therefore, the lapsed share of income should primarily be applied, under para. 1 of Part II of Sched. I, to pay the debts and expenses.

Notes. Followed: *Re Worthington, Nichols* v. *Hart*, [1933] All E.R.Rep. 189. Distinguished: *Re Sanger, Taylor* v. *North*, [1938] 4 All E.R. 417. Referred to: *Re Harland-Peck, Hercy* v. *Mayglothing*, [1940] 4 All E.R. 347.

As to the order of the application of assets in an administration, see 16 HALSBURY'S LAWS (3rd Edn.) 344 et seq.; and for cases see 23 DIGEST (Repl.) 539 et seq. For Administration of Estates Act, 1925, see 9 HALSBURY'S STATUTES (2nd Edn.) 718.

Cases referred to:

(1) *Re Lamb, Vipond* v. *Lamb*, [1929] 1 Ch. 722; 98 L.J.Ch. 305; 141 L.T. 60; 45 T.L.R. 190; 73 Sol. Jo. 77; 23 Digest (Repl.) 540, *6046*.

(2) *Re Kempthorne, Charles* v. *Kempthorne*, [1930] 1 Ch. 268; 99 L.J.Ch. 107; 142 L.T. 111; 46 T.L.R. 15, C.A.; 23 Digest (Repl.) 545, *6074*.

Appeal from an order of CLAUSON, J.

By his will dated Feb. 2, 1929, the testator, Livesey Tong, directed that a certain portion of the income of the remainder of his residuary estate should be paid to his sister, Mrs. Emmeline Holt, during her life with a remainder over to the children of his two nieces, Monica Holt and Alice Oppenshaw Tong, who should attain the age of twenty-one, and, if there were no children, then the whole of the accumulated funds were to be divided between the Bolton and Leigh infirmaries in equal shares. The will was attested by Emmeline Holt's husband, and, therefore, there was a lapse of her share of such income. The testator died on March 12, 1929, leaving personal estate of the value of about £45,000. An originating summons was taken out to determine the question, inter alia, whether the share of income which lapsed ought primarily to be used to pay the debts and funeral expenses, &c., or whether they should be paid out of the corpus of the residuary estate. Clauson, J., held that the testator's funeral, testamentary and administration expenses, debts and liabilities, other than estate duty in his will mentioned, ought to be paid primarily out of any property of his undisposed of by will, including the share of income of his residuary estate directed to be paid to Mrs. Holt, which has lapsed by reason of her husband having attested the will.

Emmeline Holt appealed from the decision and Alice Tong cross-appealed, being also respondent to the first appeal.

Alexander Grant, K.C., and *E. W. Lavington* for Emmeline Holt.
W. P. Spens, K.C., and *F. R. Evershed* for Alice Tong.
Alan Walmsley for the executors of the will.
J. Norman Daynes for interested charities.

LORD HANWORTH, M.R.—The testator died on March 12, 1929, having made his will which was dated Feb. 2, 1929, and was proved on July 4 the same year. I will refer to the last clause of the will by which the testator directed his executors to collect the income from the remainder of his estate and to pay 75 per cent. of it to his sister Mrs. Emmeline Holt during her life, and on her death to invest the whole of the estate for the benefit of the children of his two nieces, Monica Holt and Alice Tong, in equal shares on their attaining the age of twenty-one years. This was followed by a gift over to two infirmaries in the event of there being no children. It appears that neither Monica Holt nor Alice Tong is married, so that that event of there being children has not arisen, but as the bequest in favour of the children is only to take effect on the death of Mrs. Holt it has an effect in the future as it does not operate until after her death. But the immediate gift to Mrs. Holt of 75 per cent. of the income is rendered null and void under s. 15 of the Wills Act, 1837, because her husband witnessed the will. The result of the bequest to Mrs. Holt being null and void is to make it necessary that that part of the income should be dealt with as on an intestacy during her life.

The Administration of Estates Act, 1925, has introduced considerable alterations in the law. Part III relates to the administration of assets, and s. 32 (1) provides:

> "The real and personal estate, whether legal or equitable, of a deceased person, to the extent of his beneficial interest therein, and the real and personal estate of which a deceased person in pursuance of any general power (including the statutory power to dispose of entailed interests) disposes by his will, are assets for payment of his debts (whether by specialty or simple contract) and liabilities. . . ."

The first contention of counsel for Emmeline Holt is that this income, which has now to be dealt with as on an intestacy, is not part of the property of the deceased within the meaning contemplated by s. 32. He says that it arises from the executors realising the property of the deceased, and after making certain payments out of the proceeds investing the remainder in proper securities, and that it is the income to be derived from the corpus so ascertained that falls to be considered in this case. Counsel argues that this income is something which was not in being in the lifetime of the testator, but arose after his death when the estate was no longer his, and that, therefore, it ought to be treated as something in marked contradistinction to the property of the deceased. I am unable to agree with that view. Section 32 deals with real and personal estate of a deceased person legal or equitable, and I pause to consider the meaning of the word "property" as defined in s. 55 (1) (xvii), of the Act, which provides: " 'Property' includes a thing in action and any interest in real or personal property." Property which belongs to a testator and passes to the executor of his will may have, and in most cases has, the quality of producing income. Clauson, J., refers in his judgment to stock producing progeny, an example of assets by increase, as showing that income is not something independent of the property producing it, but is the result of an integral quality belonging to many classes of property and is included in the definition of property in s. 55, sub-s. (1) (xvii). That being so, this income, the destination of which is ineffective, is, nevertheless, part of the estate of the testator. Further, it is to be dealt with as on an intestacy. What then does that mean? It means that the personal representative is to deal with it on the supposition that there was no testamentary disposition of it at all. That is the effect of s. 15 of the Wills Act making the bequest null and void, and, therefore, leaves the income to be dealt with as on an intestacy of it.

The Administration of Estates Act, 1925, s. 34 (3) provides:

> "Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administrative expenses, debts and liabilities payable thereout in the order mentioned in Part II of Sched. I to this Act."

The estate in this case is solvent, the value of it being some £45,000. Part II of Sched. I gives a table fixing the order to be followed in the application of assets when, as here, the estate is solvent. The first paragraph provides for the application of "Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies." I have already dealt with the meaning to be given to "Property of the deceased" which, in my opinion, includes income of residue. It is noticeable, however, that when we come to examine this table all the eight paragraphs, with the exception of the fifth and eighth, open with the words "property of the deceased." That reinforces the view I have already expressed that the expression "property of the deceased" is to be given a wide significance, and to be taken as including everything that passes to the executors or that would pass under the will.

This leaves for consideration the contention that para. 1 of Part II does not apply, because the residue is referred to in the will with the intention of disposing of it so that the income is not undisposed of within the meaning of the paragraph. Counsel argued that para. 1 was intended to describe property which, by the mistake of the testator was not dealt with in his will and that property only, as, for instance, when a testator is possessed of real estate, but makes a will relating to personalty only so that it is ineffective to deal with the portion of his property consisting of realty. In my opinion, it is impossible to give so narrow an interpretation to the words "undisposed of by will." Eve, J., in *Re Lamb*, *Vipond* v. *Lamb* (1), said that he was unable to accept the view that these words must be confined to "property to dispose of which no attempt has been made by the will and ought not to be read as including a share of residue which has lapsed by reason of the legatee's death in the lifetime of the testator." He says: "The language is plain and unambiguous—a lapsed share of residue is properly described as property undisposed of by will." In *Re Kempthorne*, *Charles* v. *Kempthorne* (2), the Court of Appeal reserved that point for further consideration. My own view was that it did not immediately come before us and was not material for our decision, and that it would be mischievous to say something which would be merely obiter, but I had little doubt that I shared Eve, J.'s, view. I was of opinion that it would not be wise in dealing with Acts relating to the law of property to attempt to solve matters not before us for immediate determination. I adhere to the view which has often been expressed that it is wiser to deal with points only which are before the court for immediate solution. On this question as to what is meant by the expression "undisposed of by will" I am satisfied to say that I agree with Eve, J.'s decision in *Re Lamb* (1). I cannot find any such distinction as has been suggested. A case where property has been left out of his will by a testator through forgetfulness is, in my view, in pari materia with a case where the testator attempts to dispose of it, but his disposition is rendered null and void by the Wills Act. It would be going back on the provisions of the Wills Act making the disposition null and void to say that there had been a disposition although one that was ineffective. The fact that a disposition is null and void connotes that the property attempted to be dealt with is undisposed of, and it follows that para. 1 of Part II of Sched. I to the Administration of Estates Act, 1925, is apt to cover the income of residue under consideration in the present case. So far I have dealt with the points raised on Emmeline Holt's appeal and I definitely adhere to the decision in *Re Lamb* (1).

By way of cross-appeal the same points are taken by counsel for Alice Tong, and in addition he says that this case falls within *Re Kempthorne* (2) as there are indications in the testator's will of a contrary intention preventing the statutory table of the order of application of assets from operating. The words in the will that he is relying on are: "I direct my executors to collect the income from the remainder of my estate"; and he says that the word "remainder" must mean what is left after the funeral and testamentary expenses and debts and legacies have been paid. I am unable to accept that argument. It is quite clear that the testator directed his executors to pay the legacies free of duty and that any duty that might contingently become payable on any gifts he might make before his decease should be paid out of his estate. He also provided that the executors were to make provision for any possible call on shares not fully paid up. These are specific duties imposed on the executors. It appears to me, therefore, that the rule "expressio unius exclusio alterius" must apply and that we cannot treat the word "remainder" as an indication that not only the specified duties and liabilities, but also all other duties, expenses and liabilities were to be paid out of residue. In my view, it is much easier to construe the will in conjunction with the statutory table. The will was made after the date when the Administration of Estates Act, 1925, came into force, and anyone drawing the will would know the rules as to the order of the application of assets which would apply. If some other mode of paying the expenses and liabilities was not expressly introduced in the will, there are express directions as to some matters. Is it not the fair inference that he intended the statutory order of application of assets to be followed in regard to the payment of other expenses, debts or liabilities? I cannot accept the view that there is any indication in the words used in the will that the statutory order of application of assets was not to apply in regard to those other matters. It follows that *Re Kempthorne* (2) does not apply and that we cannot treat the will as making any variation in the statutory order of application of assets. It follows that both appeals must be dismissed.

ROMER, L.J.—I agree. By s. 34 (2) of the Administration of Estates Act, 1925, it is provided that where the estate of a deceased person is solvent his real and personal estate shall be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities in the order mentioned in Part II of Sched. I. When I turn to this part I find that after certain paragraphs dealing with the order of application of assets when an estate is solvent, it is provided that this order of application may be varied by the testator. The first question then is whether the testator has by the terms of his will varied the order of application of assets specified in Part II of Sched. I. It is true that the testator directed his executors to make provision for any possible calls on shares, that is to say, for a contingent liability and also to pay certain duties; but I fail to find anything in the will of the testator amounting to an indication of the testator's intention that the funeral and testamentary expenses and debts generally should be paid in any other mode than that directed in Part II of Sched. I. Even if the testator had directed his executors to pay all his funeral and testamentary expenses and debts and then given the remainder of his estate upon certain trusts, I should still have hesitated to say that this amounted to an indication that the expenses and debts were to be paid in any other order out of the assets than that provided for in Sched. I. The truth of the matter is that there is nothing in this Act which prevents or is intended to prevent executors from paying expenses, debts and liabilities out of the first assets which come to their hands available for the purpose; and Part II of Sched. I really only deals with the ultimate adjustment of the burden as between the parties who have become entitled to the testator's estate. Therefore, the use of such a word as "remainder" does not seem to me to make any difference. Such words throw no light on how, as between the persons having beneficial interests in the remainder, the liability for expenses and debts is to be A apportioned. On this point I agree with CLAUSON, J.

The next question is whether in the events which have happened the income of a share of residue ineffectually given to Mrs. Holt during her life is "property of the deceased undisposed of by will." It is said that the words "undisposed of by will" mean property that the deceased has not attempted to dispose of by will. This is, in my view, an untenable argument. Obviously the words must include B property not effectually disposed of by will. That is the natural meaning of the words, and that this meaning should be given to them is clear from para. 6 of Part II of Sched. I which refers to "property specifically devised or bequeathed." That must mean property effectively, not ineffectively, disposed of.

The remaining question is, what is the meaning of "property of the deceased." It is said that, if a testator disposes of the whole of his estate, giving his residuary C estate to executors upon trust for A, B and C and A, B and C all die in the lifetime of the testator, the residue is not property of the testator undisposed of by his will, but is property of the executors. By s. 55 (1) (xvii) of the Administration of Estates Act, 1925, "property" is defined as including "any interest in real or personal property." Therefore we must read para. 1 of Part II of Sched. I as referring to any interest in property of the deceased undisposed of by will. This disposes D of the argument that residue given to executors upon trusts which fail is not property undisposed of by the testator's will. The testator has caused the whole legal estate in his property to vest in executors, but in the case I have mentioned he has not in the events which happened, disposed of the equitable interest, and that is just as much property as the legal estate. It follows that the property in the residue would not be disposed of and would fall within para. 1 of Part II of E Sched. I. Then it is said that this may very well be so as regards the corpus of residue or of a share of residue, but that what the testator here failed to dispose of was income. I would point out that all this amounts to is that in this case the testator has disposed of the legal estate and part of the equitable interest but not of the whole equitable interest, and the part not effectively disposed of is property undisposed of by will. F

I have made these observations out of deference to the arguments of counsel. Otherwise I should have contented myself with saying that I agreed with CLAUSON, J., and with the decision of EVE, J., in *Re Lamb*, *Vipond* v. *Lamb* (1).

EVE, J.—I also agree. Three questions arise. The first is: Does the income of a testator's residuary estate, or of so much of his residuary estate as is settled, constitute property of the testator inasmuch as it accrues after his death? What G would the position of Mrs. Holt have been if she had been able to enjoy the interest bequeathed to her? She would have been the equitable tenant for life of three-fourths of the testator's residuary estate; and when the residuary estate vested in the executors virtute officii or as trustees of a trust estate, it would remain property of the testator's estate and not property of the executors or trustees. In my opinion, it is impossible to differentiate between the produce of an estate and H the corpus of an estate as it existed at the testator's death even if the estate has since been converted and is invested in something different from the property, as it then existed. I think the decision of CLAUSON, J., that the income constituted part of the property of the testator is undoubtedly right.

The further question arises whether this interest can properly be described as property of the deceased "undisposed of by will." Unless one is compelled to I put an artificial meaning on language, I cannot myself comprehend why it is not. It is clearly undisposed of by the testator's will. I adhere to what I said in *Re Lamb*, *Vipond* v. *Lamb* (1) as to the wholly unambiguous language used in para. 1 of Part II of Sched. I to the Administration of Estates Act, 1925.

The next question is: Does Part II of Sched. I apply in this particular case, or has the testator, pursuant to para. 8 (a) of Part II, directed by his will that the order of the application of assets set out in Part II should be varied? Counsel for Alice Tong says that the testator has done so, and, if the will be examined, indications will be found that the statutory order of application of assets in Part II of Sched. I is not to apply. That the testator contemplated that certain payments should be made otherwise than as provided in Part II of the schedule is clear. He directed, first, that special provision should be made for certain contingent liabilities on shares not fully paid up, and then he assumed liability for any duty on gifts made by him within three years before his death, and, having provided for the payment of that duty out of his estate, goes on to direct that all legacies are to be paid free of duty. He then gives a number of legacies and annuities, which would have to be provided for before the remainder could be ascertained in which Mrs. Holt was interested. I cannot help thinking that by indicating certain respects in which the statutory order of application of assets was to be departed from, the testator indicated clearly that, except in respect of the payment of these particular liabilities, the scheduled order of application was to be adhered to. The construction which CLAUSON, J., placed on the will in this respect was in my opinion correct.

Lastly, it was argued by counsel for Alice Tong that, if we read Part II of the schedule upside down, we shall find grounds for supporting a contention he was about to make that the various kinds of property therein mentioned are mutually exclusive, and that, as in that way we should arrive at para. 2 before para. 1 and find something in para. 2 which applies in this particular case, it would be unnecessary to go further. I know no authority for reading a schedule prescribing the order in which assets are to be applied in payment of expenses and debts for the purpose of justifying a reversal of that order. To my mind, if we read the paragraphs in the order in which they are set out, we shall find something in para. 1 which is applicable to this case, and having found in para. 1 assets primarily liable for paying expenses and debts, it becomes unnecessary to read the schedule further. I agree with the other members of the court that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Richardson, Sowerby, Holden & Co.*; *Pritchard, Englefield & Co.*, for *Butcher & Barlow*, Bury; *Winder & Holden*; *Kinch & Richardson*, for *Hayward & Son*, Leigh, Lancs.

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

PEECH v. BEST

[COURT OF APPEAL (Scrutton, Greer, Slesser, L.JJ.), April 30, May 1, 26, 1930]

[Reported [1931] 1 K.B. 1; 99 L.J.K.B. 537; 143 L.T. 266;
46 T.L.R. 467; 74 Sol. Jo. 520]

Profit à Prendre—Shooting rights—Infringement—Change of character of land over which rights granted—Right of grantee to damages.

A landlord who grants sporting rights over a farm for valuable consideration may cultivate the farm in the ordinary way and change its cultivation in the ordinary way although doing so lessens the amount of game or the sporting amenities, but he must use his land reasonably having regard to the interests of the grantee, and, if he fundamentally changes the character of the land over which the rights were granted, though not with the deliberate intention of injuring the sporting rights, and though it is a thing which a landowner would have power to do if he did not injure the rights of others, and if the change has the necessary effect of substantially injuring the rights of the grantee, he has derogated from the grant and substantially interfered with the profit à prendre granted. That is as true of partial changes in the land as of changes affecting the whole of the land. Where the grant contains a covenant for the quiet enjoyment of the rights and those rights are interfered with by an act of the grantor which goes beyond what is necessary in the management of his estate, there is a breach of that covenant.

Per GREER, L.J.: The grantee acquires by a grant of sporting rights a profit à prendre, an incorporeal hereditament, which he is entitled to protect from injury either by the grantor or a third party.

Per SLESSER, L.J.: The rule that a grantor may not derogate from his grant applies to a profit à prendre as well as to corporeal hereditaments.

Notes. Considered: *Seligman* v. *Docker*, [1948] 2 All E.R. 887; *Mason* v. *Clarke*, [1955] 1 All E.R. 914. Referred to: *Wenner* v. *Morris* (1935), 79 Sol. Jo. 252; *Mason* v. *Clarke*, [1954] 1 All E.R. 189.

As to profits à prendre, see 12 HALSBURY'S LAWS (3rd Edn.) 620 et seq.; and for cases on disturbance, see 19 DIGEST 207, 208.

Cases referred to:

(1) *Wickham* v. *Hawker* (1840), 7 M. & W. 63; 10 L.J.Ex. 153; 151 E.R. 679; 30 Digest (Repl.) 528, *1660*.

(2) *Jeffreys* v. *Evans* (1845), 14 M. & W. 210; 3 Dow. & L. 52; 14 L.J.Ex. 363; 153 E.R. 452; 42 Digest 138, *1335*.

(3) *Caldwell* v. *Kilkelly*, [1905] 1 I.R. 434.

(4) *Boyle* v. *Holcroft*, [1905] 1 R. 245.

(5) *Ewart* v. *Graham* (1859), 7 H.L.Cas. 331; 29 L.J.Ex. 88; 33 L.T.O.S. 349; 23 J.P. 483; 5 Jur.N.S. 773; 7 W.R. 621; 11 E.R. 132; 2 Digest (Repl.) 292, *13*.

(6) *Fitzgerald* v. *Firbank*, [1897] 2 Ch. 96; 66 L.J.Ch. 529; 76 L.T. 584; 13 T.L.R. 390; 41 Sol. Jo. 490, C.A.; 2 Digest (Repl.) 294, *27*.

(7) *Bird* v. *Great Eastern Rail. Co.* (1865), 19 C.B.N.S. 268; 34 L.J.C.P. 366; 13 L.T. 365; 11 Jur.N.S. 782; 13 W.R. 989; 144 E.R. 790; 11 Digest (Repl.) 126, *160*.

(8) *Great Western Rail. Co.* v. *Swindon and Cheltenham Rail. Co.* (1884), 9 App. Cas. 787; 53 L.J.Ch. 1075; 51 L.T. 798; 48 J.P. 821; 32 W.R. 957, H.L.; 11 Digest (Repl.) 107, *37*.

(9) *Pattisson* v. *Gilford* (1874), L.R. 18 Eq. 259; 43 L.J.Ch. 524; 22 W.R. 673; 28 Digest 404, *315*.

(10) *Gearns* v. *Baker* (1875), 10 Ch. App. 355; 44 L.J.Ch. 334; 33 L.T. 86; 39 J.P. 564; 23 W.R. 543, C.A.; 2 Digest (Repl.) 100, *668*.

A (11) *Dick* v. *Norton* (1916), 85 L.J.Ch. 623; 114 L.T. 548; 32 T.L.R. 306; 60 Sol. Jo. 321; 2 Digest (Repl.) 100, *669*.

(12) *Farrer* v. *Nelson* (1885), 15 Q.B.D. 258; 54 L.J.Q.B. 385; 52 L.T. 766; 46 J.P. 725; 33 W.R. 800; 1 T.L.R. 483; 25 Digest 359, *98*.

(13) *Leeds Industrial Co-operative Society, Ltd.* v. *Slack*, [1924] A.C. 851; 93 L.J.Ch. 436; 131 L.T. 710; 40 T.L.R. 745; 68 Sol. Jo. 715, H.L.; 20 Digest B 549, *2710*.

(14) *Leech* v. *Schweder* (1874), 9 Ch. App. 463; 43 L.J.Ch. 487; 30 L.T. 586; 38 J.P. 612; 22 W.R. 633, L.JJ.; 31 Digest (Repl.) 129, *2673*.

(15) *Patrick* v. *Harris's Trustees* (1904), 6 F. (Ct. of Sess.) 985; 31 Digest (Repl.) 388, **1730*.

(16) *Fetherstonhaugh* v. *Hagarty*, [1878] L.R.Ir. 150.

C **Appeal** from an order of AVORY, J., in an action tried by him without a jury at Winchester Assizes.

By an indenture of lease dated July 1, 1921, the defendant, John Thomas Best, demised to the plaintiff, Samuel Barker Peech, for fourteen years from March 25, 1920, the exclusive right of shooting and sporting in, over and upon part of Hazeley Farm, Twyford, in the county of Hants, at a yearly rent of £60, payable D in advance, subject to the defendant Best's rights under the Ground Game Act, 1880. The lease contained a covenant that the plaintiff should peaceably and quietly have, hold and enjoy the said rights without any lawful interruption from the defendant Best, or any person or persons claiming through, under or in trust for him, and that the defendant Best, his heirs and assigns, and his and their workmen, would take all necessary and reasonable care to preserve the nests, eggs E and young of all game birds on the said land and not unnecessarily disturb the same. On Nov. 30, 1929, the defendant Best agreed to sell to the defendant, Etienne George De Mestre, about twelve acres of the land comprised in the lease. The defendant, Best, knew that he (De Mestre) intended to erect training stables on it for thirty-six horses and certain cottages for a caretaker and six stable lads. On the same date Best covenanted to indemnify De Mestre and his builder against F any claims by the plaintiff for infringement of his sporting rights. The plaintiff instituted the present action against Best, De Mestre, and the builder, one Freemantle, claiming (i) a declaration that he had the exclusive right of shooting and sporting upon and over the land referred to in the lease, and (ii) damages. The defendant Best admitted that thirty-six loose boxes and two store sheds had been erected, but he denied that he had thereby or in any other way been guilty of any G breach of the covenants of the lease or had infringed any rights of the plaintiff. He further denied that any nests, eggs or young of any game birds had been disturbed or that reasonable care had not been taken. AVORY, J., found that there had been a substantial interference with the plaintiff's sporting and shooting rights, and assessed the damages at £100. The defendant Best appealed.

A. T. Denning for the defendant.

H *W. Blake Odgers* for the plaintiff.

Cur. adv. vult.

May 26. The following judgments were read:

SCRUTTON, L.J.—This appeal raises questions of some difficulty and importance as to the nature and extent of a grant of sporting rights, and the acts which I will infringe such a grant. Mr. Best was the owner of an estate of nearly 700 acres near Winchester. The land was primarily agricultural land, but during the war a substantial part of it was being used as a camp. After the war the camp was being given up by the War Office, and the huts and road materials on it were sold and removed. On July 1, 1921, Best, the landlord, granted to one Peech "for a term of fourteen years from Mar. 25, 1920, the exclusive right of shooting and sporting in and over the land" in question. A point was raised at the trial as to whether part of Best's land, on which acts alleged to be an infringement of the grant of sporting rights had occurred, was part of the land demised. The trial judge found that it was, and I see no ground for dissenting from his decision. The A indenture contained a covenant by Peech that he would, during the term, so far as reasonably possible, keep up the head of game on the said land, and would to the best of his powers preserve the nests, eggs, and young of game birds from being destroyed and injured. There was a covenant by Best for quiet enjoyment, and also that Best would take all necessary and reasonable care to preserve the nests, eggs, and young of all game birds on the said premises and should not unnecessarily B disturb the same. Both parties seem to have contemplated the continuance of the practical exercise of sporting rights, which would be academic if there were no game on the land. The occupation by the War Office was expected to cease, and did cease, shortly after the lease. The huts were gradually removed, and such few as remained were, in my opinion, immaterial to the piece of land now to be considered. C

On Nov. 30, 1929, Best sold to one De Mestre twelve acres of the land the subject of the grant of sporting rights. He knew that De Mestre intended to erect training stables on it, in fact for thirty-six horses, and certain cottages for a caretaker and six stable boys. On the same date Best covenanted to indemnify De Mestre and his builder against any claims by Peech for infringement of Peech's sporting rights. The learned judge finds a substantial interference with Peech's sporting rights D since 1926 and assesses the damages at £100. It is said that this is too much, even if the judge was right in treating the sale of the land for that sort of building and use as an infringement of sporting rights. I have considered the arguments and evidence and do not feel able to interfere with the judge's finding of amount, if he was right in finding Best's action to be an infringement of Peech's sporting rights. Again, if what De Mestre did and was proposing to do would be an infringement E of Peech's sporting rights, Best authorised him to do it and indemnified him against claims by Peech, and Best would, therefore, be liable for a breach of his covenant for quiet enjoyment. He would not be liable for De Mestre's action in excess of what he (De Mestre) was authorised to do by Best.

This brings one to the real question in the case, which is: Can a landlord who grants sporting rights over his land sell part of his land for buildings which will destroy or seriously affect the sporting rights over the land that he sells. The F authorities are not very easy to understand on this point. Where the landlord leases the land to his tenant, reserving sporting rights, this is really a re-grant by the tenant: *Wickham* v. *Hawker* (1); and in such a case the tenant is usually controlled in the use of his land by the terms of his lease and cannot sell for building. He may, in my opinion, use his land in the way in which he is allowed to do by his lease, so long as he acts in good faith and not for the express purpose G of destroying the sporting rights that he has granted. In the words of WILLES, J., in *Jeffreys* v. *Evans* (2), he may use the land in the ordinary and accustomed way provided that he does "not resort to any expedients for destroying or driving away the game." He must not wilfully destroy the game. ERLE, C.J., in the same case, says (19 C.B.N.S. at p. 265):

H

> "If a portion of the land had been sown with turnips or clover, which are favourable to partridges, it would be idle to say that the grantor was guilty of a breach because his tenant in a future year chose to adopt some other mode of cultivation of the land. The same argument applies where thirty or forty acres of furze and underwood out of a farm of 300 acres is cut down for the better cultivation of the farm. If there had been a covenant to keep up the cover, of course it would be a breach of covenant to grub it up." I

BARTON, J., said, in the Irish case of *Caldwell* v. *Kilkelly* (3) ([1905] 1 I.R. at p. 447), citing his own decision in *Boyle* v. *Holcroft* (4) ([1905] 1 I.R. 245):

> "So long as the tenant is bona fide and reasonably managing and cultivating his holding the landlord must (as a general rule) be content to exercise his sporting rights upon the lands as he finds them from time to time. For example, he cannot complain if the tenant in the ordinary course of cultivation drains

> A swampy ground, with the result that snipe depart; or discontinues growing turnips, with the result that partridges disappear."

In another Irish case, the tenant, who was allowed to cultivate a certain acreage on which sporting rights had been reserved, was held entitled to stop up rabbit burrows on that acreage, but not on other land which he was not allowed to B cultivate. So, in *Boyle* v. *Holcroft* (4), a tenant whose landlord had reserved fishing rights was held not entitled, by erecting a fence, to prevent the exercise of fishing rights, his action being nominally to keep his cattle out of the river, but really to stop his landlord from fishing from the banks.

The question is simple where the tenant is the grantor of sporting rights, because his use of the land is usually controlled by his lease from the landlord. When the C landlord is the grantor to a stranger the question becomes more difficult, because you have not the help, to control the landlord, of a document, other than the grant of sporting rights. There is, however, no doubt of the nature of a grant of sporting rights, which allows the grantee to sport by himself and others and to remove the game. LORD CAMPBELL, in *Ewart* v. *Graham* (5), giving the judgment of the House of Lords, after consulting the judges, says:

> D "The nature of the right in question is exceedingly well explained in a learned and lucid judgment pronounced by my noble and learned friend on my left when a judge of the Court of Exchequer [that was PARKE, B., then LORD WENSLEYDALE, in *Wickham* v. *Hawker* (1)] and from that it appears that this is an interest in the realty which is well known to the law. The property in animals feræ naturæ, while they are on the soil, belongs to the owner of the soil, E and he may grant a right to others to come and take them by a grant of hunting, shooting, fowling and so forth; that right may be granted by the owner of the fee simple, and such a grant is a licence of profit à prendre."

The grant of shooting rights is in the same class as the grant of fishing rights, rights of turbary, or rights to cut underwood. The Court of Appeal, in *Fitzgerald* v. F *Firbank* (6), a case of a grant of an exclusive right of fishing, held that it was a grant of a profit à prendre, and that the grantee could sue in trespass at common law for any infringement of those rights. The defendant in that case, in working gravel pits near the river, turned muddy water into the river, which drove away the fish. His act was not done with the intention, but had the necessary result, of injuring the fish. LINDLEY, L.J., said ([1897] 2 Ch. at p. 102): "The defendant has no right to foul the river to the damage of anybody who has rights in that G river," which included the grantee of a profit à prendre. RIGBY, L.J., said the grantee had the right to sue for a wrongful act which operated as a disturbance of the rights granted by the deed.

This, however, leaves unanswered the question what is the effect when the person disturbing the rights of profit à prendre is a person doing an act which, unless his grant of a profit à prendre prevents him, he has a right to do as owner of the land H affected. Is he derogating from his grant, or is his grant subject to the implied term that he may use his land in an ordinary and legitimate way, so long as he himself does not "sport," or himself take the profit à prendre, or wilfully damage the right of profit à prendre? On this point the cases are obscure. In two decisions in 19 C.B.N.S. the question did not directly arise. In *Jeffreys* v. *Evans* (2) the landlord had demised a farm to a tenant, B, reserving to himself all timber and I the exclusive right of shooting and sporting. He also granted to C a house and the exclusive right of shooting and sporting over and taking game and rabbits over the land, including the farm demised to B, but he reserved to himself all trees, underwood, thorns and bushes, &c. The tenant B shot the rabbits, as injurious to his cultivation, and cut down the furze covers. C instead of suing B for unlawfully injuring his profit à prendre, as under the authority of *Fitzgerald* v. *Firbank* (6) he would be entitled to do, sued the landlord for breach of his covenant for quiet enjoyment. C failed, for it was held that B, as against the landlord, was not entitled to do what he did in respect of the rabbits, and, therefore, the landlord was not liable for his acts. ERLE, C.J, held, as to the furze covers, that the A grantee of shooting rights over a farm was not entitled to complain of covers cut down

> "for the better cultivation of the farm. The plaintiff has just as much right to shoot and sport over the thirty acres of land which has been so treated as he had before, and that is all the plaintiff covenanted he should have."

B WILLES, J., used the passage cited above, and said: "Cutting furze and underwood in the ordinary course of cultivation cannot be said to be a wilful destruction of the game." MONTAGUE SMITH, J., said:

> "He had the same right to sport over the land as before. If he wished to have the condition of the land as to furze and underwood preserved he should have expressly stipulated that the present mode of cultivation of the land should not be altered." C

The question of a fundamental alteration of the use of the land which entirely destroyed the profit à prendre does not seem to have arisen.

In *Bird* v. *Great Eastern Rail. Co.* (7) the plaintiff had a letting not under seal for three years of the exclusive right of shooting over certain land. A railway was constructed across the land, and the plaintiff claimed compensation under the D Lands Clauses Acts from the railway company. One ground of defence was, before the fusion of law and equity, that the plaintiff, having no grant under seal, had no interest in the land entitling him to compensation. This succeeded; it would not do so since the fusion of law and equity. ERLE, C.J., doubted whether, if the letting were under seal, it would make any difference. This seems contrary to the later views of LORD WATSON (9 App. Cas. at p. 803) and LORD BRAMWELL (9 App. Cas. E at p. 808) in *Great Western Rail. Co.* v. *Swindon and Cheltenham Rail. Co.* (8). ERLE, C.J., expresses himself thus (19 C.B.N.S. at p. 283):

> "He takes by his contract the right of shooting if there be game, and of fishing if there be fish. But there is no contract on the part of the landlord to keep up the quantity of game or of fish. No doubt an action would lie against Elwes, if, after having let the right of shooting and fishing, he wilfully did something F to destroy the fish or to prevent the access of the game to the land."

WILLES, J., treats the matter as a mere licence, and says (19 C.B.N.S. at p. 284):

> "The owner of the land has not contracted that he will not enjoy the land in any lawful and ordinary way which does not go directly to the destruction of the game."

Then: G

> "The books are wholly silent as to one who has a mere licence to shoot or to fish over another man's land having any right to restrain the owner of the soil in the ordinary and reasonable use of it; always excepting the malicious or intentional destruction or driving off of the game."

BYLES, J., and MONTAGUE SMITH, J., say that the plaintiff had no interest in the H land. Again, the question of profit à prendre and the question of a use of the land destroying the profit à prendre is not discussed.

In *Pattison* v. *Gilford* (9) the question of building on the land did arise. SIR GEORGE JESSEL, M.R., refused to grant an injunction restraining a landlord who had granted a right of shooting over land from advertising for sale the land described as "several plots of building land," with a statement that it was sold subject to I shooting rights. He said, however, that he would have granted it if the defendants had been going to grub up the plantations, but that in the circumstances it was not shown that damage to the shooting rights would inevitably follow, or that the purchasers would build. I think he would have granted an injunction if the landlord had threatened to build over the whole estate. He says (L.R. 18 Eq. at p. 263):

> "All these observations would apply if the defendant were actually threatening to erect villas. It does not by any means follow as of necessity that the

> erection of one or two villas will injure the right of shooting; that depends upon the part of the estate on which the villas are built, the number of villas, and the size of them, and so on. There may or may not be injury, and I should hesitate long before I granted an injunction against a defendant, over whose estate there existed a right of shooting, to prevent his building a single house. Of course, a great deal would depend on the extent of the property, and the nature of the coverts, and so on; but I should require to be satisfied, according to the authorities, that by the erection of a house, or even two houses if the estate was a large one, injury must necessarily and inevitably follow."

He does not mention the profit à prendre, but I think he would have restrained a different use of the land, which was a farm when the rights were leased, if it substantially destroyed the profit à prendre.

In *Gearns* v. *Baker* (10) the landlord, who had granted shooting rights over 1,300 acres, proposed to cut down some of the coverts on the land and sell the timber. JAMES and MELLISH, L.JJ., refused to restrain this as an infringement of a mere grant of shooting rights. JAMES, L.J., said (L.R. 10 Ch. at p. 357):

> "It is preposterous to suppose that a man who grants a shooting lease for twenty-one years is to be dictated by this court as to whether he shall cut down a tree or remove a coppice, because by so doing he would be driving away the hares or interfering with the breeding of the pheasants. If men mean to acquire such rights, they must express their meaning clearly. I am of opinion that such rights are not expressed and not implied in the ordinary grant of shooting, and that this court has no right to interfere in the way suggested. As this case stands, it is the common case of a man who has granted the right of shooting and is minded to deal with his estate as other landowners deal with their estates, and I am of opinion that there is no right or power in this court to interfere with him in so dealing."

MELLISH, L.J., treated it as cutting the trees in the ordinary course of managing the estate, but added (L.R. 10 Ch. at p. 358): "It is unnecessary to consider whether he could turn the covers into pasture or arable land, because he is not proposing to do anything of the kind."

In *Dick* v. *Norton* (11), where a landlord who had granted shooting rights over his farms, reserving to himself the right to enter the coverts at any reasonable time consistent with the non-disturbance of game for the purpose of felling trees, then sold the timber on the farm for munition purposes, EVE, J., refused to grant an interlocutory injunction, partly on the ground, following *Gearns* v. *Baker* (10) that the lessor had the right to turn his property to the best advantage for which it was suited, partly on the ground that if there was any right it was rather a case for damages than an injunction. But it appears that at the trial of the action PETERSON, J., gave the plaintiff damages, presumably on the ground that cutting down all the timber was a substantial interference with the profit à prendre going beyond the ordinary cultivation of the farm. In *Farrer* v. *Nelson* (12) a sporting tenant who brought an unreasonable number of pheasants on the land, which injured the crops, was held liable in damages. This apparently shows that both landlord and sporting tenant must use their land reasonably having regard to the interest of the other, and will be liable for damage caused to the other by "extraordinary non-natural or unreasonable action."

I test the case in this way. May a landlord who grants sporting rights over a farm for valuable consideration turn the whole farm into building land? I think SIR GEORGE JESSEL, M.R., would have stopped him (*Pattison* v. *Gilford* (9)). On the other hand, *Gearns* v. *Baker* (10) shows that the landlord could not be interfered with in cultivating the farm in the ordinary way and changing its cultivation in the ordinary way, though it lessened the amount of game or the sporting amenities. What is the difference? It appears to me that fundamentally changing the character of the land over which sporting rights are granted, though it is not with the deliberate intention of injuring the sporting rights, and though it is a thing which a landowner would have power to do if he does not injure the rights of others, if it has the necessary effect of substantially injuring the rights of others, is derogation from the grant, and is a substantial interference with the profit à prendre granted. If this is true of buildings affecting the whole land, or cutting down all the timber on the land for sale (PETERSON, J., in *Dick* v. *Norton* (11)), it appears to me to be true of partial changes in the land, provided that they substantially injure the rights granted. In the present case a farmer has sold a substantial part of the land over which sporting rights are granted for the purpose of erecting a training stable for thirty-six horses with cottages for attendant stableboys and a caretaker. The judge has found that this substantially affects the sporting rights. I should doubt myself, when the stables for thirty-six horses and six stableboys are in occupation, whether a game bird would be left within a quarter of a mile of the stable. In my opinion, this is a derogation from the grant, and an infringement of the rights of profit à prendre, and a breach of the covenant for quiet enjoyment, and the plaintiff is entitled to the damages awarded. The appeal should be dismissed with costs.

GREER, L.J.—By a lease under seal dated July 1, 1921, the defendant, who was the owner of Hazeley Farm, Twyford, and was in possession of the farm except as to a certain part which was then occupied by the Crown for the purposes of a military camp, granted to the plaintiff exclusive shooting rights over part of the farm. The lease of the shooting rights included some of the land which was still in the occupation of the Crown at the date of the lease, but which both parties expected would soon revert to the lessor and be again used as farming land. There were certain buildings on part of the land the subject-matter of the lease, and, in addition, on that part which was, as hereinafter mentioned, sold to a Mr. De Mestre, there were roads and trenches. Notices to quit had been received from the Crown and, as I have said, it was anticipated at the date of the lease that the land would, in the near future, be again used for farming purposes. I think, therefore, we must treat the lease of the shooting rights as a lease of shooting rights over farm land, though, of course, the lessee could not complain of any interference caused by the existence of the buildings, roads, and trenches on part of the farm.

On Nov. 30, 1929, the defendant conveyed to Mr. De Mestre twelve acres of the farm, the major part of which had been in the occupation of the Crown, with the knowledge that the purchaser intended to use the land to erect thereon racing stables and bungalows and other buildings to accommodate men or boys to look after the stables and the horses. He also entered into a deed of covenant on the same date indemnifying the purchaser against the claim brought against him in the present action, the purchaser having started to build a stable consisting of a number of loose boxes for racehorses. After the purchase, but before the conveyance, the plaintiff brought this action against the lessor, J. T. Best, De Mestre, and the builder, claiming an injunction restraining the defendants from doing any acts calculated to deprive the plaintiff of the shooting rights given by his lease, and damages. In the course of the action the plaintiff asked for an interlocutory injunction, which was refused. When the action came on for trial it was still an action for an injunction, notwithstanding the fact that the plaintiff's counsel did not think it worth while to press for an injunction, but asked for damages instead. It was, at one time, thought that where damages were claimed it was necessary to establish that, at the date of the writ, the plaintiff's rights had in fact been invaded and that in a quia timet action where nothing was proved except a threat which, if carried out, would amount to a breach of the plaintiff's rights, damages could not be given. It was, however, finally decided by the House of Lords in *Leeds Industrial Co-operative Society* v. *Slack* (13) that by reason of Lord Cairns' Act (Chancery Amendment Act, 1858), in a proper case damages can be given to compensate for the injury which will be done to the plaintiff from the carrying into effect of the threat. The law applicable to the matter is thus stated by VISCOUNT FINLAY ([1924] A.C. at p. 857):

> "In my opinion this question must be answered in the affirmative. The power given is to award damages to the party injured, either in addition to or in

> substitution for an injunction. If the damages are given in addition to the injunction they are to compensate for the injury which has been done and the injunction will prevent its continuance or repetition. But if damages are given in substitution for an injunction they must necessarily cover not only injury already sustained but also injury that would be inflicted in the future by the commission of the act threatened. If no injury has yet been sustained the damages will be solely in respect of the damage to be sustained in the future by injuries which the injunction, if granted, would have prevented."

In the present appeal it was contended on behalf of the defendant that the plaintiff was not entitled to complain of the building of the stables on the ground that the grant of shooting rights by a deed which contained a covenant for quiet enjoyment does not take away from the grantor the right to use his land during the period covered by the grant in the ordinary and usual ways in which landowners may deal with the land for their own purposes and that the building of a stable was an ordinary and normal use of the land by the landlord and that the plaintiff was, therefore, neither entitled to an injunction nor to damages. It was also contended that, in any event, the damages were excessive. As regards the first point I have come to the conclusion that there was implied in the conduct of the defendants, Best and De Mestre, a threat to put the twelve acres to uses which would have entirely prevented the exercise of sporting rights over that particular part of the farm. The plaintiff had, by his lease, acquired a right which is a profit à prendre, an incorporeal hereditament, a right in rem which he was entitled to protect from injury either by his lessor or by a third party: see *Fitzgerald* v. *Firbank* (6). Though the mere building of a stable might not have been, in itself, a breach of the plaintiff's rights under his lease, I am of opinion that a complete ouster of the plaintiff from exercising his rights over a definite part of the land would be such a breach, which, if threatened, would entitle him to an injunction, and he was, therefore, entitled to have damages granted in lieu of an injunction upon the hypothesis that as no injunction was granted the defendants would carry out their threat. I agree with the contention that a covenant for quiet enjoyment does not, without express words, enlarge the subject-matter of the grant. It is a covenant for quiet enjoyment of that which is granted in the operative part of the grant: see *Leech* v. *Schweder* (14). But, in construing the grant, the court must have regard to the character of the land at the date of the grant. I can quite understand that a grant of sporting rights over land which had already been developed as building land would not prevent the owner from going on with his plans and building houses from time to time; but I regard the lease of sporting rights in this case as a lease of rights over farm lands. Though such a grant would not operate to restrain the landlord from interfering with the sporting rights by carrying out any reasonable and normal operations which might be deemed advisable for the purpose of dealing with the land to the best advantage as farming land, he would have no right to put the land to uses which have nothing to do with farming requirements, so as to entirely oust the sporting tenant from exercising his rights over a substantial part of the land included in the grant.

I do not think that the authorities relied on by the defendant, *Jeffreys* v. *Evans* (2), *Gearns* v. *Baker* (10), *Dick* v. *Norton* (11), and *Bird* v. *Great Eastern Rail. Co.* (7), are inconsistent with this view of the law. It is true that the language used by WILLES, J., in *Bird* v. *Great Eastern Rail. Co.* (7), if literally interpreted, seems to indicate that that learned judge held the opinion that nothing short of malicious or intentional destruction or driving off all the game would amount to a breach of sporting rights even when granted by deed. I do not think that that learned judge meant to go as far as that. I think his reference to malicious and intentional destruction can only be treated as an illustration of one way in which the rights of the sporting tenant could be interfered with so as to give him a cause of action, and that it was not intended to be exclusive. In any case the observations of the learned judge were obiter, and, though entitled to great weight, they are not binding on this court. In my judgment, what the defendants were threatening to do by their conduct, if not restrained by injunction, was entirely to prevent the plaintiff from exercising any shooting rights over twelve acres of the land over which his lease gave him shooting rights, and, I think, also to damage to some extent his shooting rights beyond that area by frightening the birds away. I think this would have derogated from the incorporeal hereditament which had been granted to the plaintiff, that it would have been a breach of the covenant for quiet enjoyment, and, therefore, that a good case was made by the plaintiff for an injunction or, if the court decided to give damages in place of an injunction, a good case for damages which would be a sufficient substitute for the injunction to which he would otherwise have been entitled. I cannot find that the damages granted by Avory, J., were excessive when regarded as damages estimated not merely on the basis of what had been done on the land at the date of the sale of the twelve acres, but estimated as a substitute for an injunction. For these reasons, though at one time I was inclined to take a different view, I have, after considering the decision in *Leeds Industrial Co-operative Society* v. *Slack* (13), come to the conclusion that this appeal should be dismissed.

SLESSER, L.J.—By an indenture dated July 1, 1921, John Thomas Best, one of the defendants in this action, demised to Samuel Barker Peech, the plaintiff, the exclusive right of shooting and sporting in, over, and upon part of Hazeley Farm, Twyford, Hampshire, comprising about 700 acres, from March 25, for the term of fourteen years, subject to six months' previous notice in writing to determine by the plaintiff at the end of the third, fifth, seventh, or tenth years of the term. The yearly rental was £60, payable in advance by the plaintiff, and the plaintiff covenanted, so far as reasonably possible, to keep up the head of game upon the land and to the best of his power to preserve the nests, eggs and young of all game birds from being destroyed or injured. The landlord, Best, covenanted that Peech should peaceably and quietly have, hold, and enjoy the property, and, further, that he and his agents would take all necessary and reasonable care to preserve the nests, eggs and young of all game birds on the said premises and not unnecessarily disturb the same. Peech was to be at liberty to employ keepers, who were to be allowed free access at all times to the said premises for all necessary and proper purposes. Notwithstanding this lease of shooting rights, the defendant Best, on Nov. 30, 1929, conveyed to one Etienne George De Mestre a parcel of land of about twelve acres, which, the plaintiff contends, is a part of the area demised to him in 1921 for shooting and sporting rights as above stated. In the conveyance of Nov. 30, 1929, the vendor is described as seised of the hereditaments in unincumbered fee simple, but by a collateral covenant of the same date it is recited that, whereas Best has agreed to sell to De Mestre the twelve acres in question, and whereas Peech has started an action against Best, De Mestre and a Mr. Freemantle, a builder employed by De Mestre, Best, in consideration of the completion of the purchase of the land by De Mestre, indemnifies De Mestre and Freemantle in respect of the action of Peech.

This action was heard before Avory, J., who found that the erection of thirty-six loose boxes by De Mestre, the purchaser of the twelve acres, to be occupied by horses (which will be trained on the ground) appeared to him to be entirely inconsistent with the grant of the shooting rights, and in fact amounted to a physical obstruction of the plaintiff in the exercise of his shooting rights, and he came to the conclusion that the portion which has been sold and converted into a racing stable, though not of much value from a shooting point of view, was of some value, and he awarded the plaintiff £100 damages against the defendant Best, this £100 to compensate for the infringement of the plaintiff's rights which had thus taken place. The learned judge said: "Judgment for £100 damages which I say covers the damage already done." He also granted a declaration that the plaintiff was entitled to the sporting rights over the land sold to De Mestre.

From the authorities it would appear that injury to shooting rights, arising from the ordinary management of land, is not an injury of which the shooting tenant can complain. In *Gearns* v. *Baker* (10) it was held that a landowner who has demised the right of shooting is not prevented from cutting timber as he thinks fit in the ordinary management of his land although injurious to the shooting. JAMES, L.J., says, speaking of ordinary grants of shooting (L.R. 10 Ch. at p. 357):

> "It is the common case of a man who has granted the right of shooting, and is minded to deal with his estate as other landowners deal with their estates, and I am of opinion that there is no right or power in this court to interfere with him in so dealing."

MELLISH, L.J., says (L.R. 10 Ch. at p. 358):

> "In my opinion the right of shooting is a right to shoot over the land as the lands may happen to be at the time, the landlord, of course, not doing anything for the express purpose of injuring the right of shooting."

He, however, continues:

> "It is unnecessary to consider whether he could turn the covers into pasture or arable land, because he is not proposing to do anything of the kind."

This case is thus clear authority for the proposition that were Mr. Best or Mr. De Mestre to do something which landowners reasonably do in dealing with their estates, there could be no complaint by the shooting tenant. This principle has been applied also to a failure to do that which may be necessary to preserve the shooting. In *Patrick* v. *Harris's Trustees* (15) it was held that, under a lease with right of shooting, there is no implied obligation upon the landlord to keep the fences around the plantations in such a state of repair as to be effectual to exclude live stock. The Lord President says (6 F. (Ct. of Sess.) at p. 987):

> "A person taking a shooting over such a small estate takes it as he finds it, and in the absence of express obligation, I think it would not only be novel, but also unreasonable, to hold that the landlord was subject to such an implied obligation."

LORD ADAM says:

> "No doubt if the landlord cuts down wood in the plantations and drags it away, that may injure the shooting. But he will be entitled to do that apart from special stipulation to the contrary."

In *Jeffreys* v. *Evans* (2) it was argued that a covenant for quiet enjoyment in a shooting lease was impliedly a covenant not to grub up furze or underwood. ERLE, C.J., said (19 C.B.N.S. at p. 265):

> "The plaintiff has just as much right to shoot and sport over the thirty or forty acres of land which has been so treated as he had before; and that is all the plaintiff covenanted that he should have."

MONTAGUE SMITH, L.J., said (19 C.B.N.S. at p. 268):

> "He had the same right to sport over the land as before. If he wished to have the condition of the land as to furze and underwood preserved, he should have expressly stipulated that the present mode of cultivation of the land should not be altered."

The destroying of rabbits by the tenant, the necessary result of proper tillage or culture, in a lease reserving to the lessor all rabbits with full liberty to destroy them, is lawful: *Fetherstonhaugh* v. *Hagarty* (16). So, also, the cutting and keeping down weeds in a river where the landlord has reserved the exclusive right of fishing: *Caldwell* v. *Kilkelly* (3). Nor does the landlord guarantee a supply of game. In *Bird* v. *Great Eastern Rail. Co.* (7), ERLE, C.J., speaking of shooting rights, says (19 C.B.N.S. at p. 283):

> "He takes by his contract the right of shooting if there be game . . . but there is no contract on the part of the landlord to keep up the quantity of game."

On the other hand, on a covenant for quiet enjoyment, if the facts show that the act of the landlord goes beyond what is reasonable in the management of his estate, or, in effect, deprives the tenant of that which he bargained for under the covenant for quiet enjoyment, notwithstanding certain dicta such as those of Mellish, L.J., in *Gearns* v. *Baker* (10), and Willes, J., in *Jeffreys* v. *Evans* (2), that the landlord is only liable on the covenant when he intentionally injures the shooting rights, I think that, if such injury is the reasonable result of his action, the tenant can complain. The rule that a lessor may not derogate from his grant applies to a profit à prendre as well as to corporeal hereditaments and the lessor of shooting rights must not do that which would annihilate the rights which he has granted: *Fitzgerald* v. *Firbank* (6). In *Pattisson* v. *Gilford* (9), on a motion for injunction to restrain the owner of a shooting estate from issuing particulars of sale of the estate in lots, stating that land suitable for villas and residences might be erected on part of it, giving full notice of the right of shooting, the injunction was refused, but Sir George Jessel, M.R., said (L.R. 18 Eq. at p. 264):

> "No cautious man who understood the particulars would buy that land for immediate building purposes; he would see the difficulty which he would get into with regard to the owner of the right of shooting."

There are indications in the case that had the lots actually been built upon it may have been that an action would lie. In *Jeffreys* v. *Evans* (2), Willes, J., said (19 C.B.N.S. at p. 266):

> "I apprehend that such a grant as that does not prevent the landowner or his tenants from using the land in the ordinary and accustomed way, provided they do not resort to any expedients for destroying or driving away the game."

As I have already indicated, I read the words "resort to any expedient" to include action which must necessarily have the same result. In *Dick* v. *Norton* (11), a case of sale of timber not for estate management, but for commercial purposes, Eve, J., refused an interlocutory injunction, but, on the trial, Peterson, J., gave damages: Redman on Landlord and Tenant (8th Edn.), p. 261. See also *Boyle* v. *Holcroft* (4) to the like effect.

In the present case the learned judge, having heard the evidence, has come to the conclusion that the plaintiff has suffered damage from the physical obstruction of the shooting rights. He has not found, nor, indeed, was it seriously suggested, that the use of the land for racing stables was in any way reasonably necessary or at all connected with the farm management. I think this is a case where the injury done cannot be said to fall within the principle of *Gearns* v. *Baker* (10), and that what was done was not for the management of the land; rather does the case resemble *Dick* v. *Norton* (11), where the timber was felled solely for mercantile purposes, in which case damages were given by an experienced Chancery judge. It is said that the learned judge should have considered only what had already been done, which is the erection of buildings. The learned judge here has apparently confined his damages to the injury already done, but I read him to have given them in lieu of a claim for an injunction for breach of covenant, and in such case damages can deal with what would have been prevented by the injunction if granted, per Viscount Finlay in *Leeds Industrial Co-operative Society* v. *Slack* (13) ([1924] A.C. at p. 857), Mayne on Damages (10th Edn.), chapter 27. So no complaint can be made that the learned judge took into consideration the purpose to which it was to be put, for such considerations would be material on the granting of an injunction. In this case he was right in considering all the matters as to the use to which the racing stables might be put as he would have been had he been considering the grant of the injunction itself. For these reasons I think that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Cunliffes, Blake & Mossman*, for *White & Nash*, Winchester; *Petch & Co.*, for *R. J. Harris*, Winchester.

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

TAYLOR *v.* LOCK

[COURT OF APPEAL (Scrutton, Slesser and Romer, L.JJ.), February 3, 1930]

[Reported 99 L.J.K.B. 245; 142 L.T. 537; 23 B.W.C.C. 55]

Workmen's Compensation—"Arising out of and in course of employment"—Act within employment done negligently—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 1 (2).

The deceased man was employed by the respondent as the driver of a steam lorry. On April 12, 1929, when on a journey for his employer on the lorry, he left the lorry for purposes of his own for a short period. Upon his return to the road he beckoned to the steersman of the lorry, who had no licence to drive, to drive the car to him, and the steersman did so. The deceased man then attempted to board the lorry while it was moving, and he slipped and fell under the wheels and was killed. The county court judge held that it was for his own purposes that the deceased man left his employment, and that the act was not done by him in connection with his employer's business.

Held: the fact that a workman did negligently an act which he was employed to do did not in itself render that act one which was not done in the course of his employment, unless he did the act in such a negligent way as to make it quite a different act, an added peril, and so outside what he was employed to do; the county court judge had not sufficiently considered that matter; and, therefore, the case must be remitted for him to do so.

Notes. The Workmen's Compensation Act, 1925, was repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents, but s. 1 (1) of the latter Act provides that the insurance shall be "against personal injury caused . . . by accident arising out of and in the course of" employment, thus adopting the wording of s. 1 (1) of the Act of 1925. See also s. 7 (1).

Referred to: *Knowles* v. *Southern Rail. Co.*, [1937] 2 All E.R. 403.

As to "accidents" within the Workmen's Compensation Acts, see 34 HALSBURY'S LAWS (2nd Edn.) 816 et seq.; and for cases see 34 DIGEST 266 et seq. For Workmen's Compensation Act, 1925, see 16 HALSBURY'S STATUTES (2nd Edn.) 202; and for National Insurance (Industrial Injuries) Act, 1946, see ibid. 797.

Cases referred to:

(1) *Clark* v. *Southwark Corpn.* (1925), 133 L.T. 753; 18 B.W.C.C. 367; [1926] W.C. & I.R. 45; 34 Digest 287, *2407*.

(2) *Lancashire and Yorkshire Rail. Co.* v. *Highley*, [1917] A.C. 352; 86 L.J.K.B. 715; 116 L.T. 767; 33 T.L.R. 286; 61 Sol. Jo. 397; 10 B.W.C.C. 241; [1917] W.C. & I.R. 179; 34 Digest 290, *2425*.

(3) *Jibb* v. *Chadwick*, [1915] 2 K.B. 94; 84 L.J.K.B. 1241; 112 L.T. 878; 31 T.L.R. 185; 8 B.W.C.C. 152; [1915] W.C. & I.R. 342, C.A.; 34 Digest 290, *2426*.

(4) *Wemyss Coal Co., Ltd.* v. *Symon*, 1912 S.C. 1239; 49 Sc.L.R. 921; 1912 2 S.L.T. 127; 6 B.W.C.C. 298; 34 Digest 292, *2436*, *i*.

(5) *Strong* v. *Wright & Co.*, 1922 S.C. 515; 59 Sc.L.R. 415; [1922] W.C. & I.R. 167; 34 Digest 284, *q*.

(6) *Guest* v. *Gaston & Co.*, [1927] 1 K.B. 1; 95 L.J.K.B. 759; 135 L.T. 400; 42 T.L.R. 547; 70 Sol. Jo. 667; 19 B.W.C.C. 237; [1926] W.C. & I.R. 355, C.A.; 34 Digest 292, *2437*.

(7) *Moore* v. *Manchester Liners, Ltd.*, [1910] A.C. 498; 79 L.J.K.B. 1175; 103 L.T. 226; 26 T.L.R. 618; 54 Sol. Jo. 703; 3 B.W.C.C. 527, H.L.; 34 Digest 309, *2547*.

(8) *Reed* v. *Great Western Rail. Co.*, [1909] A.C. 31; 78 L.J.K.B. 31; 99 L.T. 781; 25 T.L.R. 36; 53 Sol. Jo. 31; 2 B.W.C.C. 109, H.L.; 34 Digest 294, *2449*.

(9) *Warren* v. *Hedley's Colliery Co., Ltd.* (1913), 6 B.W.C.C. 136; [1913] W.C. & I.R. 172; 34 Digest 296, *2460*.

Appeal from an award of His Honour Judge Bowen, sitting at the Shrewsbury Court as arbitrator under the Workmen's Compensation Act, 1925.

Harry Taylor, the deceased, was employed by the respondent as driver of a seven-ton steam lorry. He had a licence to drive, but his steersman, a man named Smout, had not. On April 12, 1929, when he was on a journey for the employer, he stopped the engine at the side of the road and got off. Smout said that the deceased got off to go and get some tobacco from his father, who was working in a field near by. The father said that after he had got the tobacco the deceased man relieved the wants of nature against a hedge. After that he did not go back to the lorry at the place where he had stopped it, but walked forward and beckoned to the steersman to drive the lorry on. He knew that the steersman was not licensed to drive, but there was a very short distance to cover. The steersman drove the lorry on and said that he saw the driver running to meet him. The steersman did not know anything of what happened until he felt a bump, which was apparently caused by the fact that the driver, in trying to get on to the moving lorry with the door to the driver's seat closed, slipped and fell under the wheels of the lorry and was killed. On an application by the widow of the deceased under the Workmen's Compensation Acts, the county court judge said:

> "Upon the evidence I hold that it is a case of an accident not arising out of or in the course of the deceased's employment, and that he was in no sense doing that which is part of, or fell within, his employment. It was for his own purposes, as declared by himself, namely, the convenience of the moment, in proceeding to obtain a supply of tobacco from his father, that he left his own duties and employment. I find also that this act was not done by the deceased workman for the purposes of and in connection with his employer's trade or business. In that act, unhappily, he met his death, and, in my opinion, this claim for compensation fails."

The applicant appealed.

St. John G. Micklethwait, K.C., and *R. G. Micklethwait* for the applicant.
E. W. Cave, K.C., and *Winning* for the respondent.

SCRUTTON, L.J.—In my experience most of these cases about accidents happening on moving vehicles have been extremely troublesome. *Clark* v. *Southwark Corpn.* (1) was a case of that kind, and gave me doubt about the correct result. This, I think, is a different case. It arises in this way. There was a motor lorry where, as usual, there was a driver and a steersman. The driver had a licence to drive and the steersman had not. Going along on a journey for the employer the driver stopped his engine and got off. His mate says that he got off to go and get some tobacco from his father who was working in a field near by. The father says that after his son had got the tobacco he relieved the wants of nature against the hedge. The learned county court judge does not make any express finding about relieving the wants of nature. He says: "It was said." Apparently, the dead man did not go back to the lorry at the place where he stopped it, but he walked forward and beckoned to the steersman to drive the lorry on. He knew, of course, that the steersman was not licensed to drive, but he had a very short distance to drive. The steersman drove the lorry on and he, the steersman, says: "I saw the driver running to meet me." There was a small door to the driver's seat. The steersman says he did not see it opened; in fact, the steersman did not know anything of what happened until he felt a bump, and the bump was apparently caused by the fact that the driver, in trying to get on the moving lorry with the door apparently shut—at least, the steersman says he did not open it, and did not see it opened—slipped and fell under the wheel of the lorry, and was killed.

The question is: Did that accident arise out of and in the course of the employment of the driver? The county court judge—beginning with LORD SUMNER's celebrated definition in *Lancashire and Yorkshire Rail. Co.* v. *Highley* (2) ([1917] A.C. at p. 372):

> "Was it part of the deceased's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment"

—has found that the accident did not arise out of his employment. I suppose the best way it can be put for that finding is that he was not employed to get on a moving lorry driven by a person whom he knew was not qualified to drive it. Upon that statement of LORD SUMNER's there has been grafted, by a series of decisions, this: The fact that you do negligently an act which you are employed to do does not in itself take the act out of your employment. You are employed to do that act, and, although you do it negligently and at a risk, namely, the risk which follows from doing it negligently, that does not in itself take it out of your employment. But if you do the act you are employed to do in such an odd and negligent way as to make it quite a different act, that may take it out of your employment. It is put sometimes in this way: Was the dead man doing something outside the sphere or ambit of his employment, or was he doing what he had to do in a wrong way? Was he acting negligently within the scope of his employment, or had he taken upon himself such an added peril, something quite peculiar and outside what he was employed to do, so as to take the act outside his employment? While there are several cases which say that it is a question of degree, and, therefore, for the county court judge, there are also cases where the Court of Appeal has said that there was no evidence on which the county court judge could find that the act by itself put the matter beyond doubt.

I think the view taken of cases relating to moving vehicles has varied with the passing years. There are two cases, one of which is *Jibb* v. *Chadwick* (3) and the other *Wemyss Coal Co., Ltd.* v. *Symon* (4), where Jibb, getting into a moving train, when he had to travel by train to carry out his duty, and in *Wemyss Coal Co., Ltd.* v. *Symon* (4), where Symon when boarding a moving tramcar, were held to take the act outside the scope of the employment. Then the current of authorities seems to turn the other way. In *Strong* v. *Wright & Co.* (5) the workman was on a lorry and, in the course of his journey, his coat blew off, and he got off the lorry before it stopped while it was going at five miles an hour. There the court held, reversing the arbitrator, that the accident was one arising out of the employment. Again, in *Clark* v. *Southwark Corpn.* (1), where a man walked on while the lorry in which he was going stopped, and then as it passed him at two and a half miles an hour he tried to clamber on to a swinging ladder at the back and fell and was fatally injured, the court held that there was no evidence upon which it could be proved that trying to get on a swinging ladder behind the lorry was out of the scope of the employment. There have since been many more such cases. In *Guest* v. *Gaston & Co.* (6) we had the case of a man getting on to a moving tramcar. We there thought that the very experienced county court judge at Liverpool had not addressed his mind to the qualification of the principle in *Lancashire and Yorkshire Rail. Co.* v. *Highley* (2), which I have mentioned, namely: Was the getting on to the moving tramcar at the speed at which it was travelling, and at the place where it was done, merely negligently carrying out the right to travel by tram, or was it such a different class of case that it could not be contemplated as being within the scope of the employment? We came to the conclusion that the learned judge, who had another point in his mind and had not dealt with it, had not considered that aspect of the case, and we sent it back to him in order that he might consider it. I have come to the conclusion, after considerable doubt and hesitation, that that is the proper course to take in this case. I have read the learned judge's judgment carefully, and I do not think he had in his mind and sufficiently considered the difference between negligently doing an act which you are authorised to do, and doing an act which you have a right to do in such an unusual way as to make it an act outside the scope of the employment.

I myself think, with some hesitation, that it is open to the judge to find either way, provided that he does consider the authorities which point out the distinction between negligently doing an act which is within the authority and doing an act which you are employed to do in such an unusual way as to take it outside the authority. I think it is quite capable of argument that to set an unlicensed man to drive a vehicle and then to try to get on to it while it is in motion may come within the second class of case. On the other hand, it is, I think, open to argument that it may be merely negligently doing that for which you are employed, the negligence not being so great as to put it into the second class of case. In those circumstances, as the matter is going back to the learned judge, who has great experience of these matters, I am sure when the matter the Court of Appeal desire him to consider is pointed out to him he will deal with it with his usual care. I think the matter must go back to the learned county court judge for re-consideration on the lines that I have indicated. The applicant must have the costs of this hearing, and the costs of the first hearing will abide the result of the second hearing.

SLESSER, L.J.—I agree. In the particulars in this application it is alleged that the deceased was attempting to get on to his engine while it was moving slowly and slipped under the wheel. It is a very material question to consider whether in that attempt he was acting so negligently as, within the many authorities which have been decided on this point, to take him outside the employment altogether, or whether he was doing something which, as was said by LORD LOREBURN, L.C., in *Moore* v. *Manchester Liners, Ltd.* (7), was one of the things which he might reasonably do while employed. It is an unfortunate fact, as I understand the history of this case, that the argument, and, I think, the judgment, were devoted not to this matter, but to other questions which do not decide the issue between the parties. I notice, for example, in the first place, that the cross-examination is not directed in any way to the question whether it was or was not negligent so to attempt to board a moving vehicle. The first question simply deals with the fact that Mr. Smout, the steersman, "did not see him walk along the hedge inside the field to make water," and, secondly, "He knew that I had no licence to drive the steam wagon. It was his duty to drive and mine to steer." When the matter comes on for argument there is one case mentioned by the learned judge which is used in argument by the employer: *Reed* v. *Great Western Rail. Co.* (8). That I see is a case where the question, when labour was intermittent, was whether during an intermission of the labour the employer was or was not responsible for an accident. It was the case of an engine driver who left his engine when it was at rest and crossed the line to communicate with the fireman of another engine, and on his way back was knocked down and killed, the argument being that that did not arise out of and in the course of his employment.

When one comes to examine the award in this case it is clear to my mind that the question which I have indicated is the material question here, but it was not considered, or, at any rate, was certainly not decided. After reciting the facts, there being no finding of fact either way as to whether this act was or was not so negligently done as to bring it outside the scope of the employment, the learned judge proceeds to set out an admirable condensation of the authorities on these matters, such as *Lancashire and Yorkshire Rail. Co.* v. *Highley* (2), and other authorities. In the last two paragraphs, which alone have reference to this particular matter here to be considered, the learned judge says: "The workman cannot increase the responsibility of the employer by doing something for his own purposes." Later on he says:

> "It was for his own purposes, as declared by himself, namely, the convenience of the moment in proceeding to obtain a supply of tobacco from his father, that he left his own duties and employment."

So far, therefore, the learned judge is giving attention to the matter of leaving his duties for the purpose of obtaining a supply of tobacco. He goes on:

A
> "It is no part of the employment of a workman to do an act during the period of his employment which adds to his ordinary employment a peril which that employment does not normally possess."

That might be said to refer to doing the act of mounting the engine improperly. But in contra-distinction to that, in the second paragraph, after speaking of the act of going to obtain a supply of tobacco, he goes on:

B
> "I find also that this act was not done by the deceased workman for the purposes of and in connection with his employer's trade or business."

The words "purposes of and in connection with his employer's trade or business," strictly speaking, are not the relevant questions to decide this case. These words have been mentioned in some of the earlier authorities as a test of what is "in the C course of the employment," and are very material in a case of prohibited acts where it is necessary as a condition under sub-s. (2) of s. 1 dealing with prohibited acts for the applicant to satisfy the court that what occurred was done for the purpose of the employer's trade or business. But, as no question of prohibited act arises in this case at all, it is not very easy to see the immediate relevance of those words. At any rate, it brings me to the conclusion that the learned judge has not D directed his mind to the matter which is to be decided in this case, and if we follow the principle which is laid down in *Guest* v. *Gaston & Co.* (6), where it is said that in all these cases, the question whether the act done does or does not take the applicant outside the scope of the employment is one of degree, it is obvious that the county court judge must find facts to establish exactly whether this case falls on one side of the line or the other. It is clear to my mind that he E has not found such facts, and, consequently, his finding at present is inconclusive of the matter which falls to be determined. I agree, therefore, that this case must be remitted to him in order that such facts as are indicated in *Guest* v. *Gaston & Co.* (6) may be determined, and a finding on the material issue may be made by the county court judge.

F **ROMER, L.J.**—I agree. It appears to me that the two matters which the learned county court judge had to decide are matters quite distinct one from the other. The first was whether, apart altogether from the circumstance that the engine was moving at the time the workman tried to get on it again, he was at the time he got on it again acting outside the scope of his employment. I will assume that when he got down from the engine and entered the field where his G father was working he did it solely for the purpose of getting some tobacco from his father, and that in so doing he temporarily left his employment. Assuming that, having temporarily left his employment, it was his duty to his employer to re-enter the employment as soon as possible, and, in my opinion, when he was—on the assumption that I have made—getting up on the step to get into the steam engine again he had re-entered his employer's employment. As COZENS-HARDY, H M.R., said in *Warren* v. *Hedley's Colliery Co., Ltd.* (9), in connection with this subject of breaking the employment and adapting it to the present case ([1913] W.C. & I.R. at p. 174):

> "If the workman goes where it was not his duty to go and practically gets back and resumes his work before the accident happens, the fact that he went away does not in any way disentitle him to the protection of the Act."

I If, therefore, and so far as the learned county court judge came to the conclusion that the workman was acting outside the scope of his employment inasmuch as he had gone out of the employment for the purpose of getting his tobacco, I am of opinion that there was no evidence upon which he could come to such a conclusion. The other matter, and a distinct matter, is this: Was it outside the scope of his employment to get on the lorry when it was moving? In other words, was he acting negligently within the scope of his employment, or had he taken upon himself in doing so such an added peril as to take the act outside his employment? This was stated in this court in *Guest* v. *Gaston & Co.* (6) to be a question of fact and a question of degree to be decided by the arbitrator. In the present case I am unable to find that the learned county court judge has addressed his mind to that matter at all. I therefore agree that the matter must be remitted to him for that purpose with the consequences which have been mentioned by my Lord.

Case remitted.

Solicitors: *T. H. Horwood & Co.* for *B. D. J. Hayes*, Shrewsbury; *Barlow, Lyde & Yates* for *Shakespeare & Vernon*.

[*Reported* by G. P. Langworthy, Esq., *Barrister-at-Law.*]

HALLIWELL *v.* VENABLES

[Court of Appeal (Scrutton, Lawrence and Slesser, L.JJ.), March 18, 1930]

[Reported 99 L.J.K.B. 353; 143 L.T. 215; 74 Sol. Jo. 264]

Negligence—Res ipsa loquitur—Road accident—Car overturned at bend in road —Driver driving with only one hand on steering wheel.

Costs—New trial ordered—Defendant deprived of costs of first trial in any event —Case at first trial wrongly withdrawn from jury.

The plaintiff, who was the widow of a man who had been killed in a motor accident, brought an action for damages against the driver of the motor-car in which her husband was riding when he was killed. At the end of the plaintiff's case at the trial counsel for the defendant submitted that there was no case to go to the jury, and the trial judge thereupon withdrew the case from the jury and gave judgment for the defendant. According to the evidence, the defendant was driving a fast small motor-car on the night of the accident. It was a dark night, but dry. The road was broad and there was no other traffic at the time and place of the accident, which happened on a slight bend in the road. The driver said that he was going at the rate of thirty-five miles an hour, and that he was driving with one hand only on the wheel, as was his usual practice. The motor-car was found to have turned over and apparently bounded along the road and possibly to have turned over twice. A good deal of damage had been done to the offside of the motor-car. The passenger had been thrown out on the right-hand side of the road—the offside—and the motor-car was found some way off the road on the left-hand side of the road. On appeal,

Held: (i) the case ought not to have been withdrawn from the jury as the above facts constituted an accident which did not usually happen with proper driving, and they required explanation by the defendant, and, therefore, there would be a new trial; (ii) the plaintiff would have the costs of the appeal, and if she succeeded on the second trial she would have the costs of the first trial, but the defendant was not to have the costs of the first trial in any event.

Notes. Referred to: *Hunter* v. *Wright*, [1938] 2 All E.R. 621.

As to presumption of negligence, see 23 Halsbury's Laws (2nd Edn.) 671 et seq.; and as to a new trial, see ibid., vol. 26, 124 et seq. For cases see 36 Digest (Repl.) 143 et seq, and Digest, Pleading, Practice and Procedure, 590 et seq.

Cases referred to:

(1) *Scott* v. *London Dock Co.* (1865), 3 H. & C. 596; 5 New Rep. 420; 34 L.T.Ex. 220; 13 L.T. 148; 11 Jur.N.S. 204; 13 W.R. 410; 159 E.R. 665, Ex.Ch.; 36 Digest (Repl.) 145, *772*.

A (2) *Austin* v. *Great Western Rail. Co.* (1867), L.R. 2 Q.B. 442; 8 B. & S. 327; 36 L.J.Q.B. 201; 16 L.T. 320; 31 J.P. 533; 15 W.R. 863; 8 Digest (Repl.) 103, *676*.

(3) *Coggs* v. *Bernard* (1703), 1 Salk. 26; 1 Com. 133; Holt, K.B. 13; 2 Ld. Raym. 909; 3 Salk 11; 91 E.R. 25; 36 Digest (Repl.) 32, *144*.

(4) *Ellor* v. *Selfridge & Co., Ltd.* (1930), 46 T.L.R. 236; 74 Sol. Jo. 140; 36 Digest B (Repl.) 91, *489*.

(5) *Harris* v. *Perry & Co.*, [1903] 2 K.B. 219; 72 L.J.K.B. 725; 89 L.T. 174; 19 T.L.R. 537, C.A.; 8 Digest (Repl.) 11, *51*.

(6) *Marshall* v. *York, Newcastle and Berwick Rail. Co.* (1851), 11 C.B. 655; 21 L.J.C.P. 34; 18 L.T.O.S. 94; 16 Jur. 124; 138 E.R. 632; 8 Digest (Repl.) 132, *849*.

C (7) *Shillibeer* v. *Glyn* (1836), 2 M. & W. 143; 2 Gale, 212; 6 L.J.Ex. 21; 150 E.R. 704; 12 Digest (Repl.) 211, *1507*.

(8) *McGowan* v. *Stott* (1923), 99 L.J.K.B. 357n.; 143 L.T. 217, C.A.; 36 Digest (Repl.) 144, *760*.

Appeal from an order of SWIFT, J., in an action tried by him with a special jury D at Lancaster Assizes.

The plaintiff, a widow, claimed damages from the defendant, alleging negligence by him in driving a motor-car which caused the death of the plaintiff's husband. At the end of the plaintiff's case, the defendant submitted that there was no case to go to the jury. The judge withdrew the case from the jury and gave judgment for the defendant. The plaintiff appealed.

E The facts appear in the judgment of SCRUTTON, L.J.

J. C. Jackson, K.C., and *G. J. Lynskey, K.C.*, for the plaintiff.

J. E. Singleton, K.C., and *H. Broadbent*, for the defendant.

The following cases were referred to: *Scott* v. *London Dock Co.* (1); *Austin* v. *Great Western Rail. Co.* (2); *Coggs* v. *Bernard* (3); *Ellor* v. *Selfridge & Co., Ltd.* (4); *Harris* v. *Perry & Co.* (5); *Marshall* v. *York, Newcastle and Berwick Rail. Co.* F (6); and *Shillibeer* v. *Glyn* (7).

SCRUTTON, L.J.—The plaintiff is the widow of a man who has been killed in a motor accident, and she sues the driver of the car in which her husband was riding when he was killed. At the end of the plaintiff's case the learned judge, partly on the invitation of counsel for the defendant, held that there was no case G to go to the jury, and, therefore, gave judgment for the defendant. The plaintiff appeals.

I think the learned judge struck too soon, and that there was evidence which should have been submitted to the jury, or, to put it in another way, I think that, if the jury had found, on the evidence that had been given, a verdict for the plaintiff, we could not have disturbed that verdict. As the case is going for a new trial, H following the practice of this court, I do not desire to say too much about the facts, because other facts may possibly appear at the second trial. In my view, where the judge went wrong was in not paying sufficient attention to the fact that the mere happening of an accident, unexplained, may be and often is in itself evidence of negligence without it being ascertained exactly why the accident happened. The case that is always cited as the leading authority for this doctrine of res ipsa loquitur I is the case where a cask fell from the second floor of a warehouse. ERLE, C.J., in the passage which is continually cited in subsequent cases, said this (*Scott* v. *London Dock Co.* (1), 3 H. & C. at p. 601):

> "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

Following that case in *Ellor* v. *Selfridge & Co.* (4), quite recently we held that, as motor-cars do not usually run on to the pavement and hit people in the back, the fact that a motor-car did so, and that the man who was driving it gave no explanation with regard to why it ran on to the pavement was in itself evidence of negligence, in the absence of explanation, which entitled the plaintiff to have the case left to the jury.

In the present case the defendant was driving a fast small sports motor-car. I do not know whether it is permissible to take judicial notice of the fact that these small motor-cars do bounce about a good deal. It was a dark night, a dry night; a broad road; no other traffic; slight bend; statement by the man driving that he was going at thirty-five miles an hour and that he was driving with one hand only on the wheel, as was his usual practice; motor-car found to have turned over and apparently bounded along the road, and possibly to have turned over twice; a good deal of damage to the offside of the motor-car; passenger thrown out on the right-hand side of the road, the offside; motor-car found some way off the road on the left-hand side of the road. All that it is necessary for this judgment to say is that, given those facts, it appears to me that they require explanation by the person driving the motor-car. The judge ought not to have withdrawn the case from the jury as the above facts constituted an accident which would not usually happen with proper driving, and the person who could explain it, or give evidence about it, did not go into the box to explain it.

I do not propose to say anything more about the facts than that, because there is going to be a second trial, but I want to say this. There has been too much lately of submitting that there is no evidence to go to the jury. It is very much better for the parties, in the matter of expense, that the verdict of the jury should be taken in such a case coupled with the submission that there is no evidence to go to the jury, because then the expense to the parties of a second trial is avoided. By way of enforcing that view we propose to act in the same way as the Court of Appeal did in *McGowan* v. *Stott* (8) in 1923, of which we have been supplied with a shorthand note, and to make the order that the plaintiff has the costs of this appeal, and, if the plaintiff succeeds in the new trial, she is to have the costs of the first trial, but the defendant is not to have the costs of the first trial in any event. Perhaps when counsel for defendants know that that is added to their risk they may not be quite so ready to take the point that there is no evidence to go to the jury.

LAWRENCE, L.J.—I agree. Counsel for the defendant has invited this court to lay down some rule with regard to the measure of want of care in the case of a man asking another man to take a seat in his motor-car and go for a drive, as distinguished from the measure of want of care which the driver owes to the general public. Speaking for myself, I decline to lay down any such general rule. In both cases, negligence is in the want of due care and skill which the driver owes either to a member of the public or to a passenger whom he has taken for a drive in his motor-car. In each case I think it must depend upon the particular circumstances whether there was negligence or not. As regards the facts of this particular case I agree with my Lord that the least said about them the better, but I wish to emphasise what my Lord has already said, that in this case there seems to me to be evidence upon which the jury could find negligence. I, therefore, agree that the learned judge struck too soon and that there ought to be a new trial.

SLESSER, L.J. I agree, and I would add that in addition to the evidence to which my Lord has referred, I think there was given in this case specific evidence which a jury ought to be bound to consider. One of the particulars of negligence which is given in the statement of claim is that the defendant was negligent in steering the said motor-car with his left hand only and in failing to use his right hand to control the steering. In answer to an interrogatory which was administered to him and which was put in evidence he said :

> "In accordance with my general habit when driving on the open road I was using the left hand to steer, my right hand resting on the side of the car."

The defendant himself did not give evidence, but a gentleman, a Mr. Richard Atkinson, who stated that he was a member of many learned societies connected with engineering and motoring and similar matters, was called on behalf of the plaintiff, and he was asked this specific question: "In your opinion, is it safe to drive that motor-car at any speed at night-time round that corner with only your left hand?" It is to be observed that that is not a general question about driving with the left hand, but it is a specific question, and the expert answered: "Absolutely unsafe." What weight a jury may give to that answer is not for me to consider here, but I do not understand the learned judge when, very shortly afterwards, he says that this particular witness has said nothing against the defendant. It seems to me that, in addition to what has been pointed out to me by my Lord, there was there some evidence of negligence, because, in the opinion of this expert, it was unsafe to drive with the left hand alone.

I would only add one observation with regard to the argument of counsel for the defendant that because the deceased man had not paid to be carried in this motor-car, or had been carried at his own suggestion or on the invitation of the defendant, therefore, in some way the defendant did not owe him the duty which it is said here the defendant failed to perform. I think that the position of the deceased person is covered specifically by the general principle laid down in *Coggs* v. *Bernard* (3), that, if a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it. Or, as was said in *Shillibeer* v. *Glyn* (7): The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it.

Finally, there is *Harris* v. *Perry & Co.* (5), which was a case where a person invited himself to travel on a railway engine without any contract and without payment of any consideration. He was injured, and the question arose, on the finding that the accident was due to the negligence of the defendants' servants, whether the defendants, Perry & Co., were liable to this person who had himself volunteered to ride upon this engine. The Court of Appeal were of the opinion that they were so liable, and the Master of the Rolls ([1903] 2 K.B. at p. 226) quotes BLACKBURN, J., in *Austin* v. *Great Western Rail. Co.* (2) (L.R. 2 Q.B. at p. 445):

> "I think that what was said in the case of *Marshall* v. *York, Newcastle and Berwick Rail Co.* (6) was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely."

Later on in his judgment the Master of the Rolls says:

> "The defendant, therefore, through Rowell, must be taken to have constructively permitted the plaintiff to travel on the engine. There was certainly evidence fit for the consideration of the jury on this point. And there was evidence of such a failure of due care on the part of the defendant's servants as to render the defendant responsible to the plaintiff for the damage arising therefrom."

If then it be the fact in the present case that there was a duty on the part of the driver of the car towards the person who was driving with him, and if there be a failure to satisfy that duty in the circumstances, then an action of negligence will lie, or possibly an action framed on the old basis of assumpsit, notwithstanding the fact that the passenger was there without any reward being given or by reason of any contract.

Appeal allowed.

Solicitors: *William C. Crocker*, for *Wood, Lord & Co.*, Liverpool; *Burton, Yates & Hart*, for *Hart, Jackson & Sons*, Barrow-in-Furness.

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

SAGAR *v.* H. RIDEHALGH & SON, LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), November 10, 11, 12, 13, December 9, 1930]

[Reported [1931] 1 Ch. 310; 100 L.J.Ch. 220; 144 L.T. 480; 95 J.P. 42; 47 T.L.R. 189; 29 L.G.R. 421]

Master and Servant—Wages—Deduction—Deduction for bad work—Legality—Trade usage—Truck Act, 1831 (*1 & 2 Will.* 4, *c.* 37), *s.* 3.

The plaintiff was a weaver employed by the defendants under a contract into which were incorporated rates of wages agreed between the trade unions to which the parties respectively belonged. There was evidence that for more than thirty years it had been the practice at the defendants' cotton mill that reasonable deductions should be made from those rates for bad work and that that practice was the general usage in more than eighty-five per cent. of the mills engaged in the Lancashire cotton weaving trade. From the wages due to the plaintiff for the week ending Aug. 1, 1928, the defendants deducted one shilling for bad work.

Held: (i) a deduction for bad work was made in calculating what wages were due to the workman, and was not a deduction from wages already calculated to be due to him, and so it was not in breach of s. 3 of the Truck Act, 1831, which requires that "the entire amount of the wages earned by or payable to" an artificer should be "actually paid to such artificer in the current coin of this realm": *Riversdale Mill Co.* v. *Hart* (1), [1928] 1 K.B. 176, applied;

(ii) the fact that the usage of making such deductions was not universal did not render it inoperative, it was not unreasonable, and it was not rendered uncertain by the fact that the employer had to estimate the loss to him on which the deduction was based and the workman was free to dispute the accuracy of that estimate, and, further, it was so well known among weavers that it must be incorporated in the plaintiff's contract of service; and, therefore, the defendants were entitled to make the deductions in question.

Notes. Considered: *Marshall* v. *English Electric Co., Ltd.*, [1945] 1 All E.R. 653. Referred to: *Petrie* v. *Macfisheries, Ltd.*, [1939] 4 All E.R. 281.

As to usages, see 11 HALSBURY'S LAWS (3rd Edn.) 182 et seq.; and as to the Truck Acts, see ibid., vol. 17, 138 et seq. For cases see 17 DIGEST (Repl.) 23 et seq., 56, 57, and 24 DIGEST (Repl.) 1096 et seq. For Truck Act, 1831, see 9 HALSBURY'S STATUTES (2nd Edn.) 11.

Cases referred to:

(1) *Riversdale Mill Co.* v. *Hart*, [1927] 1 K.B. 624; 96 L.J.K.B. 203; 136 L.T. 332; 43 T.L.R. 73, D.C., affirmed sub nom. *Hart* v. *Riversdale Mill Co.*, [1928] 1 K.B. 176; 96 L.J.K.B. 691; 137 L.T. 364; 91 J.P. 135; 43 T.L.R. 396; 71 Sol. Jo. 407, C.A.; 24 Digest (Repl.) 1101, *480*.

(2) *Broom* v. *Davis* (1794), 7 East, 480, n.; 103 E.R. 186, N.P.; 44 Digest 1298, *39*.

(3) *Basten* v. *Butter* (1806), 7 East, 479; 3 Smith, K.B. 486; 103 E.R. 185; 44 Digest 1297, *29*.

(4) *Farnsworth* v. *Garrard* (1807), 1 Camp. 38; 170 E.R. 867, N.P.; 44 Digest 1300, *58*.

(5) *Thornton* v. *Place* (1832), 1 Mood. & R. 218, N.P.; 7 Digest 367, *142*.

(6) *Chapel v. Hickes* (1833), 2 Cr. & M. 214; 4 Tyr. 43; 3 L.J.Ex. 38; 149 E.R. 738; 44 Digest 1297, *30*.

(7) *Mondel* v. *Steel* (1841), 8 M. & W. 858; 1 Dowl. N.S. 1; 10 L.J.Ex. 426; 151 E.R. 1288; 7 Digest 398, *262*.

(8) *Davis* v. *Hedges* (1871), L.R. 6 Q.B. 687; 40 L.J.Q.B. 276; 26 L.T. 155; 20 W.R. 60, D.C.; 40 Digest (Repl.) 424, *180*.

(9) *Sharp* v. *Hainsworth* (1862), 3 B. & S. 139; 1 New Rep. 24; 32 L.J.M.C. 33; 7 L.T. 320; 26 J.P. 742; 9 Jur.N.S. 353; 11 W.R. 36; 122 E.R. 53; 34 Digest 111, *831*.

(10) *H. Dakin & Co., Ltd.* v. *Lee*, [1916] 1 K.B. 566; 84 L.J.K.B. 2031; 113 L.T. 903; 59 Sol. Jo. 650, C.A.; 7 Digest 366, *135*.

(11) *Chawner* v. *Cummings* (1846), 8 Q.B. 311; 15 L.J.Q.B. 161; 6 L.T.O.S. 364; 10 J.P. 229; 10 Jur. 454; 115 E.R. 893; 24 Digest (Repl.) 1104, *497*.

(12) *Archer* v. *James* (1862), 2 B. & S. 67; 31 L.J.Q.B. 153; 6 L.T. 167; 8 Jur.N.S. 166; 10 W.R. 489; 121 E.R. 998, Ex.Ch.; 24 Digest (Repl.) 1104, *498*.

(13) *Willis* v. *Thorp* (1875), L.R. 10 Q.B. 383; 33 L.T. 11; 23 W.R. 730; sub nom. *Wallis* v. *Thorp*, 44 L.J.Q.B. 137; 40 J.P. 6; 24 Digest (Repl.) 1104, *500*.

(14) *Hewlett* v. *Allen & Sons*, [1892] 2 Q.B. 662; 62 L.J.Q.B. 9; 67 L.T. 457; 57 J.P. 260; 41 W.R. 197; 8 T.L.R. 793; 36 Sol. Jo. 730; 4 R. 77, C.A.; affirmed, [1894] A.C. 383; 63 L.J.Q.B. 608; 71 L.T. 94; 58 J.P. 700; 42 W.R. 670; 10 T.L.R. 464; 38 Sol. Jo. 455; 6 R. 175, H.L.; 24 Digest (Repl.) 1100, *475*.

(15) *Williams* v. *North's Navigation Collieries (1889), Ltd.*, [1906] A.C. 136; 75 L.J.K.B. 334; 94 L.T. 447; 70 J.P. 217; 54 W.R. 485; 22 T.L.R. 372; 50 Sol. Jo. 343, H.L.; 24 Digest (Repl.) 1101, *477*.

(16) *Devonald* v. *Rosser & Sons*, [1906] 2 K.B. 728; 75 L.J.K.B. 688; 95 L.T. 232; 22 T.L.R. 682; 50 Sol. Jo. 616, C.A.; 17 Digest (Repl.) 26, *307*.

(17) *Ropner & Co.* v. *Stoate, Hosegood & Co.* (1905), 92 L.T. 328; 21 T.L.R. 245; 49 Sol. Jo. 262; 10 Asp.M.L.C. 32; 10 Com. Cas. 73; 17 Digest (Repl.) 31, *363*.

Appeal by the defendants from an order of FARWELL, J. ([1930] 2 Ch. 117).

The plaintiff, Thomas Sagar, was a weaver in the employ of the defendants, H. Ridehalgh & Son, Ltd., who carried on business as manufacturers of cotton cloth at Nelson, Lancashire. The wages of weavers were calculated according to the amount of cloth woven by them in each week. By agreement between the Nelson Cotton Manufacturers' Association, of which the defendants were members, and the Nelson and District Weavers' Association, of which the plaintiff was a member, a uniform list of prices was agreed on for different cloths. That agreement was contained in a book which was supplied to the employees, and the rate of wages depended on the inspection by a "clothlooker" of each piece of cloth, as it was completed, to decide whether it contained any defect. The Manufacturers' Association was affiliated to the Cotton Spinners' and Manufacturers' Association, and the Weavers' Association to the Amalgamated Weavers' Association. According to the list of prices the plaintiff was, in the week ending Aug. 1, 1928, entitled to a wage of £2 6s. 6½d., from which there was to be deducted 1s. 4d. for insurance and an agreed sum of 2d. for hospitals, leaving a total of £2 5s. 0½d. The defendants, however, paid him only £2 4s. 0½d., alleging that they were entitled to deduct 1s. in respect of eight yards of cloth in which a fault had been found. On a claim by the plaintiff for a declaration that the shilling was wrongly deducted it was contended on his behalf that there was no justification for the defendants either to deduct the shilling from the wages or to deduct the shilling in calculating the wages. FARWELL, J., held that the deduction was not justified; that the practice of making such deductions was not universal, nor reasonable or certain; and that the deduction was illegal under s. 3 of the Truck Act, 1831. The defendants appealed.

Cyril Atkinson, K.C., *Harold Derbyshire, K.C.*, and *B. Ormerod* for the defendants.

F. P. M. Schiller, K.C., and *Neville Laski*, K.C., for the plaintiff.

Cur. adv. vult.

Dec. 9. The following judgments were read.

LORD HANWORTH, M.R.—This action is brought by the plaintiff, a cotton weaver in the employ of the defendants, for a declaration that a sum of 1s., which was deducted by the defendants from the wages paid to him, on account of bad work done by him in the course of carrying out his duty to his employers as a weaver, is due to him, and that this deduction is illegal and contrary to the terms of s. 3 of the Truck Act, 1831. The plaintiff's wages were estimated by piece-work. The defendants justify the deduction on the grounds that (a) under the contract of employment the price of the piece-work—that is, the wages to be paid to the plaintiff—was for good weaving only; (b) the practice at the defendants' mill, to which the plaintiff assented, expressly or impliedly, was to pay for good work producing merchantable cloth only, and this practice, as the plaintiff well knew, included a right to make a deduction from the sum payable to the weaver if this standard was not adhered to by the workman; (c) the custom of the whole weaving trade in Lancashire recognised this practice as above stated, and justified a deduction if merchantable cloth was not produced by the workman; (d) the sum deducted was less than the amount of the deduction which might have been made by the defendants, if they had exacted the full sum by which the cloth woven by the plaintiff fell short of the standard required of him as above.

The plaintiff came to the defendants' mill in 1920 when he was thirteen years old, as a pupil to his father—who had been for some seven years a weaver in the defendants' employ, and held the position of a shop steward—in order that he should learn to be a weaver. After the plaintiff had been a pupil for twelve months his father went to the manager and asked that the son should be taken on as a weaver. The manager assented, and the plaintiff was put in charge of two looms, and began to receive wages on the basis of what is known as the "uniform price list," a standard for payment agreed upon between the unions of which the plaintiff and his employers were respectively members. The plaintiff was advanced, after two years, to look after three looms, and subsequently four looms. He was paid at the rates prescribed in the list down to July 28, 1928. On some occasions before that date the plaintiff, in his evidence, said that he had been "brought to the warehouse on several occasions and chastised about his work" in respect of some pieces of cloth spoiled by him, though he had never suffered any deduction from his wages. On this date he was notified that a deduction would be made from his wages in respect of three yards of cloth spoiled. The proper deduction for this amount of cloth was 3s., but when the wages were paid to the plaintiff for the week which ended on Aug. 1, 1928, a deduction of 1s. only was made. The plaintiff resists the defendants' claim to make this deduction, and on Sept. 26, 1928, issued the writ in this action. Farwell, J., who tried the case, held that the deduction was not justified; that the practice above-stated was not universal, nor reasonable or certain, and that the deduction was illegal under s. 3 of the Truck Act, 1831. From this judgment the defendants appeal.

The discussion in this court covered a wide field and a great number of authorities were referred to, some of which were not brought to the notice of Farwell, J. Before turning to the evidence and forming a conclusion upon it as to the terms of the contract under which the plaintiff was engaged and did his work, it will be useful to deal with some of these authorities, and the statutes regulating the employment and payment to workmen such as the plaintiff, in order to determine the nature of the contract, and to observe the rules and limitations within which such a contract of employment can be made.

Long before the Truck Act, 1831, and other statutes relating to employment in factories had been passed, the terms of a contract of employment and the rights of an employer in respect of bad work had been considered in the courts. In 1794, Buller, J., had held in *Broom* v. *Davis* (2) that a defendant employer was not entitled to reduce the sum to be paid under a contract for work done, by a deduction in respect of bad workmanship, but that his remedy lay in a cross-action for damages. This case was reviewed in 1806 by the court in banco in *Basten* v. *Butter* (3), in which the court (Lord Ellenborough, C.J., Grose, Lawrence, and Le Blanc, JJ.) held that where a plaintiff sues upon a quantum meruit, he ought to be prepared to show that he had done the stipulated work according to his contract, and that it is open to the defendant to prove that the work was executed in such a manner as to be of no value at all to him, or not to be of the value claimed: see per Lawrence, J., 7 East at p. 484. In *Farnsworth* v. *Garrard* (4), an action upon a quantum meruit, Lord Ellenborough followed *Basten* v. *Butter* (3). He said, "This action is founded upon a claim for meritorious service. The plaintiff is to recover what he deserves." He then referred to the decision of Buller, J., and mentioned that he had had a conference with the judges upon the subject, and stated what he considered as the correct rule:

> "If there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence."

That is, if negligence be relied upon as an independent cause of action. "The claim shall be co-extensive with the benefit. Here then has there been any benefit, and to what amount?"

In *Thornton* v. *Place* (5), Parke, J., gave the same ruling: "What the plaintiff is entitled to recover is the price agreed upon in the specification, subject to a deduction"; and in *Chapel* v. *Hickes* (6) the court followed the same principle. Lord Lyndhurst said:

> "It cannot be consistent with reason, that a party who has not performed his contract should recover the full amount for which he has stipulated; and that the other party should be driven to an action against him for not performing the contract faithfully."

Bayley, B., stated the rule to be, "that if the contract be not faithfully performed, the plaintiff shall be entitled to recover no more than the value of the work and materials."

Finally, in *Mondel* v. *Steel* (7), Parke, B., said that the rule which had been found so convenient was established, namely, "that in all these cases of goods sold and delivered with a warranty, and work and labour, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and that it is competent for the defendant, in all of those, not to set off, by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth, by reason of the breach of contract." This right is one to be exercised at the defendant's option: see *Davis* v. *Hedges* (8).

In *Sharp* v. *Hainsworth* (9) the above principle was applied to an information laid before justice under 20 Geo. 2, c. 19, s. 1, [relating to the regulation of servants and apprentices] by an artificer to recover summarily, under that Act, wages due to him. That section gives jurisdiction to the justices, upon complaint made by servants, miners, and a number of handicraftsmen, to make such order for payment of so much wages to such servant, artificer, &c., "as to such justices shall seem just and reasonable" within a limit of £10. The claim was for wages earned in weaving blankets, and the justices found that the blankets had been woven in improper lengths and that the employer had been compelled to sell them at a serious loss. They decided, however, that they were bound to order payment of the full amount of wages without deduction. This decision was reversed on appeal, and the case remitted for the proper deduction to be estimated. Cockburn, C.J., said: "The case must be remitted to the justices with our opinion, that they may take into their consideration the question whether the work was so badly done that the master got no benefit from it, or that the value of the work was so deteriorated as that the whole amount of wages was not earned." The case was not argued for the workman, but, nevertheless, a decision of the Chief Justice, with Wightman, Blackburn, and Mellor, JJ., beside him must be respected, and the facts present the same features as those of the case now under consideration.

The cases that I have referred to were once more considered and reviewed in recent years in relation to an action by a builder for payment for the erection and repair of a house in respect of which the owner complained of bad work. The principle above enunciated was held applicable both in the Divisional Court and by the Court of Appeal: see *Dakin & Co., Ltd.* v. *Lee* (10). It would seem, therefore, clear that in such a contract as that under which Sagar was employed, the defendants would have a right to make a deduction from his wages for bad work, unless there was some term of the contract which excluded this right, or unless such a deduction is forbidden by statute. FARWELL, J., held that this principle is not applicable to the relation between master and servant. No authority is advanced for this proposition, and it seems contrary to the words of the judgments in the cases cited, particularly *Mondel* v. *Steel* (7) and *Sharp* v. *Hainsworth* (9). The relation between master and servant is established by a contract between them—a contract which is subject to the rules applicable to other contracts, except in so far as statute law has superimposed limitations or rights or duties inter se, upon such a contract and the parties to it. I turn, therefore, to the consideration of these limitations.

The Truck Act, 1831, was designed, as its title expresses, to prohibit the payment, in certain trades, of wages in goods, or otherwise than in the current coin of the realm. By s. 3 it is provided that the entire amount of the wages earned by, or payable to, any artificer in any of the trades enumerated—which includes weaving—in respect of any labour by him done in any such trade shall be actually paid to such artificer in the current coin of the realm and not otherwise. It prohibits payment of any such wages by delivery to the artificer of goods, and no set-off is to be allowed against wages for goods supplied to him at any shop kept by or belonging to his employer, and it enforces these provisions by penalties. The device, therefore, of requiring the workman to purchase goods at an employer's shop, making deduction therefor from, or a set-off against, the wages of a workman—which was a practice at that time—is brought to an end. But s. 3 in terms deals with "the entire amount of the wages earned by or payable to" the artificer. It does not deal with any system by which those wages are to be estimated; but only with their payment after estimation. Further, s. 23 excepts from the generality of the prohibition a charge or deduction made at the true value for the supply of materials, tools or other specified services by the employer to the workman, when there is a contract in writing signed by the artificer. Thus, in *Chawner* v. *Cummings* (11) it was decided that where a workman was paid a less sum than his wages because under the usages of the trade a frame rent, and sums for other services, were deducted in the mode of calculating the wages, the Act did not apply. The deductions were found to be not colourable, but all according to the usage of the trade, and made in the course of the calculation of the sum earned by the workman and so not a diminution of the wages earned by him. That case was considered in *Archer* v. *James* (12) and was followed by the court in banco. In the Exchequer Chamber the court were equally divided. But the principle on which *Chawner* v. *Cummings* (11) was decided—namely, that what had been done was a detail of the manner in which the wages were to be calculated and before they were ascertained—does not appear to have been discountenanced. The judges who disagreed with *Chawner* v. *Cummings* (11) differed from their colleagues on what was paid for the artificer's labour, and held that any other ingredient contracted and paid for could not be considered as in the course of or part of the wages earned, but as outside the contract of labour, with the result that any deduction for such an ingredient was a deduction from the wages. This view of *Chawner* v. *Cummings* (11) is supported by the opening words of BLACKBURN, J.'s judgment in *Willis* v. *Thorp* (13); and BOWEN, L.J., in his judgment in *Hewlett* v. *Allen* (14) ([1892] 2 Q.B. at p. 669) recognises the above cases as establishing that a mode of calculating the wages to be paid in which deductions are made may take the case outside the Truck Act altogether.

By the Hosiery Manufacture (Wages) Act, 1874, s. 3, any deduction from wages for "frame rent and standing or other charges" was forbidden. In *Willis* v.

Thorp (13) a deduction was made from the wages of the workmen by fines for staying away from work without permission in accordance with the regulations of the factory. It was held that this was not within the prohibition of the section and BLACKBURN, J., in his judgment reviews the state of the law and notices the Truck Act as well as the particular Act subsequently passed. It is noticeable that the later Act in s. 1 expressly excepts from the prohibition of the truck system a deduction or stoppage for bad and disputed workmanship, thus, apparently, recognising that there was a right on the part of the employer to make such a deduction. Further, in the Employers and Workmen Act, 1875, which gave jurisdiction to the county courts in cases of disputes between employers and workmen, a right of set-off is preserved to the employer in respect of the amount of damage which he may have sustained by reason of the absence of the workman or of his leaving work: see s. 11.

Williams v. *North's Navigation Collieries* (*1889*), *Ltd.* (15) was relied upon by the plaintiff in this appeal, but it does not, to my mind, deal with the case before us. The claim made by the employers in that case was to deduct from wages payable to the workmen on Jan. 30, 1904, a sum which the workmen had been ordered to pay by the justices at Bridgend by an order made on Jan. 16, 1904, for absenting themselves from their work previously to that date. I have ascertained these facts and dates from the original order which was produced from the Record Office. It would seem quite clear that the deduction was not made in the course of calculating the wages payable to the workmen on Jan. 30, but that it arose out of a separate order made previously. LORD DAVEY points this out in his speech ([1906] A.C. at p. 143), and emphasises the point that the facts before him took the case outside the principle of *Chawner* v. *Cummings* (11). But he and LORD ATKINSON ([1906] A.C. at pp. 146, 147) recognised the principle and distinction arising where sums by way of deduction are to be taken into account in ascertaining the amount of wages actually earned.

The last case that I need refer to is *Riversdale Mill Co.* v. *Hart* (1). The facts were, in substance, similar to those in the case now before us. There was a difference of opinion in the court below. The majority, AVORY and SALTER, JJ., held that the deduction made from the wages of the weaver was not in contravention of s. 3 of the Truck Act. LORD HEWART, C.J., held that the deduction was made from and after the wages had been ascertained, and, therefore, not permissible under that section. The facts found by the justices included this, that by the terms of the contract

> "it was the duty of the workman to weave a good merchantable cloth by performing her work without negligence and in a careful manner, and that it was an implied condition of the payment to be made to her, according to the 'standard list,' that the prices in the list should apply to good merchantable cloth produced by the observance by the workman of her duty as a weaver."

AVORY, J., in his judgment, after dealing with *Chawner* v. *Cummings* (11), *Archer* v. *James* (12), and *Williams* v. *North's Navigation Collieries* (15), came to the conclusion, upon these facts, that neither in the statutes nor in the reported decisions was there anything making it illegal to calculate the wages earned as had been done in that case. SALTER, J., pointed out that the "standard list" provided for certain additions to be made to the wages in excess of the datum line of the "standard list," and by parity of reasoning, where a deduction for bad work was to be made, both additions and deductions were to be made in the course of estimating the sum earned, and were not to be treated as additions to or deductions from the sum of the wages previously ascertained. In the Court of Appeal, SCRUTTON, L.J., called attention to the findings of the justices to the effect that by the contract between the employer and the workman the wages depended on the quality of the work; and that if, starting with the standard wages, you get work which is not standard work tendered to you, it is a matter of contract that the wages should be so much less than they would have been if the standard work had been performed properly. The court held that the deduction that had been made was not a separate and independent deduction from the rightly ascertained wages; but was a loss which accrued in the true calculation of what sum she ought to have been paid as wages. That case cannot be distinguished from the present if there is a term in the contract of employment to the same effect as the justices found, applicable to the calculation of the wages to be paid.

Two matters must be noted. Section 2 of the Truck Act, 1896, provides that an employer shall not make a contract with a workman for any deduction in respect of bad or negligent work, from the sum to be paid to the workman, unless certain conditions are complied with. But the observation falls to be made that the legislature has not imposed an absolute prohibition on such deductions. By an order made, however, under s. 9 of the Act, exemption from its provisions was granted to persons engaged in the weaving of cotton in Lancashire. Next, it is admitted in the statement of claim that the provisions of s. 116 of the Factory and Workshop Act, 1901, [repealed by Factories Act, 1937] which requires particulars of the rate of wages, applicable to the work to be done by each weaver, to be furnished to him in writing at the time when the work is given out to him, was complied with.

There is no other statutory impediment to be considered. The question, therefore, to be determined is whether in the present case there was a term in the contract which provides that the quality of the work done was to be taken into account in the estimation of the wages payable. Counsel for the plaintiff went so far as to say that there was no promise of skill on the part of the workman; that under the contract of employment the employer takes the risk of the workman's skill; that the workman only undertakes to exercise the skill that the employer has estimated that he possesses, and for which the employer agrees to pay him at the rates in the list of prices affixed a certain remuneration for weaving; and thus that any complaint of bad work must sound in a claim for damages outside the payment to be made for wages, and that such a claim was in the nature of a penalty. FARWELL, J., found as a fact that the three yards of cloth in question was not merchantable cloth; that this was due to the plaintiff's carelessness; and that the loss suffered by the defendants owing to that fault exceeded the sum of 1s. deducted. The plaintiff in his evidence submitted that his duty was to see that the cloth was being woven as perfectly as possible, and that the weaving was carried out in a proper way. "A weaver does his work as well as he can do it. That is what he ought to do." He added: "It is up to the weaver to do his best—to bring care and skill to bear upon his work, and it is for that that he is paid." And again: "Q. To earn that money you have to bring your proper skill and care to the weaving of that cloth? A. Yes." Again: "Yes; I took it that these prices paid to me were prices paid for good work." There is abundant evidence to justify the finding of FARWELL, J., that the plaintiff was guilty of carelessness in his work; that he failed to comply with the standard of proper skill which he agreed it was his duty to exercise—indeed he admitted his carelessness. Further, he agreed that the prices in the list and on the card issued to him were prices for work carefully done. It seems that there was on one occasion a strike or lock-out at a mill in Nelson arising out of a deduction made from wages. The plaintiff admitted he knew of it—that the strike came to an end, and that the system of deductions remained and was assented to. There was cogent evidence that the system of deductions in the estimation of the work to be paid for had been in operation at the defendants' mill for a long stretch of time and had been exercised from time to time at the discretion of the defendants and their manager. FARWELL, J., found a difficulty in believing that the plaintiff did not become aware that there was such a system in vogue at the defendants' mill, and I share it. The uniform list of prices provides a scale of increased payment where special care has to be taken by the weaver, as in the case of what is known as "pickfinding," and provision is also made for an allowance in favour of the workman where inferior materials are provided for his weaving by the employer. Our attention was called to joint rules for the settlement of trade disputes adopted by the employers and the weavers' association.

These rules provide for the settlement of disputes as to a weaving price and cases of underpayment of the uniform list of prices for weaving.

After careful consideration of these materials, it seems clear that the prices in the uniform list provide a datum above which the weaver may be entitled to be paid, if he has been engaged on pickfinding or other special work, or has received improper materials to work upon. Equally the workman on his part must suffer a deduction if he has not done the good work which the prices were intended to match. The plaintiff's evidence shows clearly that the basis of his employment was for good work, and, in my judgment, it was an integral term of it that he should not receive the full scale except for good work, not that bad work gave rise only to a right to dismiss the workman or sue him for damages. In other words, the contract between him and his employer was that in measuring the value of his work and the payment to be made to him, the quality of work not less than the quality of the materials supplied, and the nature of the work to be done—whether of an ordinary type or a superior class such as pickfinding—was to be taken into account. It matters not that these deductions were not always enforced. They may have been used for a disciplinary purpose—to enforce a standard of work by the weavers. They may have thus come to be known among the weavers as fines. If the contract provided that the work should be measured according to its quality, the principle laid down in *Basten* v. *Butter* (3) applies. Nor can *Mondel* v. *Steel* (7) be dismissed as a case dealing with procedure only. The procedure by way of defence was allowed because the right to cut down the plaintiff's claim to its real value was established. Holding that the contract between the parties was of the terms that I have indicated, it is unnecessary to consider the practice at other mills or in any larger area. The contract was, in my judgment, one to which, following *Chawner* v. *Cummings* (11), the prohibition of the Truck Act does not apply. The appeal must be allowed with costs and judgment entered in the action for the defendants with costs.

LAWRENCE, L.J.—In this action the plaintiff, a weaver in the employ of the defendants, claims a declaration that the deduction by his employers from his wages of the sum of 1s. for a bad piece of weaving was illegal under s. 3 of the Truck Act, 1831. The writ also claims payment of the 1s. so deducted by the defendants, but in this court counsel for the plaintiff confined the claim for relief to the declaration above-mentioned, stating that the object of the action was to test the legality of a deduction for bad work made by the employers themselves, although the sum deducted might properly be made the subject of set-off or defence in an action brought by the workman for his wages.

In *Williams* v. *North's Navigation Collieries (1889), Ltd.* (15), the House of Lords decided that s. 3 of the Truck Act, 1831, does not allow an employer when paying wages rightly earned by or payable to a workman to deduct a sum due from the workman to the employer in respect of an antecedent breach of his contract to work. In *Hart* v. *Riversdale Mill Co., Ltd.* (1), the Court of Appeal decided that when a deduction made by the employer was not a deduction from wages rightly earned or payable but a loss which accrued to the workman in the ascertainment of what sum for wages had been earned or was payable to him the deduction did not contravene the provisions of s. 3 of the Truck Act, 1831.

The question we have to decide is whether the facts of the present case bring it within the decision in *Williams' Case* (15), or within the decision in *Hart's Case* (1). Three alternative views of the terms of the plaintiff's contract of service have been suggested in the course of the arguments before us, namely: (i) that the employers agreed to pay the workman a specified lump sum for every piece of cloth whether well or ill woven, leaving the employers to their remedy for damages in case the workman should have committed a breach of his implied obligation to exercise reasonable skill and care; or (ii) that the employers agreed to pay the workman a specified lump sum for every piece of cloth woven if of good merchantable quality, leaving the workman in case of bad workmanship, entitled to a quantum meruit only; or (iii) that the employers agreed to pay the workman a specified lump sum for every piece of cloth woven subject to a deduction (not exceeding the actual or estimated loss sustained by the employer) if the workman did not exercise reasonable skill and care. If the effect of the evidence be that the terms of the contract were as stated in the first of these three alternatives I am of opinion that the case would be governed by the decision in *Williams' Case* (15) and the appeal should fail. If, on the other hand, the effect of the evidence be that the terms of the contract were as stated in either the second or third alternatives, I am of opinion that the case would be governed by the decision in *Hart's Case* (1) and the appeal should succeed.

As regards the first of these alternatives, it is not disputed, and, indeed, it is pleaded by the plaintiff, that the uniform list of prices agreed between the Amalgamated Weavers' Association and the Cotton Spinners and Manufacturers Association were incorporated in the plaintiff's contract for service. Further, it was admitted by the plaintiff, in giving his evidence at the trial, that the standard prices fixed by this list were only applicable when the yarn supplied by the employers was of good quality. It was also explicitly admitted by him that these standard prices were only applicable when the weaving was skilfully and carefully done so as to produce good merchantable cloth. Thus in the shorthand notes of the plaintiff's cross-examination: "Q. Do you suggest that these are prices for careless weaving? A. No." Again: "Q. What I am suggesting to you is that these prices are perfectly well understood by you all to be the prices for work carefully done? A. Yes." Again: "Q. You knew that those prices in the price list were the prices for cloth in regard to which you had taken all proper care? A. Yes, I took it that these prices paid to me were prices paid for good work." In the face of these admissions and of the uncontradicted evidence of the defendants I find myself unable to agree with the findings of FARWELL, J., that under the plaintiff's contract of service the standard price fixed by the uniform list of prices had been earned and were payable to him whether the work had been well or ill done and that the only remedy open to the employers if the plaintiff failed to exercise reasonable care and skill was to dismiss him or to sue him for damages for breach of contract.

That leaves the question whether the second or third alternative view of the plaintiff's contract for service is the true one. If the matter had rested simply on the fact that the prices in the uniform list of prices were for good work only, the logical result would have been that the true terms of the contract were those mentioned in the second alternative and that the plaintiff in the circumstances of the present case would only have been entitled to a quantum meruit, in which case no question under s. 3 of the Truck Act, 1831, would have arisen. Other factors have, however, to be taken into consideration and for the reasons mentioned hereafter I am of opinion that the true terms of the contract were those mentioned in the third alternative. The contention of the employers in support of the third alternative is that the true inference to be drawn from the admitted and proved facts is that reasonable deductions for bad work were an incident of the plaintiff's contract of service and were properly taken into account in calculating the correct amount of the wages earned by or payable to the plaintiff. In my judgment, this contention is well founded.

The employers based their contention on two alternative grounds, either that the established practice of making reasonable deductions for bad work in the defendants' mill was incorporated into the plaintiff's contract of service by reason of his having agreed to be employed upon the same terms as the other weavers in that mill or else that the general usage of making reasonable deductions for bad work prevailing in the cotton weaving trade of Lancashire was so well known and understood that every weaver engaging in that trade must be taken to have entered upon his employment on the footing of that usage.

As regards the first of these grounds. It is clearly established by the evidence of Mr. G. Ridehalgh that the practice of making reasonable deductions for bad work has continuously prevailed at the defendants' mill for upwards of thirty years, and that during the whole of that time all weavers employed by the defendants have been treated alike in that respect. The practice was, therefore, firmly established at the defendants' mills when the plaintiff entered upon his employment there. Further, I think that it is clear that the plaintiff accepted employment in the defendants' mill on the same terms as the other weavers employed at that mill. I draw this inference not only from the statement of claim (as explained by the particulars) and from the plaintiff's own evidence, but also from the fact that this action is avowedly brought to test the legality of the practice prevailing at the defendants' mill and not to determine whether this particular plaintiff was employed upon some special terms which would make that practice inapplicable to his contract of service. Although I entirely agree with the learned judge in finding it difficult to believe that the plaintiff did not know of the existence of the practice at the mill, I think that it is immaterial whether he knew of it or not, as I am satisfied that he accepted his employment in the same terms as to deductions for bad work as the other weavers at the mill.

In the result I have come to the conclusion that the practice of making reasonable deductions for bad work prevailing at the defendants' mill was incorporated in the plaintiff's contract of service. Further, I am of opinion that the second ground is also established by the evidence, namely, that the practice in the defendants' mill is in accordance with the general usage of making reasonable deductions for bad work prevailing in the weaving trade of Lancashire, which usage in the absence of any stipulation to the contrary would be incorporated into every contract of service as a weaver in a Lancashire cotton mill without special mention. This usage seems to me to receive recognition in the joint rules for the settlement of trade disputes appended to the uniform list of prices (to which rules both the plaintiff and the defendants were subject), inasmuch as r. 4 expressly provides that in the case of an underpayment by the employer of the uniform list of prices, where the employer either admits the underpayment or refuses to consent to an inspection of the work, the workman is to be at liberty to take whatever action he thinks fit without the necessity of bringing the matter before either the local or central employers' committee.

The main contention of the plaintiff on this part of the case was that both the practice in the defendants' mill and the general usage in the weaving trade in Lancashire sought to be incorporated into the plaintiff's contract of service were illegal as contravening the provisions of the Truck Act, 1831. In my judgment, this contention is completely answered by the fact that the practice of making reasonable deductions for bad work from wages has been recognised as legal both by the Court of Appeal in *Hart's Case* (1), and by the legislature in at least three Acts of Parliament, namely, the Hosiery Manufacture (Wages) Act, 1874, s. 1; the Employers and Workmen Act, 1875, ss. 3 and 11; and the Truck Act, 1896, ss. 2, 8 and 29. It would serve no useful purpose to repeat what was said by Avory, J., in the Divisional court, and by the members of the Court of Appeal in *Hart's Case* (1) on this subject, but I desire to express my respectful concurrence in the view expressed in that case that the Truck Act, 1896, is directed to regulating a practice recognised to be lawfully existing, and is not directed to enabling something to be done which would not lawfully have been done previously. As pointed out by Scrutton, L.J., s. 8 of the Act would render ss. 1 and 2 wholly ineffectual if the contracts therein referred to were illegal under the Truck Act, 1831. It is significant on the question of the existence and notoriety of the general usage in the weaving trade in Lancashire, Cheshire, Derbyshire and the West Riding of Yorkshire to note that in the year 1897 the workmen employed in that trade, being apprehensive that a compliance with the provisions of ss. 1 and 2 of the Truck Act, 1896, might lead to the more rigid enforcement of the usage of making deductions for bad work, persuaded the Secretary of State that the provisions of the Act were unnecessary for their protection, and procured him to make an order under s. 9 granting an exemption from those provisions in respect of the persons engaged in all branches of that trade, thus leaving the usage to continue as theretofore unfettered by any of the restrictions imposed by the Act.

Apart from the question of illegality under the Truck Act, 1831, FARWELL, J., has held that the usage is not a good usage because it is neither universal nor reasonable, nor certain and, accordingly, does not comply with the tests laid down in *Devonald* v. *Rosser & Sons* (16). If I am right in thinking that the plaintiff's contract of service incorporated the established practice at the defendants' mill the question whether the general usage in the trade is good or bad does not arise, but, as I may be wrong on this point, and as the question has been fully argued and dealt with by the learned judge in his judgment, I think it right that I should shortly express my views upon it. In the first place, it is to be noticed that in *Hart's Case* (1) the justices found that "deductions for bad work are and have been for many years the usage and custom in the cotton weaving trade of Lancashire, and have always been and are an incident of a weaver's contract of service, and have always been and are taken into account in calculating the correct wages." The Court of Appeal decided that this usage was not illegal under the Truck Acts and gave effect to it. This decision is binding both on courts of first instance and on this court, and, in my opinion, covers the present case. Further, with all respect for the opinion of the learned judge, I do not agree with his decision that the facts given in evidence in this case show that the usage which admittedly has subsisted now for very many years in spite of attempts made from time to time to get rid of it by legislation and strikes, and has been regulated by statute, is bad in law. The learned judge based his decision that the usage was bad because it was not universal, on the fact that some of the mill owners in Lancashire have tried, and some are still trying, to do without applying the usage to their mills. This fact, in my judgment, in no way destroys the usage. CHANNELL, J., in *Ropner & Co.* v. *Stoate Hosegood & Co.* (17) (92 L.T. at p. 332), says:

> "When a custom is once established, the fact that persons frequently contract themselves out of the custom would not of itself destroy the custom; but I think the practice of contracting out may become so general as to destroy the custom. When once the custom becomes the exception and not the rule there is no longer a custom."

I agree with this statement of the law. The evidence in the present case comes nowhere near to proving that the usage of making deductions for bad work has become the exception in Lancashire. On the contrary the evidence shows that it still prevails in over eighty-five per cent. of the mills in that county. In the next place, I am of opinion that the usage is not, as held by the learned judge, unreasonable. The deductions are not arbitrary deductions at the will and pleasure of the employers; they are limited to cases where there has been bad work, and they are limited to an amount which does not exceed the actual or estimated damage or loss occasioned to the employer by the act or omission of the workman. The workman is free to prove that his work was good and that no deduction ought to be made, or to prove that any particular deduction exceeds the amount of the actual or estimated damage or loss to the employer. Moreover, the usage comes strictly within what the legislature has considered fair and reasonable in a contract between workman and employer: see s. 2 (1) (b) of the Truck Act, 1896.

The ground upon which the learned judge held that the usage was bad for uncertainty is because the amount of the deductions for bad work is left to the discretion of the employers, and because the maximum amount of such deductions is the actual loss occasioned to the employers, which could not in most cases be ascertained until after the payment of the wages. In the first place, I think it is clear that the maximum amount of the deduction is not merely the actual, but also the estimated, loss occasioned to the employer, and that the workman is free to dispute the accuracy of such actual or estimated loss. In the next place, a trade usage allowing an employer to make deductions for bad work at his discretion not exceeding a certain defined limit does not, in my opinion, render the usage uncertain. It would be altogether unreasonable if the usage were to make certain definite deductions in every case. There are degrees of negligence and it is reasonable that employers should not exact the full amount of the loss occasioned to them in every case. From a business point of view there is no uncertainty about such a usage. A Lancashire weaver knows, and has for very many years past known, precisely what his position was as regards deductions for bad work on accepting employment in a Lancashire mill. There would be no uncertainty in his mind on this point as to the effect of his engagement. He, no doubt, would hope and expect to be treated fairly and sympathetically if he could show reasonable cause why he should be excused for any particular piece of bad work, but he would have no doubt as to the extent of his liability any more than he would have had if he had entered into a written contract embodying the usage under s. 2 of the Truck Act, 1896. Although the Lancashire weavers as a class may have objected in principle to the usage for many years past, this is the first case in which it has been suggested that the usage is bad for uncertainty and in my judgment the suggestion is unfounded.

The only other point that I need mention is that made by Mr. Schiller under s. 116 of the Factory and Workshop Act, 1901. In my opinion, the particulars of the rate of wages to be furnished under sub-s. 1 (b) of that section are applicable only to wages for work to be done with reasonable skill and care as it would manifestly be impossible to give particulars of deductions for bad work before the work had been commenced. Moreover, in view of the statement in para. 10 of the statement of claim that the defendants had complied with the provisions of the section, the point is not open to the plaintiff. For the reasons stated I agree that the appeal should be allowed and the action should be dismissed with costs.

ROMER, L.J.—In this case the plaintiff, who is in the service of the defendant company as a weaver, is suing for a declaration that a sum deducted from the amount alleged to be due to him as wages under his contract of employment was illegally deducted. It is, therefore, necessary in the first place to ascertain what the terms of that contract were.

The circumstances that led up to the plaintiff's engagement by the defendants were as follows. In or about the year 1920, when the plaintiff was of the age of thirteen years, he began attending at one of the defendants' mills at Nelson for the purpose of learning the work of a weaver from his father, who was himself in the defendants' employ in that capacity and had been so employed for about seven years. After this had been going on for about twelve months the father appears to have suggested to the defendants' manager that his son might enter their service. He asked the manager if the plaintiff might have two looms. A day or two later the manager took the plaintiff up to two looms that were not working and said: "Here I have got two looms for you. I will see how you go on. I will give you a trial." The plaintiff accordingly went to the two looms, and has been in the employment of the defendants as a weaver from that time down to the present, working, however, after a time at four looms instead of the two with which he started. Nothing was said about wages or any other term of the plaintiff's employment. But, in my judgment, the proper inference in these circumstances is that the plaintiff was employed upon the same terms as the other weaver employees of the defendant company, including the plaintiff's father. This, indeed, is the plaintiff's own contention. In his statement of claim he alleges that the uniform list of prices as amended from time to time governed the terms and conditions of employment of himself and the other employees of the defendants, and in his further particulars he states that he and the defendants were also subject to the rules for the settlement of trade disputes, which are bound up in one volume with the uniform list of prices. In the alternative, he contended that in so far as the terms of his employment were not oral they were implied from a usage obtaining in his employment by the defendants and that of the other employees of the defendants, which usage, he says, was in terms identical with the provisions of the agreements. This is, however, merely stating the same thing in a different way. If the uniform list of prices and the rules for settlement of disputes or the usage of the defendants are implied terms of the plaintiff's employment, this can only be because they were the terms upon which the other employees were serving. I regard therefore the plaintiff's allegations in his pleading as admitting that he was engaged upon the same terms as the other employees, an admission that is in accordance with my own conclusion. If this be so, it cannot, I think, be doubted that the practice of paying a weaver, in respect of work carelessly done, a less sum than he would have been entitled to under the uniform list of prices had the work been properly done, was imported into the plaintiff's contract of employment. The plaintiff alleges that he did not know of this practice at the time of his engagement. But, in my opinion, this would be immaterial. Entering the defendants' service upon the same terms as the other weavers employed by them, he must be deemed to have subjected himself to those terms whatever they might turn out to be. As a matter of fact, however, FARWELL, J., said that he felt some difficulty in believing that the plaintiff did not become aware of this practice before he had been in their employment very long. I feel the same difficulty. It is, indeed, almost impossible to believe that the plaintiff did not come to hear of this practice during the twelve months he was in the mill being instructed by his father. Mr. George Ridehalgh has been the manager of the defendants for the last thirty years, and during the whole of that time the practice has been followed. We were not told how often the deductions were made, except for one period between June 22, 1927, and Aug. 10, 1928, in respect of which the wage sheets of the defendants had been examined. But in that period the deductions had been made on fifty-one occasions and I have no reason to suppose that the period chosen differed materially from any other. It was, therefore, a not unusual occurrence. But whether the deductions were or were not known to the plaintiff, there is no doubt that the practice in fact existed in the defendants' mill, and if, as I think, the practice was imported into the plaintiff's contract of service, he cannot escape from its operation by showing that it lacks some of the essentials of a valid custom or usage of the trade.

The only question is whether the practice is rendered illegal by the Truck Act, 1831. The answer to that question depends upon whether the deductions are made for the purpose of calculating and fixing the correct wages of the plaintiff, or whether they are deductions made from wages already fixed. If they are the former, it has been decided by the court that in making them the defendants do not contravene the provisions of the Truck Act, 1831: see *Hart* v. *Riversdale Mill Co.* (1), applying *Chawner* v. *Cummings* (11) and *Archer* v. *James* (12). The true nature of the deductions is not to be determined by what the parties are in the habit of calling them. That they are usually referred to at the present time as "fines" is as immaterial as the fact that they are said to be made for the disciplinary reasons or as a deterrent, or the fact that the defendants do not always insist on making them. The real question is whether the uniform list of prices fixes the same wages for good weaving as for bad. The list is the result of agreement between the respective representatives of the masters and the men engaged in the trade, and it is primâ facie improbable that the prices contained in that list were going to be paid by the employers for anything but merchantable cloth, or were going to be accepted by the employees for weaving anything but merchantable material. It could hardly be expected, however, that the price list should indicate how much less should be paid for unmerchantable cloth or how much more for unmerchantable material. That would obviously depend upon the facts of each particular case. But one would expect to find something in the joint rules to provide for such cases in the event of the employer and employee failing to reach a satisfactory solution, and on turning to the rules this expectation will be found to be justified. Rule 2 provides for the case of bad material, and r. 4 for underpayment of the uniform list of prices. Both the list and the rules, therefore, are quite consistent with the inherent probabilities of the case. But when the evidence is looked at, it appears that the plaintiff and his employers alike recognise that the prices in the list are prices for merchantable cloth and for weaving with merchantable materials. As regards the latter, the plaintiff agreed that, if the yarn supplied was bad, so putting extra work on the weaver, he was entitled to ask for extra pay. The more important question, however, for the present purposes related to the deductions. As to these he agreed that the prices in the list were perfectly well understood by all the weavers to be prices for work carefully done. He also said that he took it that the prices were prices paid for good work. This means that the list of prices fixed his wages for good work alone. That being so, the wages to be paid for bad work were either never determined, in which case he would be paid upon a quantum meruit, or they were determined by reference to the practice in the mill under which it was in the option of the manager to pay him the wages he would have been paid had the work been good, or those wages less a sum not exceeding the damage accruing to the defendants by reason of the faulty work. In either case the payment of the lower wage would not offend against any provision of the Truck Act, though for the reasons I have already given I think that his wages for bad work were determined by reference to the usage. In these circumstances, I am of opinion that the case is governed by the decision in the *Riversdale Mill Co.'s Case* (1).

Having arrived at the conclusion that the practice was incorporated in the plaintiff's contract of employment, and that such practice is one which relates to the fixing of the wages for faulty weaving and not to a deduction from wages already ascertained, it is not necessary for me to deal with the other grounds on which the plaintiff relied. I wish, however, to say a few words about s. 116 of the Factory and Workshop Act, 1901, upon which the plaintiff placed some reliance. His contention as I understood it, was that, inasmuch as the particulars furnished to him in writing under sub-s. (1) (b) of that section contained no reference to any diminution of the wages shown in the particulars and placard for faulty work, those wages must be deemed to be the wages payable to him whether his work were well or ill done. It is, however, to be observed that the particulars to be given are those of rates of wages applicable to the work to be done by him, and are to be furnished when the work is given out to him; that is, of course, before he has begun weaving. The particulars required would, accordingly, appear to be particulars of the rates of wages payable for the work that he is expected to do, namely, good work and nothing else. The particulars in writing furnished to the plaintiff appear to me, therefore, to have been a sufficient compliance with the section. It is, indeed, to be observed that the section requires the particulars of the rates of wages applicable to the work "to be done" to be furnished for the purpose of enabling the worker to compute the total amount of wages payable to him in respect of his work, which would seem to mean the work actually done by him. Once given the rate of wage payable for the work that he was expected to do, the operative would have no difficulty in computing what he would be entitled to for the work actually done. The fact that the employer might, nevertheless, be generous enough to pay him as though his work were properly done is immaterial. For these reasons, I agree that the appeal should be allowed, with the consequences stated by the Master of the Rolls.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co.*, for *John Taylor & Co.*, Blackburn; *Stow, Preston & Lyttelton*, for *J. C. Waddington & Son*, Burnley.

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

R. *v.* DIVINE. Ex parte WALTON

[KING'S BENCH DIVISION (Talbot, Charles and Humphreys, JJ.), February 10, 11, March 17, 1930]

[Reported [1930] 2 K.B. 29; 99 L.J.K.B. 433; 143 L.T. 235; 94 J.P. 129; 46 T.L.R. 321; 28 L.G.R. 283]

B

Coroner—Quashing of inquisition—Misconduct—Visit to scene of accident with person subsequently juryman—Visit to scene when viewed by jury—Permission to persons concerned to attend view—Explanation at view by witness of evidence already given—Duty of coroner to read to witness notes of evidence—Coroners Act, 1887 (50 *&* 51 *Vict., c.* 71), *s.* 6 (1). C

For a coroner before an inquest is held to take a person who is subsequently to serve on the jury and privately investigate with him any of the facts of the case—whether or not it can be shown that there was anything in the nature of discussion between them—is contrary to public policy, "misconduct" at common law, and ground for quashing the inquisition under s. 6 (1) of the Coroners Act, 1887. D

In deciding whether or not to quash an inquisition under s. 6 (1) the court is not to attend to mere informalities, nor to criticise minutely the summing-up, or the nature of the evidence, or the procedure, at the inquest, but if the inquest has been so conducted, or the circumstances attending it are such, that there is real risk that justice has not been done, and a real impairment E of the security which right procedure provides that justice is done and is seen to be done, the court ought not to allow the inquisition to stand. A coroner has considerable latitude as to the way in which he may conduct an inquest. He is not fettered by detailed rules of procedure, but, on the other hand, the proceedings are formal, they are conducted on lines which are now established by long usage, and the public and those more particularly F interested have a right to expect that the verdict will be given on the sworn evidence heard at the inquest and on nothing else.

The fact that at a view, by a coroner's jury, of the scene of a collision where two vehicles had collided, a police constable, who had already been sworn and given evidence at the inquest, was allowed to point out to the jury where had been the marks in the roadway of the two vehicles which were said to have G met, and where one of the vehicles had come to rest—the distance between which points the jury measured—is ground for quashing an inquisition under s. 6 (1) of the Coroners Act, 1887.

As a general rule it is better that a coroner should not accompany the jury to a view of the scene of an accident or of the vehicles involved therein, but, if he does so accompany the jury, he should carefully abstain from any dis- H cussion of the case with the jury at such view. A coroner is not bound to allow others, such as those concerned in the accident or their representatives, to be present on such a view by the jury. It is a matter for his discretion.

There is no statutory requirement that the notes taken by the coroner of the evidence of a witness at an inquest should be read over to that witness, but, if a coroner thinks there is any uncertainty as to what a witness meant, and, I particularly, if a witness, before he signs his deposition, requests that it be read over to him, the coroner ought to read it. No doubt a witness would be entitled to refuse to sign a deposition until this had been done.

Notes. With regard to the method of selection of jurors criticised by the court in this case, reg. 35 of the Coroner's Rules, 1953, now provides that "no person shall be summoned to attend as a juror at inquests held in the same coroner's jurisdiction on more than three days in any year." By s. 1 of the Law Officers Act, 1944, the Solicitor-General is empowered, in the circumstances mentioned in the section, to discharge the functions of the Attorney-General under s. 6 (1) of the Coroners' Act, 1887.

As to the summoning of an inquest jury, see 8 Halsbury's Laws (3rd Edn.) 495–500; witnesses and evidence at an inquest, ibid., 502–506; and quashing an inquisition, ibid., 528–533. For cases, see 13 Digest 243 et seq., 252 et seq. For Coroners Act, 1887, see 4 Halsbury's Statutes (2nd Edn.) 823.

Cases referred to:

(1) *R.* v. *Haslewood, Ex parte Margerison*, [1926] 2 K.B. 468; 95 L.J.K.B. 975; 136 L.T. 276; 90 J.P. 158; 42 T.L.R. 746; 70 Sol. Jo. 906; 24 L.G.R. 505, D.C.; Digest Supp.

(2) *Garnett* v. *Ferrand* (1827), 6 B. & C. 611; 9 Dow. & Ry.K.B. 657; 4 Dow. & Ry.M.C. 441; 5 L.J.O.S.K.B. 221; 108 E.R. 576; 13 Digest 232, *1.*

(3) *R.* v. *Wood, Ex parte Anderson*, [1928] 1 K.B. 302; 97 L.J.K.B. 113; 138 L.T. 224; 91 J.P. 185; 44 T.L.R. 23; 25 L.G.R. 501; 28 Cox, C.C. 446, D.C.; Digest Supp.

(4) *Bird* v. *Keep*, [1918] 2 K.B. 692; 87 L.J.K.B. 1199; 118 L.T. 633; 34 T.L.R. 513; 62 Sol. Jo. 666; 11 B.W.C.C. 133, C.A.; 13 Digest 260, *408.*

(5) *R.* v. *Plummer* (1844), 1 Car. & Kir. 600; 8 J.P. 615; 8 Jur. 921, N.P.; 13 Digest 245, *171.*

(6) *R.* v. *Staffordshire Coroner* (1864), 10 L.T. 650; 13 Digest 253, *310.*

(7) *R.* v. *McIntosh* (1858), 32 L.T.O.S. 146; 7 W.R. 52; sub nom. *Re R.* v. *M'Intosh, Ex parte M'Intosh*, 22 J.P.Jo. 754; 13 Digest 253, *313.*

(8) *R.* v. *Ingham* (1864), 5 B. & S. 257; 4 New Rep. 141; 33 L.J.Q.B. 183; 10 L.T. 456; 28 J.P. 580; 10 Jur.N.S. 968; 12 W.R. 793; 9 Cox, C.C. 508; 122 E.R. 827; 13 Digest 249, *237.*

(9) *R.* (*Mansfield*) v. *O'Brien* (1882), 17 I.L.T. 34; 13 Digest 253, *n.*

(10) *Re Mitchelstown Inquisition* (1888), 22 L.R.Ir. 279; 13 Digest 253, *o.*

Rules nisi for certiorari obtained by one George Walton on the fiat of the Attorney-General under s. 6 (1) of the Coroners Act, 1887, to bring up and quash the inquisitions of a coroner on inquests held by him, with a jury, on the bodies of two men who had died from injuries received as the result of a collision between a motor lorry, in which were the deceased, and a motor car driven by the said George Walton.

At the inquests the jury returned verdicts of manslaughter against George Walton, who stood committed for trial upon the coroner's inquisitions. The applicant obtained the rules on the grounds (i) that before the inquest the coroner viewed and discussed with a man who subsequently acted as foreman of the jury the vehicles involved in the collision; (ii) that the coroner joined the jury in their visit to the garage where the vehicle was and the scene of the collision and in their discussion and without allowing any other parties to be present; (iii) that the coroner failed to direct the jury as to the meaning of manslaughter or as to the degree of negligence required to support such a charge; (iv) that the coroner failed to read over his notes to the witnesses before they signed them; and (v) that new facts and evidence had been discovered. A sixth ground was added to the second ground by amendment on the hearing of the argument, that the coroner had allowed Police-constable Farmery, one of the witnesses who had already given evidence, to attend at the view by the jury of the scene of the collision and there to speak to the jury and to point out to them certain matters. This evidence was not available at the time when the rules were applied for. The coroner by his affidavit stated that before the inquest he took one, Ralph, who subsequently acted as foreman of the jury, to view both vehicles and the scene of the collision. He took Ralph because he was a motor driver and would not have taken him if he had known that it would become necessary for all the jury subsequently to view the two vehicles and the scene of the accident. No discussion took place between Ralph and himself as to the accident or its causes; they merely viewed the damage.

At the time of this preliminary view the coroner had himself not seen the statements of the witnesses. It had been stated that at the garage he had referred to Ralph as "one of his regular jurymen." That was quite possible as eleven jurymen were summoned by the coroner's officer from a panel of sixteen or seventeen only. It, therefore, necessarily happened that some of these were summoned time after time and that most of them did become regular jurymen. As to the second ground the coroner stated that he did not discuss anything with the jury when they visited the garage and the scene of the collision. All interested parties had an opportunity of attending when the jury viewed the vehicles and the place of collision. As to the fourth ground the coroner stated that he read over the deposition of Mrs. George Walton, the wife of Mr. George Walton, who appeared to be in an agitated state, that he gave Mr. George Walton the opportunity of reading over his deposition, which was declined, and that the depositions of the other witnesses were not read over to them. As to the sixth ground, it appeared from the affidavit filed that Police-constable Farmery on the view by the jury at the scene of the collision had indicated to the jury the place of the marks made by the vehicles on the road and the position where one of the vehicles had come to rest.

By the Coroners Act, 1887:

> "Section 4 (1): The coroner shall, at the first sitting of the inquest, examine on oath touching the death all persons who tender their evidence respecting the facts, and all persons having knowledge of the facts whom he thinks it expedient to examine. (2) It shall be the duty of the coroner in a case of murder or manslaughter to put into writing the statement on oath of those who know the facts and circumstances of the case, or so much of such statement as is material, and any such deposition shall be signed by the witness and also by the coroner. (3) After hearing the evidence the jury shall give their verdict, and certify it by an inquisition in writing, setting forth, so far as such particulars have been proved to them, who the deceased was, and how, when, and where the deceased came by his death, and if he came by his death by murder or manslaughter, the persons, if any, whom the jury find to have been guilty of such murder or manslaughter or of being accessories before the fact to such murder. . . ."
>
> "Section 6 (1): Where Her Majesty's High Court of Justice upon application made by or under the authority of the Attorney-General, is satisfied . . . where an inquest has been held by a coroner that by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, or otherwise, it is necessary or desirable, in the interests of justice, that another inquest should be held, the court may order an inquest to be held touching the said death . . ."

P. E. Sandilands, showing cause against the rules, referred to the observations of WILLS, J., in charging the grand jury at Chester Assizes on March 17, 1890, as to the scope of the coroner's inquiry (reported in JERVIS ON CORONERS (7th Edn.), p. 254; *R.* v. *Haslewood, Ex parte Margerison* (1), *Garnett* v. *Ferrand* (2) (1827) 6 B. & C. at p. 626; *R.* v. *Wood, Ex parte Anderson* (3); *Bird* v. *Keep* (4), *R.* v. *Plummer* (5), and *R.* v. *Staffordshire Coroner* (6).

C. Paley Scott in support.

TALBOT, J.—We understand that time is of importance, and we think that the convenient course will be to quash these inquisitions at once, that the fresh evidence may be heard as soon as possible at new inquests to be held before Mr. Thomas Holtby, the coroner for the adjoining Howdenshire division. We will take time to consider our judgment on the other points, but we desire to make it clear now that we make no reflection whatever on the coroner. Whether or not we ultimately decide that he correctly interpreted his official duty, we accept his statement that he had no motive for what he did other than to further the interests of justice.

Cur. adv. vult.

At the second inquests the jury returned verdicts of accidental deaths.

March 17.—**TALBOT, J.**, read the following judgment of the court: In this case rules were moved pursuant to the fiat of the Attorney-General, and were granted, calling upon Dr. Divine (one of His Majesty's coroners for the city and county of Kingston-upon-Hull) to show cause why a writ of certiorari should not issue to remove into this court two inquisitions taken before him in December last on the bodies of two men, who had been killed in a collision in a public road in or near the city of Hull, and why other inquests should not be held. The rules were applied for under s. 6 of the Coroners Act, 1887, and s. 19 of the Coroners (Amendment) Act, 1926, on two grounds: (i) Irregularity in the proceedings at and connected with the inquest. (ii) The discovery of new facts and evidence.

The second ground depends particularly on s. 19 of the Act of 1926 which was enacted "for the removal of doubts"—doubts, that is, how far the "generality of the provisions" of s. 6 of the Act of 1887 (which will be considered presently) empowered the court to quash an inquisition and order a new inquest because of the discovery of new facts or evidence. The affidavits filed in support of the rule disclosed evidence as to which we will not say more than that it appears to be material and important; they also accounted satisfactorily for the fact that this evidence was not tendered at the inquests already held. In his affidavit the learned coroner says as to this evidence:

> "I had at no time before the conclusion of the said inquest any information that either Harry Norman Doughty or Arthur James Pilling, whose statements are exhibited to the affidavit of the said George Walton, could give any evidence or throw any light upon the said accident, and I am very willing, if this honourable court is of opinion that the inquisition should be quashed so that a new inquest can be held at which such fresh evidence can be given, to hold such new inquest, and to procure the attendance and examination of such new witnesses thereat with a fresh jury or as directed by this honourable court."

The learned counsel who appeared to show cause added that the coroner would prefer that, if the court thought fit to order new inquests so that this evidence might be considered, they should be held before the coroner of another district under s. 6 (2) of the Act of 1887. In these circumstances we considered that the conditions laid down by the statute had been satisfied, and at the conclusion of the arguments we ordered new inquests accordingly. We wish to add that we must not be taken to give any encouragement to applications for fresh inquests merely on the ground that further evidence is available. We made absolute the rules in the present case, having regard to the nature of the evidence now disclosed, as to which for obvious reasons it is best to say nothing, and because the absence of it at the inquests is fully explained. The fact that the new inquests are ordered with the assent, and, indeed, we think we may say by the desire, of the learned coroner, also weighed with us. We thought it right to give our decision at once upon this ground, which sufficiently supports it, as it was important in the circumstances of this case that there should be no delay. We deferred our decision on the other points argued before us, and we now proceed to give it.

The first irregularity set forth in the order to show cause is, that "the coroner viewed and discussed a damaged vehicle prior to the inquest with a man who subsequently acted as foreman of the jury."

There is at Hull a peculiar practice as to the summoning of jurors for inquests, which is described in Dr. Divine's affidavit:

> "I may well have referred to the said Joseph Ralph as one of my regular jurymen. I hold many inquests with juries and the practice of my court is

> always to require all jurymen to be summoned. As these are selected by the coroner's officer from a list or panel of sixteen or seventeen only, it necessarily happens that some of the same persons are summoned as jurors time after time, and it follows therefore that most of the jurymen who can and who do attend are regularly summoned and become regular jurymen. . . . I have nothing to do with their selection in any way.''

Though it is, we believe, common to use the voters' list as a list of jurors to be summoned for coroners' inquests, no list is prescribed by statute, and so long as the coroner obtains the attendance of the statutory number of duly qualified persons, the method by which he does it is left very much to his discretion. This is probably to be explained by the ancient history of these inquests. Originally the coroner's duty was to go to the place where a death, which was to be inquired into, had occurred, summon the inhabitants of the neighbourhood, and inquire of them upon oath what they knew of the matter. Everyone of twelve years old or upwards in the townships summoned was bound to attend : see the Stat. De Officio Coronatoris (4 Edw. 1) and the Stat. of Marleberge, c. 25 (52 Hen. 3), both now repealed. Gradually, no doubt (as in the parallel case of the grand jury) the functions of jurors and witnesses were distinguished, and for many centuries a limited number of jurors has been impanelled. We are not told how or by whom the panel at Hull is formed, or whether the origin of the practice prevailing there is known, but we are bound to say that to confine the area of selection to sixteen or seventeen persons out of a great city appears to us to be very objectionable. Apart from the obvious risk of practical inconvenience, it is, in our opinion, quite contrary to the principle of the jury system; which is the determination of questions of fact by persons taken at haphazard from the general body of qualified persons. It is an entire departure from this to have a small panel of ''regular jurymen,'' who must be perfectly well known, and, at any rate, can easily be known, to everyone in Hull who takes an interest in the matter. We are not called on to say whether or not the practice is actually illegal, and we express no opinion as to that, but it is, in our view, improper, and it has in fact led to what we hold to be an irregularity in the present case.

It appears from the evidence that on Dec. 3, 1929, two days before the inquests were held, the coroner, accompanied by a man named Ralph, visited a garage belonging to one Bell to whom the coroner introduced Ralph as ''one of my regular jurymen,'' and desired to see a motor car which Mr. George Walton, against whom the jury afterwards brought in a verdict of manslaughter, was driving at the time of the collision. Mr. Bell showed them a car and the coroner and Mr. Ralph then examined it together. They also examined the lorry in which the two dead men had been and the scene of the collision. Ralph was foreman of the jury at the inquests. He had also served on the jury at another inquest held by the coroner on Dec. 3 (two days before these inquests) and the same jury appears to have been summoned and to have served on both occasions. The coroner's account of this transaction in his affidavit is as follows :

> ''On Dec. 3, 1929, I held an inquest with a jury summoned by the coroner's officer from the jury panel, without any intervention on my part, at the Royal Infirmary, Hull. At the conclusion of that inquest (which was wholly unconnected with those referred to in [the present case]) the jury were warned by the said officer (again without any intervention on my part) that they were required to attend at the inquests to be held on Dec. 5 following. The said Joseph Ralph was one of the members of the jury so warned, and I said to him that I was going that afternoon to look at the motor lorry and motor car involved in the accident to be inquired into on Dec. 5, 1929, and also to view the scene of the accident, and that he might accompany me if he desired. He agreed and went with me later as hereafter set forth. The reason I took him with me was because he had a knowledge of motor cars, being a driver himself, and I thought he would be better able to follow the evidence at the inquest after

> seeing the vehicles and viewing the scene of the accident. In so doing I had no other motive to serve than to promote the interests of justice. I should not have taken the said Joseph Ralph with me beforehand if I had known that the evidence would be such that it would be necessary (as during the inquest it turned out to be) for all the members of the jury to see, and, as in fact they did, see the vehicles, and view the scene of the accident. I met the said Joseph Ralph that afternoon and took him with me to the yard in Anlaby Park Road where the motor lorry was which I had seen the previous day, and which had been identified by the said Fred Farmery as already stated. We then visited the scene of the accident and Mr. Bell's garage at Hessle where a damaged motor car was pointed out to us by Thomas Leonard Bell (who afterwards gave evidence at the inquest) as the car belonging to Mr. George Walton which had been involved in the accident. The said Joseph Ralph and I examined the two motor vehicles for the purpose of seeing the condition of each of them respectively and for no other purposes. No discussion took place between us as to the circumstances in which the accident happened, or the causes thereof. We merely viewed the damage. Further, I had no statements of witnesses then, nor any written information with regard to the accident."

It is evident that the coroner contemplated that Ralph would have at the inquest knowledge which the other jurors would not or might not have, and that the others might have to depend on Ralph for a report of what he had seen. We can accept without reserve the coroner's statement that no "discussion" of the circumstances or causes of the accident took place between him and Ralph, though we do not suppose that their examination of the vehicles and their visit to the place of the collision passed in total silence; but it is plain that there was ample opportunity for discussion if they had wished to discuss. It was pressed upon us by counsel in showing cause that an inquest, being a court not of trial but of inquiry only, the procedure is much less rigid than that at a trial proper, whether criminal or civil, and it was argued that, apart from dishonesty or deliberate partiality, there was nothing to prevent the jury from satisfying themselves as to the facts in any way which they might think proper, so long as no material evidence was actually excluded at the inquest, and no evidence was formally taken except on oath. At common law the regular grounds on which inquisitions were quashed were defects appearing on the face of the verdict, and "misconduct" of coroner or jury. "The verdict," says SIR J. JERVIS, "is equivalent to an indictment and must be stated with the same legal certainty and precision": (JERVIS ON CORONERS (1st Edn.), p. 253). This meant that one arraigned on a coroner's inquisition had the same right to have it quashed for defects in it as in the case of an indictment, and on such grounds it could be quashed either by the judge before whom it was arraigned or by the Court of King's Bench. The court could also quash for misconduct but this jurisdiction was kept within strict limits.

Ordinarily, unless the inquisition was bad on its face, it would only be quashed on the ground of fraud: *R.* v. *McIntosh* (7). Even where unsworn evidence had been received the court would not quash the inquisition unless it appeared that the verdict had been influenced by it: *R.* v. *Staffordshire Coroner* (6), *R.* v. *Ingham* (8). So in *R.* v. *Ingham* (8) the court refused even to grant a rule nisi on the ground either that the coroner had misdirected the jury on law, or that there was no evidence to warrant the verdict. Again it is clear that a coroner's inquest is not bound by the strict law of evidence. In Ireland the court, proceeding upon its common law jurisdiction (the Coroners' Act, 1887, never applied to Ireland), held that it was misconduct or irregularity for which an inquest should be quashed for the coroner to be in the jury room while they were considering their verdict: see *R.* (*Mansfield*) v. *O'Brien* (9), *Re Mitchelstown Inquisition* (10). These cases were followed by this court in *R.* v. *Wood* (3). LORD HEWART, C.J. (see [1928] 1 K.B. at p. 304), rested his judgment on the ground that it is "clearly contrary to public policy" for a coroner to go into the jury room after the jury had retired to consider their verdict. MORRIS, C.J., in the *Mitchelstown Case* (10) used the same expression. The grounds upon which the inquisitions were quashed in those cases is not exactly that upon which these rules were granted, though it is not unlike it. In our opinion, it is "contrary to public policy" that a coroner should take, before an inquest is held, one or more persons who are to serve on the jury and privately investigate with them any of the facts of the case; and this whether or not it can be shown that there was anything in the nature of discussion. It is obvious that the condition of the vehicles involved in a collision, and the aspect of the place at which it occurred, are among the facts material to be considered in an inquiry into the cause of the death of a person killed in the collision. We think, therefore, that even at common law what the coroner and Mr. Ralph did in this case was misconduct such that this court would have quashed the inquisitions. But, in our opinion, the Act of 1887 has materially enlarged the powers, and, therefore, the duty, of the court in this matter.

Section 6 (1) is as follows:

> "Where Her Majesty's High Court of Justice, upon application made by or under the authority of the Attorney-General, is satisfied . . . (b) where an inquest has been held by a coroner that by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, or otherwise, it is necessary or desirable, in the interests of justice, that another inquest should be held, the court may order an inquest to be held touching the said death. . . ."

These are very wide words, and their generality is declared and guarded by s. 19 of the Coroners (Amendment) Act, 1926. Moreover, the fact that the powers conferred by the section can be exercised only upon an application authorised by the Attorney-General indicates that they are powers beyond those which the court already had. The same appears from s. 35 of the Act of 1887. The words "necessary or desirable in the interest of justice" are the critical words. The court is not to attend to mere informalities, nor to criticise minutely the summing up, or the nature of the evidence or of the procedure. But if the inquest has been so conducted, or the circumstances attending it are such, that there is real risk that justice has not been done, and a real impairment of the security which right procedure provides that justice is done and is seen to be done, the court ought not to allow the inquisition to stand. No doubt a coroner has considerable latitude as to the way in which he may conduct an inquest; he is not fettered by detailed rules of procedure; but, on the other hand, the proceedings are formal, they are conducted on lines which are now established by long usage, and the public and those more particularly interested have a right to expect that the verdict will be given upon the sworn evidence heard at the inquest and upon nothing else. It is unnecessary to go into this in detail, but we think the language of the Act of 1887 throughout confirms what we have just said. See (to take one example) the words "so far as such particulars have been proved to them" in s. 4 (3) where "proved" must mean "proved by sworn evidence" as provided by s. 4 (1). It was argued that the words "and to the best of your skill and knowledge" in the form of jurors' oath in Sched. II to the Act, when compared with s. 3 (3) show that the jury is not confined to sworn evidence. We cannot think that there is anything in this. It would mean practically that a verdict could be properly based on anything which the jurors knew or could find out, and would in effect annul their obligation to give the verdict "according to the evidence." The argument gives to the words a significance much greater than they can fairly bear. It is, of course, no more possible at a coroner's inquest than at a trial, either criminal or civil, to secure absolutely that jurymen will not be influenced by things which they have heard or seen outside the court. But at least nothing should be allowed which makes it certain that they will be so influenced; and it is clear that the proceedings of the coroner and Mr. Ralph in this case, however well intended, must have had this effect. It has been said over and over again that it is hardly more important that justice should be done, than that it should appear to be done; and nothing is more certain to defeat this than that it should be evident that a jury have formed at any rate a provisional opinion on the case before hearing the evidence. The affidavits make it clear that this impression was necessarily conveyed by the part which Mr. Ralph, as foreman of the jury, took at the inquest. It would be wrong to impose a limit which the law has not imposed on the right of a coroner's jury to ask questions of witnesses; but no one can wonder that a man against whom a verdict of manslaughter has been found should feel that he has not been fairly treated when questions are put to him by the foreman of the jury obviously based on information obtained outside the court.

The next ground taken is this (as amended):

> "That the coroner joined the jury in their inspection and discussion of the said damaged vehicle without allowing any other parties to be present during the holding of the said inquest, and allowed P.C. Farmery to speak to them and point out the approximate point of impact and the position in which the two vehicles came to rest."

There are three points: (i) That the coroner joined the jury in an inspection and discussion of the damage to a vehicle involved in the collision; (ii) that he did not allow others to be present; (iii) that he allowed a police constable to speak and point things out to the jury. We take these points in order. (i) There is of course no objection whatever to a view by the jury of the vehicles concerned in the collision and of the place. Nor can we say that the coroner is doing anything wrong if he goes with the jury; though we think that probably as a general rule it is better that he should not. If he does, he should carefully abstain from any discussion of the case with them. We accept the sworn statement of the coroner in this present case that he did abstain. (ii) The coroner deals with this in his affidavit:

> "It is not true to suggest that the representative of the said George Walton had no opportunity of attending with the jury to view the damaged car. When I decided that it was necessary for the jury to view the damaged vehicles and the scene of the accident, I announced in open court in the presence and hearing of all interested parties that I intended to adjourn for the purpose of permitting the jury and other parties who desired to have an opportunity of inspecting the damaged vehicles and visiting the scene of the accident. Mr. Hugh Farrell, a solicitor, was present, representing Mr. George Walton; Mr. Pearlman, a solicitor, was present on behalf of the relatives of Harold Boddy; and Mr. E. C. S. Stow, another solicitor, was present on behalf of the relatives of Frederick Thomas Rispin. I do not remember hearing Mr. Farrell asking me whether he should attend, and I certainly did not say that no interested party was to go anywhere near the jury on their inspection. What I did say was that during the inspection none of the parties must interfere with the jury in any way. All the interested parties and their solicitors had the opportunity of attending with the jury, but none of them availed themselves of the opportunity."

It is evident from Mr. Walton's affidavit that what the coroner said was misunderstood, but the allegation that he did not allow others to be present while he and the jury viewed is not made out. Nor was he bound to do so. It is a matter for his discretion. (iii) This is a substantial point. It is clear from the affidavit of Mr. Ralph that what the constable told the jury was of great, and, indeed, crucial, importance. He pointed out to them where the vehicles had met, and where the lorry in which the deceased men had been came to rest. The jury then measured the distance between these two points, and evidently this measurement convinced them that Mr. Walton's car had been travelling at a high speed. It was the foundation for the question put by the foreman of the jury to Walton to which we have already referred. The accuracy of the measurement and the inference drawn from it depend of course entirely on the information given by the police constable to the jury as to the points between which the measurement was made. The police constable had already given sworn evidence at the inquest, but it was most improper that he should have been allowed to give this exceedingly important information to the jury outside. We think that this is a good ground for quashing the inquisitions.

As to the next ground, we do not think this is made out. The coroner in his affidavit swears that he carefully directed the jury as to the degree of negligence required to justify a verdict of manslaughter. We accept his statement. Lastly, there is the ground that "the coroner failed to read over his notes to the witnesses before they signed them." This matter is now regulated by s. 4 (2) of the Act of 1887. We do not doubt that if a coroner thinks that there is any uncertainty as to what a witness meant, and, particularly, if a witness requests before he signs his deposition that it be read over to him, the coroner ought to do so; and, no doubt, a witness would be entitled to refuse to sign until this had been done. But we have no right to add a positive requirement such as is suggested to those which Parliament has enacted. We may notice that by the Indictable Offences Act, 1848, s. 17 (reproduced by s. 12 of the Criminal Justice Act, 1925), the justices are expressly required to cause a witness's deposition to be read over to him. We must take it that this was deliberately omitted from the Coroners Act, 1887. We are of opinion that, apart from the new evidence, the irregularities mentioned in the rules (so far as the latter relates to the action of the constable at the view) (grounds 1 and 6) were good grounds for making the rules absolute and quashing the inquisitions.

Rules absolute.

Solicitors: *Collyer-Bristow & Co.*, for *Laverack, Wray & Iveson*, Hull; *Smith & Hudson*, for *Rollit & Farrell*, Hull.

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

SHEARN *v.* SHEARN

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hill, J.), July 14, 1930]

[Reported [1931] P. 1; 100 L.J.P. 41; 143 L.T. 772;
46 T.L.R. 652; 74 Sol. Jo. 536]

Divorce—Maintenance of wife—Security—Matters for court to consider—Interests of both husband and wife—Security of part of sum ordered—Time at which order must be made.

An order under s. 190 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, that a husband shall secure a gross or annual sum of money to his wife must be made "on" the decree for divorce or nullity of marriage, and, therefore, a provision in the order that there should be liberty to apply as to security, thus reserving to the court the power to deal with the matter hereafter, was **held** to be ultra vires and invalid.

Where it is impossible to secure the whole of the sum which the court thinks it reasonable to order it must be considered whether it is in the wife's interest to order part to be secured. The court will not compel the husband to realise or transfer his assets in order to secure if to do so will hamper him in earning the income out of which he is to make payments under s. 190 (2).

The interests of both husband and wife have to be considered. It would not be in the interests of a husband if he were forced to sell securities which might thereafter increase in value and begin to yield income. If they did so and the means of the husband were thereby increased, the wife would be able to apply for an increase in the periodical payments. The court will not attempt to secure a present payment on shares which are now yielding no income and as to which it is a matter of speculation when they will yield any.

Divorce—Maintenance of wife—Enforcement of order against husband—Enforcement abroad—Administration of Justice Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 81), *s.* 10.

An order that a husband shall secure a sum in respect of permanent maintenance for his wife after a decree of divorce or nullity of marriage cannot be enforced abroad under s. 10 of the Administration of Justice Act, 1920.

Notes. Section 190 (1) and (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, have been replaced by s. 19 (2) and (3) of the Matrimonial Causes Act, 1950, s. 28 of which gives the court power to vary and otherwise deal with any order made under those subsections. Section 187 of the Act of 1925 has been replaced by ss. 15 and 22 of the Act of 1950.

Considered: *Stephen* v. *Stephen* [1931] P. 197; *Fraser* v. *Fraser*, [1947] 1 All E.R. 384. Referred to: *Chichester* v. *Chichester*, [1936] 1 All E.R. 271; *Barker* v. *Barker*, [1952] 1 All E.R. 1128.

As to orders for permanent maintenance, see 12 Halsbury's Laws (3rd Edn.) 430 et seq.; and for cases see 27 Digest (Repl.) 611 et seq. For Matrimonial Causes Act, 1950, see 29 Halsbury's Statutes (2nd Edn.) 388.

Cases referred to:

(1) *Scott* v. *Scott*, [1921] P. 107; 90 L.J.P. 171; 124 L.T. 619; 37 T.L.R. 158, C.A.; 27 Digest (Repl.) 631, *5917*.

(2) *Legge* v. *Legge* (1928), 45 T.L.R. 157; 73 Sol. Jo. 59, C.A.; 27 Digest (Repl.) 631, *5920*.

(3) *Smith* v. *Smith*, [1923] P. 128; 92 L.J.P. 107; 129 L.T. 187; 39 T.L.R. 294; 27 Digest 476, *4130*.

(4) *Medley* v. *Medley* (1882), 7 P.D. 122; 51 L.J.P. 74; 47 L.T. 556; 30 W.R. 937, C.A.; 27 Digest (Repl.) 628, *5895*.

(5) *Hooper* v. *Hooper*, [1919] P. 153; 88 L.J.P. 141; 120 L.T. 672; 35 T.L.R. 370; 27 Digest (Repl.) 636, *5974*.

(6) *Hulton* v. *Hulton*, [1916] 1 P. 57; 85 L.J.P. 137; 114 L.T. 449; 32 T.L.R. 319, C.A.; 27 Digest (Repl.) 617, *5770*.

(7) *Tangye* v. *Tangye*, [1914] P. 201; 83 L.J.P. 164; 111 L.T. 944; 30 T.L.R. 649; 58 Sol. Jo. 723; 27 Digest (Repl.) 635, *5959*.

(8) *Shorthouse* v. *Shorthouse* (1898), 79 L.T. 366, C.A.; 27 Digest (Repl.) 629, *5900*.

(9) *Harrison* v. *Harrison* (1887), 12 P.D. 130, 145; 56 L.J.P. 76; 57 L.T. 119; 35 W.R. 703; 27 Digest (Repl.) 632, *5930*.

(10) *Tallack* v. *Tallack and Broekema*, [1927] P. 211; 96 L.J.K.B. 117; 137 L.T. 487; 43 T.L.R. 467; 71 Sol. Jo. 521; 27 Digest (Repl.) 637, *5992*.

Cross-appeals from a registrar's order directing the respondent husband to pay the wife, who had obtained a decree absolute dissolving her marriage, £740 per annum during joint lives, free of tax, by way of maintenance.

No order for security was made. The order contained the words "liberty to apply" as to maintenance and security. Both parties appealed as to the amount. The husband further submitted that the words "liberty to apply" were ultra vires as to security. The wife asked the judge to make an order for security forthwith. The summonses were adjourned into court.

T. Bucknill for the wife.

Noel Middleton for the husband.

Cur. adv. vult.

July 14. **HILL, J.,** read the following judgment. In this case I have to deal with cross-appeals from an order as to maintenance. The registrar ordered the husband to pay £740 per annum free of tax, and embodied in his order a liberty A to apply as to security and as to maintenance. Both husband and wife object to the amount. The wife further asks that an order as to security should be made. Counsel agreed that it was not within the power of the court to embody in the order a liberty to apply as to security. Under s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, the power of the court must be exercised "on" the decree for divorce. The cases have shown (*Scott* v. *Scott* (1) and *Legge* v. B *Legge* (2)) that some latitude is allowed in determining whether the application is made "on the decree." But when the application is made the court must deal with it, and cannot reserve to itself power to deal with it hereafter.

In my opinion, counsel are right. The law as to maintenance is in an odd state. As embodied in the Supreme Court of Judicature (Consolidation) Act, 1925, it is the result of piecemeal legislation. Section 190 (1) reproduces the law as to secur- C ing maintenance as enacted in s. 32 of the Matrimonial Causes Act of 1857 and repeated in s. 1 (1) of the Act of 1907. Section 190 (2) of the Act of 1925 gathers up the enactments of the Act of 1866, s. 1, and of the Act of 1907, s. 1 (2), as to periodical payments. There is a further provision as to periodical payments in the Act of 1925, s. 196, which repeats s. 4 of the Act of 1884. The result is as follows: the wife "on the decree" may apply for security or payment or both. On such D application (i) the court may order the husband to secure to the wife a gross sum of money, or annual sum of money, for any term not exceeding her life; (ii) in addition, or instead of an order to secure, the court may order the husband to pay to the wife during joint lives a monthly or weekly sum, and may from time to time modify that order to pay as provided in sub-s. (2) and s. 196. But the court has no power to modify an order to secure, nor has it power in modifying an order E to pay to turn it into an order to secure. The two orders are essentially different. The order under sub-s. (1) is not an order to make periodic payments and secure the payments. It is an order to secure and nothing else. Under it the only obligation of the husband is to provide the security; having done that, he is under no further liability. He enters into no covenant to pay and never becomes a debtor of the payments. The wife has the benefit of the security and must look to it F alone; if it ceases to yield the expected income, she cannot call upon the husband to make good the deficiency. This is made clear by the judgments in *Smith* v. *Smith* (3) and *Medley* v. *Medley* (4). The order under sub-s. (2) is not an order to secure; it is an order to make periodic payments. There is no power under sub-s. (2) to order that these payments be secured. If the husband's means increase, the periodic payments can be increased. But however much his ability G to secure increases, he cannot under sub-s. (2) be ordered to secure. The limits of the powers of the court under s. 190 become all the more marked when contrasted with the power under s. 187 in cases of restitution of conjugal rights. In such case the order may be made "at any time," not merely "on the decree," and the court may order periodical payments and order them to be secured, and may vary the payments and the deed: *Hooper* v. *Hooper* (5). H

By his order the registrar has tried to preserve to the court the power hereafter to turn the order to pay into an order to secure. But it cannot be done. The liberty to apply must be omitted from the order. As to security, it is ultra vires; as to periodic payments, it is unnecessary.

The next question is whether the husband ought now to be ordered to provide I security under sub-s. (1). It is not suggested that he can secure anything like the full amount of maintenance which ought to be provided, but it is said that he ought to secure part of it. The advantage to the wife in an order to secure is twofold; the benefit continues for her life and not merely during joint lives, and it is made safe, though the husband part with the rest of his assets and cease to earn an income. On the other hand, the real interests of both wife and husband have to be considered. As was said by WARRINGTON, L.J., in *Hulton* v. *Hulton* (6) ([1916] P. 57 at p. 63), the court has to decide

> "by what means, looking at the interests not only of the wife but of the husband as well, the payment of the sum so allowed ought to be secured."

Of course, as sub-s. (1) directs, regard must be paid (inter alia) to the ability of the husband. As regards the wife, the object of the whole procedure is to provide maintenance from the time she has divorced her husband. The court will naturally desire to make the maintenance as secure as possible. In cases where it can properly be done the court will order a husband who is possessed of ample free capital to appropriate a sufficient part of it to secure the whole of the maintenance. In many cases that cannot be done because the husband's capital, though ample, is not yet realisable and not readily chargeable or transferable.

In all cases where it is impossible to secure the whole it has always to be considered whether it is in the wife's interest to order part to be secured. It may be that to compel the husband to realise or transfer his assets in order to secure under sub-s. (1) will hamper him in earning the income out of which he is to make the payments under sub-s. (2). The matter has to be considered from all these points of view. It is entirely in the discretion of the court. Historically, no doubt, the order to secure preceded the order to pay, and, as appears from the preamble to the Act of 1866, the power to order periodical payments was enacted to meet cases where the husband had no ability to secure. But, to-day, in the Supreme Court of Judicature (Consolidation) Act, 1925, the two powers are conferred by the same section, and the wife has no greater right to an order to secure than she has to an order to pay. In the present case the husband earns his living as a solicitor in the Federated Malay States. The whole of his present income is earned. The amount of the maintenance has been based upon his earnings. He has a share in a rubber plantation in the Malay States and shares in a number of companies in the Malay States, none of which is registered in England. The husband says that there is no income from the rubber plantation or the companies, and none is expected for years. He puts the capital value of his share in the plantation at £2,267 and of the shares at £4,190, and says that the whole is charged to the bank to secure a sum of £850. He has some policies of trifling surrender values, and finally a reversionary interest in £6,000, part of his grandfather's estate, contingent on his surviving various life tenants, of whom the youngest is about sixty years old. He says that this reversionary interest is of no present value. It is asked that he be ordered either to provide a lump sum of £3,000 to be settled, or to settle one-third of the whole of the above assets, including the reversionary interest. If the order is to be for a lump sum, the husband must realise his assets. The only realisable assets are the share in the plantation and the company shares. The court could make such an order, but I have to consider whether the court could enforce it. Assuming I do order the husband to provide a lump sum of £3,000 so as to provide an annual sum of, say, £140, then I must reduce the order to pay pro tanto, and the order to pay will be (assuming the total to be £740) for £600. If I do not order the husband to provide a lump sum, I can order him to settle one-third of his assets, subject always to the question whether the court could enforce that order, but to secure what sum by way of income am I to make that order? I must fix some sum and reduce the order to pay pro tanto. The plantation and shares in the companies yield no income, and may yield no income for years, and the reversionary interest may never yield any income. The object is to provide present maintenance for the wife. How can I attain that object by ordering the husband to secure the payment of £*x* per annum by a charge upon the shares in the plantation, on the shares in the companies, or the reversionary interest? It cannot be done.

I return, therefore, to the suggestion that the husband should be ordered to provide a lump sum of £3,000. How could that be enforced? The husband resides in the Malay States; his assets are all in the Malay States. This court cannot get at his assets. It could attach him for disobedience to its order when he comes to this country, and he has said that he comes to this country once in every three years for his health; but he could easily take his holiday in some part of Europe other than England. If he was minded to disregard the order to provide the lump sum, he could easily do so; and meantime the wife would be without the income to be secured by the provision of £3,000. It was argued that an order to secure a lump sum could be enforced in the Malay States under the Administration of Justice Act, 1920, ss. 10 and 12. They apply only to judgments or orders whereby any sum of money is made payable, and to judgment creditors and debtors. Having regard to the terms of s. 190 of the Act of 1925, and the judgments in *Smith* v. *Smith* (3) and *Medley* v. *Medley* (4), I do not think the Act applies to an order to secure under sub-s. (1). If I am wrong in this view, an attempt by the wife to enforce such an order in the Malay States would probably land her in costly and probably prolonged litigation. On the other hand, there can be no doubt that an order to pay periodical payments is an order which, as the payments fall due, can be enforced in the Malay States under the Administration of Justice Act, 1920.

It is in the interest of the wife that the order now made should be for periodical payments and not an order to secure. I think she is more likely to receive the desired maintenance. It is certainly also in the interests of the husband who would otherwise be driven to a forced sale of securities which may hereafter increase in value and begin to yield an income. If they do and the means of the husband are thereby increased, the wife will be able to apply for an increase in the periodical payments. Neither of the cases cited in support of the proposition to order one-third of the husband's property to be secured, namely, *Tangye* v. *Tangye* (7) and *Shorthouse* v. *Shorthouse* (8) helps to show me how I can secure a present payment upon shares which are at present yielding no income and as to which it is a matter of speculation when they will yield any. I do not think that *Harrison* v. *Harrison* (9) and *Tallack* v. *Tallack and Broekma* (10), which were cited, help in regard to the reversionary interest.

I see no reason for altering the order of the registrar for £740 per annum free of tax. There is no income tax in the Malay States. The husband, in order to pay in England £740 free of tax, will have to remit £954 out of his average income of £2,400. The wife will receive £740 and be entitled to collect from the income tax authorities in respect of personal allowances £52 17s. 6d, which she will have in addition to the £740. The husband will have left £1,446. It is said that it is unfair to the husband. It is true that he will be left with less than two-thirds, though the wife will receive no more than one-third of the husband's Malay income. But there is no rigid rule as to two-thirds and one-third, and it is not the wife's fault that the money to be paid her has to be remitted from the Malay States to England. The husband has to pay the cost of remitting it—he has to pay the bank charges—and there is no reason in principle why he should not also pay the income tax to which it becomes subject on arrival in England. On the other hand, the wife will be able to collect part of the tax so paid, and that ought to be taken into account in fixing the amount she is to receive directly from the husband. The registrar has fixed these amounts upon these considerations, and I see no ground for overruling him. The registrar's order offends against no principle and I confirm it.

Solicitors: *Lewis & Lewis*; *Simmons & Simmons*.

[*Reported by* W. LATEY, ESQ., *Barrister-at-Law.*]

Re CITY EQUITABLE FIRE INSURANCE CO., LTD. (2)

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), June 17, 18, 1930]

[Reported [1930] 2 Ch. 293; 99 L.J.Ch. 536; 143 L.T. 444;
[1929–30] B. & C.R. 233]

Company—Winding-up—Set-off—Balance of sum retained as security for performance of contract—Interest on that sum—Bankruptcy Act, 1914 (4 *&* 5 *Geo*. 5, *c*. 59), *s*. 31.

By art. 1 of a treaty of reinsurance, dated April 13, 1920, and made between the C. company and the L. and L. company, the C. company guaranteed by way of reinsurance a share of all insurances or reinsurances accepted by the L. and L. company. Under arts. 3 and 6 the L. and L. company agreed to pay the C. company the same rates of premium that it received, less certain deductions, and accounts were to be made up quarterly, and the balance paid over immediately. By art. 8 power was given to the L. and L. company to retain and accumulate out of any money due to the reinsurers a sum equal to 40 per cent. of all premiums credited to the reinsurers, such accumulation or deposit to remain in the hands of the L. and L. company as security for the due performance of the obligations of the reinsurers under the treaty. The L. and L. company agreed to pay interest at the rate of 3½ per cent. per annum on the deposit. In the event of the C. company going into liquidation it was provided that the L. and L. company might determine the treaty. In 1922 a compulsory winding-up order was made against the C. company, and the liquidator took out a summons for a declaration that on the true construction of the treaty of reinsurance the L. and L. company was bound to pay to the liquidator in full the balance of the deposit retained by it under the treaty, including interest accrued thereon, and was not entitled to set off moneys due from the C. company to the L. and L. company under any other treaty, contract, or policy of insurance or reinsurance.

Held: (i) on construction cl. 8 of the treaty provided that the accumulation or deposit was to be held by the L. and L. company specifically as security for the due performance by the C. company of their obligations under the treaty, that quality of security continued as to any balance which was no longer required for the purpose for which it was originally collected in the absence of any evidence of some new contract freeing the accumulation from that quality, and, therefore, the balance of the accumulation at the date of the winding-up petition was still held by the L. and L. company as security and was set apart from the ordinary current accounts between the two companies, and so there could be no set-off in respect of that balance under s. 31 of the Bankruptcy Act, 1914: observations of Vaughan Williams, J., in *Re Mid-Kent Fruit Factory* (1), [1896] 1 Ch. 567, applied; but (ii) the interest on the accumulation was a debt due from the L. and L. company to the C. company and could be set-off under s. 31 against any sum due from the C. company to the L. and L. company.

Notes. As to set-off under s. 31 of the Bankruptcy Act, 1914 (for which see 2 Halsbury's Statutes (2nd Edn.) 321), see 2 Halsbury's Laws (3rd Edn.) 480–485. For cases see 4 Digest 389 et seq.

Cases referred to:

(1) *Re Mid-Kent Fruit Factory*, [1896] 1 Ch. 567; 65 L.J.Ch. 250; 74 L.T. 22; 44 W.R. 284; 40 Sol. Jo. 211; 3 Mans. 59; 10 Digest (Repl.) 989, *6811*.

(2) *Re Daintrey, Ex parte Mant*, [1900] 1 Q.B. 546, 571; 69 L.J.Q.B. 207, 220; 82 L.T. 239, 246; 7 Mans. 107, 129, C.A.; 4 Digest 411, *3719*.

(3) *Re Deveze, Ex parte Barnett* (1874), 9 Ch. App. 293; 43 L.T.Bcy. 87; 29 L.T. 858; 22 W.R. 283, L.C. and L.JJ.; 4 Digest 400, *3652*.

(4) *Rose* v. *Hart* (1818), 8 Taunt. 499; 2 Moore, C.P. 547; 129 E.R. 477; 4 Digest 403, *3672*.

(5) *Eberle's Hotels and Restaurant Co., Ltd.* v. *Jonas* (1887), 18 Q.B.D. 459; 56 L.J.Q.B. 278; 35 W.R. 467; 3 T.L.R. 421, C.A.; 10 Digest (Repl.) 990, *6815*.

(6) *Re Pollitt, Ex parte Minor*, [1893] 1 Q.B. 455; 62 L.J.Q.B. 236; 68 L.T. 366; 41 W.R. 276; 9 T.L.R. 195; 37 Sol. Jo. 217; 10 Morr. 35; 4 R. 253, C.A.; 4 Digest 395, *3612*.

(7) *Palmer* v. *Day & Sons*, [1895] 2 Q.B. 618; 64 L.J.Q.B. 807; 44 W.R. 14; 11 T.L.R. 565; 39 Sol. Jo. 708; 2 Mans. 386; 15 R. 523; 4 Digest 410, *3714*.

(8) *Tilley* v. *Bowman, Ltd.*, [1910] 1 K.B. 745; 79 L.J.K.B. 547; 102 L.T. 318; 54 Sol. Jo. 342; 17 Mans. 97; 4 Digest 402, *3663*.

(9) *Re H. E. Thorne & Son, Ltd.*, [1914] 2 Ch. 438; 84 L.J.Ch. 161; 112 L.T. 30; 58 Sol. Jo. 755; [1915] H.B.R. 19; 10 Digest (Repl.) 1058, *7349*.

(10) *Re City Life Assurance Co., Ltd.*, [1926] Ch. 191; 95 L.J.Ch. 65; 134 L.T. 207; 42 T.L.R. 45; 70 Sol. Jo. 108; [1925] B. & C.R. 233, C.A.; 10 Digest (Repl.) 1173, *8160*.

Appeal from an order of MAUGHAM, J., by the Liverpool and London and Globe Insurance Co., Ltd.

The facts and the material articles of the treaty of reinsurance are stated in the headnote and the judgment of LORD HANWORTH, M.R.

MAUGHAM, J., held, on the true construction of the treaty, that the L. and L. company (the Liverpool and London and Globe Insurance Co., Ltd.) was bound to pay over in full to the liquidator the balance of the deposit retained and accumulated by it under the treaty and the balance of the interest. The London and Liverpool and Globe Insurance Co. appealed.

Lionel Cohen, K.C., and *Sir Albion Richardson, K.C.*, for the appellant company.
C. R. Dunlop, K.C., and *L. W. Byrne* for the liquidator.

LORD HANWORTH, M.R.—This is an appeal from a judgment of MAUGHAM, J., who refused to allow a set-off in the liquidation which is being conducted of the City Equitable Fire Insurance Co. The Liverpool and London and Globe Insurance Co., Ltd., had dealings with the City Equitable Fire Insurance Co., Ltd., under a treaty of reinsurance, the terms of which I must refer to with some accuracy in a moment. The Globe company got a certain sum of money in their hands which had been accumulated in the course of carrying out transactions which were contemplated by that treaty of reinsurance, which is dated April 13, 1920. On the other hand, there are certain sums which are due from the City Equitable company to the Globe company which arise outside this particular treaty of reinsurance, the amount of which it is unnecessary to state, because the parties happily agreed that all questions of figures can be settled. As the learned judge points out, it appears that there were a number of other treaties, contracts, and policies of insurance and reinsurance between these two insurance companies; and the Globe company claims to be entitled not only to prove in the liquidation of the City Equitable company for the balance due from the City Equitable under those other contracts, but also to be entitled to effect a set-off against the balance of the deposit. That is the question that now comes for decision.

In the summons which came before MAUGHAM, J., two matters were placed before the court for decision. The summons was taken out by the liquidator of the City Equitable company to have it declared that the Globe is bound to pay over

> "(a) the balance of the deposit retained and accumulated by the Globe under the treaty; and (b) the balance of the interest from time to time accrued on such deposit after satisfying all obligations of the City Equitable under such treaty, and is not entitled to set off against such moneys any money due from the City Equitable to the Globe under or by virtue of any other treaty, contract, or policy of insurance or reinsurance."

The learned judge determined that the Globe company is bound to pay over in full to the applicant as the official receiver the money in its hands representing (a) the balance of the deposit retained and accumulated by it under the treaty; and (b) the balance of the interest from time to time accrued on such deposit. I have read the summons and the order, because it is fair to take note that in the summons and in the order the balance accumulated by the Globe and the interest payable upon that accumulated sum are separately dealt with. Unfortunately, before Maugham, J., although in the summons the two sums were separated, no separate or special argument was directed to the question of interest. Counsel for the Globe company, in his able argument, emphasised the distinction between these two sums, and he indicated that there are different qualities and results which apply to the interest as apart from the accumulated fund. There being the sums which Maugham, J., has referred to, due to the Globe from the City Equitable in respect of the other contracts, other treaties, and other policies of insurance, the question is whether or not the Globe has a right of set-off because of the claim that they have against the City Equitable in respect of the sum which it has accumulated under the treaty of reinsurance of April 13, 1920.

The terms of that treaty, as I have said, must be examined somewhat closely. It is not a facultative treaty; it is a definite treaty under which, by art. 1, the Globe cedes and the Equitable accepts and guarantees by way of reinsurances a share as hereunder stated of all insurances or reinsurances accepted or renewed by the Globe in its power department, and so on—various risks. Under the terms under which they were to work together, under art. 3, it was provided that the Globe was to pay to the reinsurer, the Equitable, the same rates of premium that it received, less stamp duty, and/or brokerages, and under art. 6 accounts are to be rendered quarterly by the Globe to the Equitable after the end of each quarter, which shall be deemed to close on March 31, June 30, Sept. 30, and Dec. 31, respectively in each year. The accounts are to be confirmed by the reinsurer within fifteen days after they have been rendered, and the balance on either side shall be paid over immediately thereafter. Then comes art. 8, cl. 1 of which is as follows:

> "The Globe shall be entitled to retain and accumulate out of any moneys due to the reinsurer a sum equal to 40 per cent. of all premiums credited to the reinsurer in respect of the first twelve months of this agreement. The said accumulations (hereinafter called 'the said deposit') shall remain in the hands of the Globe as security for the due performance of the obligations of the reinsurer under this agreement. The said deposit shall be maintained at a sum equal to 40 per cent. of the premium credited to the reinsurer during the twelve months preceding the date to which each subsequent quarterly account is made up, and the Globe shall be entitled to retain any premiums payable to the reinsurer for the purpose of increasing the said deposit to the required amount."

It appears to us, upon the proper reading of that clause of art. 8, quite clear that the right of the Globe was to accumulate a sum which is, by the terms of the article, specifically appropriated as security for the due performance of the obligations of the reinsurer under this agreement. The subsequent provisions secure the maintenance of that fund at a sum equal to 40 per cent. of the premium, but it remains and exists as a fund for the security of the due performance of the obligation of the reinsurer under this agreement. Then comes cl. 2 of the same article:

> "The Globe may at any time after default by the reinsurer in payment of any sum owing by the reinsurer to the Globe under this agreement by notice in writing addressed to the reinsurer require the reinsurer to pay to the Globe the sum so owing. If the reinsurer shall not pay such sum within seven days of the receipt of such notice the Globe shall be entitled to take so much of the said deposit as may be required to provide the sum in respect of which default shall be made. The reinsurer shall replace any sum so taken as aforesaid."

Let us consider the working of the two companies under this agreement. Let A
it be supposed that at the close of one of the quarters there was a sum due from the reinsurer to the Globe, but not paid by the reinsurer to the Globe. The rights of the parties would then be this: the Globe might give notice in writing requiring the reinsurer to pay the sum so owing, and, if the reinsurer did not pay that sum within seven days, then the Globe was to be entitled to dip into the deposit and to provide a sum in respect of which default had been made. In other words, adding B
the fourteen days during which the account is to be made out to the seven days within which notice is to be given requiring a sum to be met, provision is thus made for the reimbursement to the Globe out of the accumulated fund of any sums which were due from the Equitable to the Globe and of which the Equitable had made default in paying over to the Globe. The Globe has dipped into the fund and repaid itself, with the consequential duty arising to the Equitable that C
then they should repay any sum so taken from the fund. Clause 2 concludes as follows:

> "The Globe shall pay to the reinsurer interest at the rate of 3½ per cent. per annum on any part of the deposit not utilised in manner aforesaid."

When one looks closely, therefore, at art. 8 it is clear that a distinction is drawn D
between the portion of the premiums which the Globe are entitled to hold back for the purpose of creating a fund—the accumulations, that is—to make up a certain sum equal to 40 per cent. of the premiums, and the interest upon the sum which remains to the credit of the reinsurer and had not been utilised for the purpose of repayment upon default by the reinsurer. The interest is clearly and definitely directed to be paid to the reinsurer. It is not to be credited in account or added E
to the accumulating fund. Clause 3 of art. 8 continues:

> "The reinsurer shall not be entitled to the return of the said deposit or any balance thereof until the determination of this agreement and the satisfaction by the reinsurer of all obligations (actual or contingent) hereunder."

Then provision is made for the determination of the agreement: F

> "Should at any time the reinsurer (a) lose the whole or any part of its paid-up capital, or (b) go into liquidation or a receiver be appointed, or (c) be acquired or controlled by any other company or corporation, the Globe shall have the right to terminate this agreement forthwith by giving notice in writing."

On the termination of this agreement the liability of the reinsurer under current cessions is to continue in force unless the Globe elect to withdraw the existing G
cessions. The Globe can, by charging the reinsurer with a certain sum, a flat rate, withdraw the cessions, withdrawing, therefore, their right to look to the reinsurer for any part of any loss and making use of the right to reimburse themselves at a flat rate from the liability which had been previously undertaken by the reinsurer. In fact, what happened was this. On Jan. 31, 1922, the Equitable went into liquidation. They presented their petition for winding-up, and on H
Feb. 1, notice was given, under the clause that I have just read, to determine the reinsurance treaty. On Feb. 14 the winding-up order was made, and on Jan. 15, 1930, this summons was issued.

It is not in question at the present time that the date at which one has to look to determine whether there is a right of set-off under s. 31 of the Bankruptcy Act, 1914, which applies to the winding-up of companies, is the date of the petition I
for winding-up just as in the case of bankruptcy it is the date of the receiving order. That has been determined in *Re Daintrey, Ex parte Mant* (2) by the Court of Appeal, when LINDLEY, L.J., was presiding, and it has been recognised ever since. It is also clear upon *Re Deveze, Ex parte Barnett* (3) that, as stated by LORD SELBORNE, the right of set-off under s. 31 of the Bankruptcy Act is not one which depends upon the volition either of the trustee or of the creditor. The section is directory in form and requires that its terms should be put in force, with a consequent result that proof should be made in respect of the balance of the account

after the set-off has been put in force—"The balance of the account, and no more, shall be claimed or be paid on either side respectively."

The question we have to determine is whether or not that principle of set-off under s. 31 applies upon the facts of the present case. Different considerations, in our judgment, apply to the accumulated fund and to the interest payable upon it. I will deal with the interest payable upon it, a sum which I understand is not negligible, for it amounts to something like £1,800. That is a sum which under cl. 2 of art. 8 arose as interest at the rate of 3½ per cent. upon the accumulations in the hands of the Globe, and, following the terms of the reinsurance treaty, is the sum which the Globe shall pay to the reinsurer. It appears, therefore, to be a sum representing a debt due from the Globe to the reinsurer, the City Equitable, and one can see no reason why it does not fall precisely within the terms of s. 31 as being a mutual credit or debt arising by reason of the relationship or nexus created between the parties by the reinsurance treaty. They were doing business the one with the other. There was to be payment on either side according as losses occurred or premiums were to be paid by the Globe to the City Equitable, and equally in the course of that business this 3½ per cent. interest became payable to the City Equitable. It seems quite clear that that is a debt which ought to be, and would be, brought into account between merchants, and, so far as the interest goes, it appears a plain case falling within the terms of s. 31. It is unfortunate that this matter was not presented to Maugham, J., but I should like to state quite explicitly that we are not in any sense overruling Maugham, J. on this point, for the matter was not brought to his attention.

I now turn to the more difficult question whether or not there is a right of set-off in respect of the accumulations which have been piled up under the terms of art. 8, cl. 1. There is no doubt of the principle of set-off which was originally adopted in bankruptcy proceedings as far back as the 4th and 5th of Queen Anne and subsequent statutes in the reign of George II, and later, all of which are indicated in the judgment delivered by Sir Nicholas Tindall and are set out at the end of the notes to *Rose* v. *Hart* (4) in 2 Smith Leading Cases (12th Edn.), p. 292. That principle has been distinctly widened and developed. It is suggested now that it has become so wide as to embrace almost all matters which ultimately end in a sum of money being due on the one side and on the other inter se persons who are creditors of a bankrupt or a company in liquidation. To hold that would be to go too far. It has been quite explicitly explained in *Eberle's Hotels and Restaurant Co.* v. *Jonas* (5) (18 Q.B.D. 459 at p. 468) that the two items on either side must be commensurable, and that where you have a claim to specific goods in detinue, and a debt in money on the other side, you cannot have a set-off, although there are some wide observations made in that case on which the Globe has relied. Different considerations apply where money has been handed over for a specific purpose and not treated as a mere item in accounts kept between the bankrupt and his creditors. Illustrations of money handed over for a specific purpose are to be found in *Re Pollitt, Ex parte Minor* (6) and *Re Mid-Kent Fruit Factory* (1). The effect of handing over money for a specific purpose appears from the cases to be that it is taken out from the current accounts as between the parties, to be held, so to speak, in suspense between them until that specific purpose for which it had been handed over has been completed; but even then it appears that the nature and quality of the specific purpose still attaches to the balance of the fund, if any, which remains in the hands of the depositee, because it was originally placed in his hands for the particular purpose, and unless and until there has been some subsequent agreement between them to release that specific purpose the nature and quality of the specific purpose still attaches to the balance of the fund which may remain. Indeed, in all cases it must be the balance of the fund which is in dispute. If the specific purpose had been carried out, then there can remain no question at issue between the parties. It is only in respect of the balance not employed in a specific purpose in respect of which the rights of the parties to it can be canvassed with a view as to whether a set-off applies or not. It appears plain from the cases which are cited that where there has been a specific purpose declared there is not until the specific purpose is put an end to by agreement between the parties any withdrawal of the specific quality or any right of set-off which arises from the general transactions between business men.

In *Re Pollitt* (6) LORD ESHER says this; he deals with the facts ([1893] 1 Q.B. at p. 457), showing that a certain authority had been given for a specific purpose, and then on page 458 he says this:

> "There is this difficulty. If the money was given to the solicitor for a specific purpose, then as between him and the bankrupt there could not be a set-off; nor as between them could there be any mutual credit."

Those words are clear. In *Re Mid-Kent Fruit Factory* (1), VAUGHAN WILLIAMS, J., to whom everyone would pay tribute as being a master in his knowledge of the bankruptcy law, not only decides the case, but also adds a few words as to the law as it now stands, as they may be useful in future cases. He had before him a case in which certain money by several cheques had been handed over to the solicitors of a company for the payment of specific debts. The argument was that the specific purpose had been exhausted, "that there was no longer any specific purpose to which the money was to be applied; and that from that time forward the money remained in the hands of the solicitors as a debt due to the company." That was the argument, but VAUGHAN WILLIAMS, J., holds that:

> "the onus is on the solicitors to show the company's consent to the money remaining in their hands; and I fail to find that the consent was given or that the solicitors ever communicated to the company that they had the balance in their hands."

In other words, dealing clearly with the argument presented that with regard to this balance not included for the specific purpose the quality and nature of the specific purpose ceased, he definitely holds that it did not, because until there was an agreement or some arrangement between the parties that the original quality of the fund should be withdrawn it remained and attached to the balance of the fund just as it had originally attached to the whole of the fund. After having decided that as a judge of first instance, he goes on to make the remarks which may be useful in other cases, and he holds that, although the principle of set-off has been widened—widened, as it was, by the introduction of the words "mutual dealings" in the Act of 1869—"still," he says, "the characteristic of mutuality must always be present." Then he cites a passage from *Palmer* v. *Day & Sons* (7) by LORD RUSSELL OF KILLOWEN, and he then deals with the matter in this way:

> "The present claim of these solicitors to retain the moneys does not arise out of contract at all. It is a claim to retain moneys which were paid into their hands for a specific purpose, for another purpose which was in no wise contemplated by the contract of bailment."

He uses that term in order to show that there was a handing over of money to the solicitors for this specific purpose, and he says this:

> "I do not think it is necessary for me to say more than that in my judgment there can be no set-off in this case, because the money was received under a contract of bailment which allotted the money and necessitated the application of it for a specific purpose, and that bailment was never determined, and neither the company nor its liquidator ever consented to the money being held for any purpose other than the one for which it was originally intended."

That case has been cited in a number of other cases. Counsel for the Globe company was quite satisfied in saying it is the decision of a judge of first instance which is not binding on the Court of Appeal, that there are other cases which ought to be considered, and that it is substantially no longer the law. I have already paid a tribute to the learned judge who delivered the judgment, but it must also be noted that that judgment was delivered on Jan. 17, 1896, and, so far as I know, has never been disputed, still less overruled, in any other case. It

A has been considered in a great number of cases. It was considered in *Re Daintrey, Ex parte Mant* (2), by WRIGHT, J. ([1900] 1 Q.B. at p. 546); it was considered in *Tilley* v. *Bowman, Ltd.* (8) ([1910] 1 K.B. at p. 752) by HAMILTON, J., who deals with it and its decision at some length. It was considered by ASTBURY, J., in *Re H. E. Thorne & Son, Ltd.* (9), and it was considered in this court in *Re City Life Assurance Co., Ltd.* (10) ([1926] 1 Ch. at p. 216), where I myself accepted it B as good and binding upon us. After the long sequence of years which have passed since it was decided and the number of cases in which it has been referred to and followed, it does not appear to this court to be possible, even if they were so minded, either to dispute or overrule its direction.

That being so, I come back to the actual terms of cl. 8, and it seems in its very words to provide that these accumulations are to be held by the Globe as security C for the due performance of the obligation of the reinsurer under this agreement; and following the directions of VAUGHAN WILLIAMS, J., that quality, that nature as security, continues as to any balance no longer required for the purpose for which it was originally collected, unless and until some new contract is made in respect of it which frees the accumulation from that definite purpose of being security for the due performance of the obligation of the reinsurer under this agreement. There D is before us no such evidence of any such fresh agreement. The result is that the moneys so collected are still held by the Globe as security and are set apart from the ordinary current accounts between the Globe and the Equitable, and there can be no set-off under s. 31 in respect of the balance of the sums not required for the purpose for which they were accumulated in the hands of the Globe. The result is that upon this point we agree with the judgment of MAUGHAM, J., and E would answer that question with regard to the accumulations in the same way that he has done.

The Globe company thus succeeds on the question of the interest, but fails on the question of the accumulations; and the question therefore arises as to what ought to be done with the costs of this appeal. In all the circumstances of the case, we think that the right course would be to allow the appeal on the question of F interest, dismissing it on the other point, and that we should direct that there should be no costs on either side of this appeal.

LAWRENCE, L.J.—I agree.

ROMER, L.J.—I agree.

Order accordingly.

G

Solicitors: *Hair & Co.*; *William A. Crump & Son.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

A

HOLMES *v.* PAYNE

[King's Bench Division (Roche, J.), May 1, 2, 12, 1930]

[Reported [1930] 2 K.B. 301; 99 L.J.K.B. 441; 143 L.T. 349; 46 T.L.R. 413; 74 Sol. Jo. 464; 35 Com. Cas. 289]

B

Insurance—Loss—Agreement to replace article mislaid by similar articles—Some replacement articles received by assured—Mislaid article found—Right of insurer to return of articles given in replacement.

By a policy dated Nov. 7, 1928, the defendant insured with Lloyds underwriters jewellery, including a pearl necklace which was valued at £600. On Nov. 20, 1928, she informed an agent of the underwriters that she had lost the necklace, and a search of her house and clothing, which the learned judge found to be one which a reasonably diligent woman would make, failed to disclose where the necklace was. In December the defendant agreed that, instead of the underwriters paying to her the value of the necklace, they should replace it by other jewellery, and, in pursuance of that agreement, she obtained from a jeweller jewellery to the value of some £200 for which the underwriters were liable to pay. On Feb. 27, 1929, the necklace was found in an evening cloak belonging to the defendant. The underwriters refused to take it as salvage, and, therefore, it remained in the possession of the defendant, who refused to part with the jewellery acquired by her under the agreement reached in December, 1928. In an action by the plaintiff, one of the underwriters, claiming the return of the jewellery supplied in replacement, C D E

Held: the agreement of December could not be rescinded or re-opened; that was so although the replacement had not been completely effected; and, therefore, the claim failed.

Per Roche, J.: Uncertainty as to the recovery of the thing insured is, in non-marine matters, the main consideration on the question of loss. It is, of course, true that a thing may be mislaid yet not lost, but, if a thing has been mislaid and is missing or has disappeared and a reasonable time has elapsed to allow of diligent search and recovery and such diligent search has been made and has been fruitless, then the thing may properly be said to be lost. The recovery of the thing is at least uncertain, and, I should say, unlikely. F

Notes. Considered: *F. W. Berk & Co., Ltd.* v. *Style*, [1955] 3 All E.R. 625. Referred to: *Webster* v. *General Accident Fire and Life Assurance Corpn., Ltd.*, [1953] 1 All E.R. 663. G

As to insurance against loss of property, see 22 Halsbury's Laws (3rd Edn.) 330, 331; and for cases see 29 Digest 421.

Cases referred to:

(1) *Da Costa* v. *Firth* (1766), 4 Burr. 1966; 98 E.R. 24; 29 Digest 300, *2461*.

(2) *Moore* v. *Evans*, [1918] A.C. 185; 87 L.J.K.B. 207; 117 L.T. 761; 34 T.L.R. 51; 62 Sol. Jo. 69; 23 Com. Cas. 124, H.L.; 29 Digest 421, *3282*. H

(3) *Polurrian S.S. Co., Ltd.* v. *Young*, [1915] 1 K.B. 922; 84 L.J.K.B. 1025; 112 L.T. 1053; 31 T.L.R. 211; 59 Sol. Jo. 285; 13 Asp.M.L.C. 59; 20 Com. Cas. 152, C.A.; 29 Digest 273, *2213*.

(4) *Roura and Forgas* v. *Townend*, [1919] 1 K.B. 189; 88 L.J.K.B. 393; 120 L.T. 116; 35 T.L.R. 88; 14 Asp.M.L.C. 397; 24 Com. Cas. 71; 29 Digest 273, *2214*. I

Action tried by Roche, J., in the Commercial List.

The plaintiff was one of several underwriters to a policy, dated Nov. 7, 1928, under which they undertook to insure the defendant, Mrs. Payne,

> "against all loss wheresoever which the assured may sustain by the loss of or damage to the property herein specified . . . during the space of twelve calendar months, commencing on Nov. 7, 1928, and ending on Nov. 6, 1929. . . .

> Property insured, £1,199. On jewellery, and/or furs, and/or valuables as per specification, so valued."

The specification included a pearl necklace valued at £600. On Nov. 21, 1928, the defendant reported to the plaintiff's agents that she had missed her pearl necklace, and, though she had searched her house thoroughly, had not found it, and, therefore, thought it must have been lost somewhere outside. A further search was made with the assistance of the plaintiff's assessor, but without success. It was then suggested that the defendant should allow the underwriters to replace the lost necklace with jewellery of equal value. There was no clause in the policy giving the underwriters the option of replacement, but the defendant agreed, and, in fact, obtained jewellery to the retail value of £264, but which was invoiced to the underwriters for £188 2s. On Feb. 27, 1929, the defendant found the missing necklace in the sleeve lining of an evening cloak, and informed the plaintiff. The plaintiff then demanded the return of the jewellery taken in replacement contending that the agreement to replace was void on the ground of mistake of fact. The defendant refused as she had taken a liking to the new jewellery. The plaintiff brought the present action, claiming (i) a declaration that the necklace had never been lost within the meaning of the policy; (ii) the rescission of the agreement made on the supposition that it was lost, (iii) the return of the jewellery supplied in replacement.

Sir Albion Richardson, K.C., and *Harold Murphy* for the plaintiff.
H. D. Samuels for the defendant.

Cur. adv. vult.

On May 12, **ROCHE, J.**, read the following judgment. This action was heard before me in the Commercial List on May 1 and 2. At the conclusion of the argument I reserved my decision. The action was in somewhat unusual form, and raised questions of interest though not, in my opinion, of real difficulty. There is, happily, no doubt or suspicion of the honesty or good faith of all parties concerned. The matter arose out of an insurance policy. The plaintiff in the action was an underwriter of such policy, claiming a declaration that no loss under the policy had happened, with certain consequential relief. The defendant, a married woman, was the assured, and her case shortly was that the underwriters had settled for a loss that happened, and that, in any event, there were no grounds justifying the re-opening of a settlement of a loss which had been made.

The facts I find to be as follows. The defendant owned a pearl necklace. She had bought it from a jeweller named Plante, and had added to the number of pearls from time to time as she found stones to match. It had cost her more than £600. For several years before the events now in question, Mrs. Payne had insured the necklace with her other jewellery or valuables at Lloyds through the introduction of Mr. Plante, the jeweller. The policy current at the material time was dated Nov. 7, 1928, and it provided as follows:

> "In consideration of the premium mentioned, we who have hereunto subscribed our names agree to insure [Mrs. Walter Payne] against all loss wheresoever which the assured may sustain by the loss of or damage to the property herein specified . . . during the space of twelve calendar months, commencing on Nov. 7, 1928, and ending on Nov. 6, 1929."

"Wheresoever" in the policy may mean "whatsoever," or it may be a compendious though not a very grammatical way of saying "wheresoever the assured may sustain the loss." The policy continues:

> "Property insured, £1,199. On jewellery, and/or furs, and/or valuables as per specification so valued."

One of the first articles in the specification is, "pearl necklace, 131 pearls." I saw the necklace, a very pretty ornament, which was, of course, as pearl necklaces are, quite small in bulk and compass. The policy I have read was merely a renewal of another policy which had been current up to Nov. 7, 1928.

On Friday, Nov. 20, Mrs. Payne missed her necklace. She wrote to Mr. Plante the next day as follows, describing her movements during the week down to the Friday.

> "I am very distressed, I have lost my pearl necklace. The last time I can actually remember wearing it was on Tuesday, the 13th, at the Berkeley. I was lunching there in the Grill. That night I went to the Comedy Theatre, Wigmore Hall, and Savoy Grill, but can't remember for certain whether I wore it or not. On Wednesday I dined at a private house in Bayswater. Thursday evening I went to the Covent Garden ball. I certainly have not seen it since."

Then she adds various statements as to what steps she had taken through the police, and concludes: "I do hope we shall recover it. I only missed it last night, otherwise I would have notified you before." With the assistance of her maids Mrs. Payne made thorough search of her house, and particularly in her bedroom and of her articles of wearing apparel kept therein. This search was unavailing. Mr. Summers, an assessor, acted for the underwriters, and saw Mrs. Payne at her house. He suggested further search, and inquiries in and out of Mrs. Payne's house. These were made without result. An advertisement with the offer of a reward was resorted to, but again without result. Mr. Summers had, at his interview with Mrs. Payne on Nov. 23, suggested that, if the necklace were not found, it should be replaced by the underwriters. There was no clause in the policy as to replacement. The defendant, Mrs. Payne, raised no question as to this, and, indeed, she had not the knowledge, even had she the inclination, to question the proposal as one that was not admissible as of right under the policy. On Dec. 4, Mr. Summers wrote to Mrs. Payne as follows. After reference in the first paragraph to certain information which had been received which turned out to have no bearing on the loss, the second paragraph proceeds:

> "We saw Mr. Plante yesterday, and if the necklace is not found in the course of the next few days, we would suggest that you see Mr. Plante with a view to him replacing the necklace for you."

Shortly afterwards Mr. Summers authorised Mr. Plante to supply Mrs. Payne with jewellery to the value of £600, thereby establishing a credit in Mrs. Payne's favour with Mr. Plante to that amount. Mrs. Payne acted on the agreement, and arranged with Mr. Plante to take the replacement in the form of several pieces of jewellery rather than in the form of one article or a pearl necklace. On Dec. 23, she selected a jade necklace and an emerald and diamond ring, and in February she selected two other rings before Feb. 27. Mrs. Payne was in process of considering and selecting articles to exhaust the balance of the £600 at the time when the events I shall next describe happened. The price to Mrs. Payne of the selected articles, that is to say, of the articles selected in December and February, was £264. The cost to Mr. Plante of the same articles was £188, and of the difference between those two sums, about £30, would represent discount to the underwriters and the rest Mr. Plante's profit.

On Feb. 27 the pearl necklace was found by Mrs. Payne's sister. She was trying on an evening cloak which Mrs. Payne contemplated disposing of, and did subsequently dispose of. During the trying on the necklace fell out of the cloak. The curious circumstance was that not only had this cloak been included in the search made by Mrs. Payne and her maids and well shaken on more than one occasion, but I am quite satisfied that between November and February Mrs. Payne had worn this same cloak on several, and probably on as many as half a dozen, occasions, and on none of them had the necklace fallen out or been felt by the wearer or by anyone who helped her into the cloak. The cloak was not available for inspection at the hearing, but, though it is not more than a surmise, the most probable supposition I think is that some part of the fur of the collar or cuffs of the cloak had come unstitched and the necklace had got into and then out of its hiding place. Mrs. Payne at once communicated the discovery to the underwriters. She had then got over her annoyance at the loss of her pearl necklace and liked and preferred to keep her new ornaments, which she had shown to her friends and had worn. The underwriters, on the other hand, preferred not to take the pearl necklace as salvage, and contended that they were not bound to do so. It appeared from the jeweller's evidence that, owing to market conditions, the necklace was not then worth the full sum of £600, but perhaps £100 less. By some oversight the underwriters' decision and contention were not communicated to Mrs. Payne until the middle of April, and by that time she was, not unnaturally, even more minded to adhere to the settlement made in December.

The question is whether or not the underwriters are entitled to re-open that settlement. The points of claim contain the following allegations:

> "Paragraph 2: On 21st November, 1928, the defendant by letter addressed to one Henry Hodson Plante, as agent for the plaintiff and verbally at an interview with the plaintiffs' agent, one Alfred Alexander Summers, a member of the firm of Summers, Henderson & Co., assessors, informed the plaintiff that she had lost the said pearl necklace, and that her residence, No. 16, York Terrace, Regent's Park, London, had been thoroughly searched and that the said necklace must have been lost at some place other than her said residence. Paragraph (3): In or about the middle of December, 1928, the plaintiff, by his agent, the said Henry Hodson Plante, verbally agreed with the defendant that in lieu of the payment to her of the sum of £600, the said Henry Hodson Plante should supply her with jewellery of an equivalent value. The plaintiff entered into the said agreement in reliance on the statements made by the defendant as in para. 2 hereof mentioned and in the belief that the said necklace had been actually lost within the meaning of the said policy."

Paragraph 7 contains the various claims:

> "(a) A declaration that the necklace in para. 1 hereof mentioned was never lost within the meaning of the said policy; (b) rescission of the agreement in para. 3 hereof mentioned; (c) the return of the jewellery in para. 4 hereof mentioned or the sum of £188 2s., the value thereof."

It is to be observed that para. 3 pleads the arrangement for replacement made in December, 1928, as an agreement. Such pleading is in accordance with the fact. It was a binding agreement outside the policy, and one of obvious pecuniary advantage to the underwriters and to the jeweller who introduced the insurance and dealt with the replacement. The plaintiff's contentions were formulated in the following manner. (i) There was no loss within the policy, and the replacement articles were supplied under a mistake of fact; (ii) the agreement to replace was induced by a representation which was in fact untrue, namely, that the defendant had made a thorough search of her wardrobe; and (iii) it was an implied term of the agreement to replace that, if the insured object should be recovered before replacement was completed, the replacement agreement must be void and the articles supplied under it must be returned. There was, of course, no suggestion that the representations relied upon were other than innocent and honest.

The contentions of the underwriters are, in my judgment, not well founded either in fact or in law. My reasons for this opinion are as follows. As regards the facts, I have already, in my narrative of the facts, stated various things which were matters of controversy, but as to which I have intended that my narrative should represent my findings as to the facts. Beyond that I am satisfied, and hold, that the defendant, Mrs. Payne, made a thorough search, that is to say, she had made all such search as occurred to her to make at a time when she was certainly extremely anxious to find what she had lost. It has to be remembered that she had not any reason to connect the cloak in question with the loss any more than any other of her articles of apparel or to suppose that she was wearing that cloak at the time the loss occurred. She had more than one evening cloak. It is said that she ought to have searched the cloak and all her clothes by feeling in all possible parts and places of her garments. But I feel quite unable to come

A to the conclusion that Mrs. Payne in her search fell below the standard of a reasonably diligent woman, or that the search which is now suggested, but which was not among Mr. Summers' suggestions at the time, would have then revealed what the shaking and wearing of the cloak failed to reveal. I further find that there was no such mistake as was alleged, and that Mr. Summers was not induced to enter into the agreement by reason of the representations of Mrs. Payne. Mr. B Summers, a very experienced gentleman, was engaged in an investigation and formed his own conclusions on all the facts and not exclusively or mainly on what he was told by Mrs. Payne. The agreement was made because, on all the evidence and his experience, Mr. Summers arrived at the conclusion that the thing insured was lost and that it was to his principals' interest to make such an agreement. Neither was there the alleged mistake nor any mistake sufficient to invalidate the C agreement. Both Mrs. Payne and Mr. Summers thought that in all probability the loss occurred outside the house, but the inference was not very certain nor was it the basis of the agreement.

As to the law, no authority was cited to me which justified the rescission or re-opening of the settlement made between the underwriter and the assured. It was said that an adjustment could be re-opened: see ARNOULD ON MARINE INSURANCE, D s. 1242, and following sections and cases cited thereunder. But an adjustment, apart from payment or actual settlement, is an admission and no more, and is subject to the same correction as any other admission. The case is, however, different where payment has been made: see *Da Costa* v. *Firth* (1); and I see no distinction between payment and replacement. In my opinion, the fact that the replacement, though agreed to, had not been completely effected can make no E difference in the circumstances of this case.

These grounds are sufficient to dispose of the action and it is unnecessary, in my view, to decide whether there was in November and December, 1928, and down to Feb. 27, 1929, a loss of the necklace. I should not be inclined nor, I think, entitled to make any declaration that there was no loss when, in my judgment, the underwriters are not entitled to any consequential relief by way of a re-opening or F rescission of the settlement. But I desire to avoid the impression that, in my view, the contention that there was no loss is well founded. It was at one time contended that a thing cannot be lost when it is in the owner's house. The contention is not supported by experience. It would be as unwise, as it is unnecessary, that I should attempt a definition of the word "loss" under a policy such as this. Losses are of many kinds and happen under diverse circumstances: see G BANKES, L.J., in *Moore* v. *Evans* (2) ([1917] 1 K.B. at p. 471). The Marine Insurance Act, 1906, has now defined losses for the purposes of marine insurance, and, in the view of the Court of Appeal, in so doing has made some change from the common law rule: see *Polurrian S.S. Co., Ltd.* v. *Young* (3); unlikelihood of recovery being substituted for uncertainty as to recovery as the test. Uncertainty as to recovery of the thing insured is, in my opinion, in non-marine matters, the H main consideration on the question of loss. In this connection it is, of course, true that a thing may be mislaid yet not lost, but, in my opinion, if a thing has been mislaid and is missing or has disappeared and a reasonable time has elapsed to allow of diligent search and recovery and such diligent search has been made and has been fruitless, then the thing may properly be said to be lost. The recovery of the thing is at least uncertain and, I should say, unlikely.

I In the present case, in the view of the underwriters' representative as well as of the assured, a reasonable time elapsed before they settled, and, as I have already found, diligent search was made and was fruitless. Subsequent discovery or recovery of the thing assured is, of course, of itself no disproof of the loss. On the contrary, the rule in a case such as the present is, in my judgment, the same as in the somewhat analogous case of capture: see the cases cited in the exhaustive judgment of KENNEDY, L.J., in *Polurrian S.S. Co., Ltd.* v. *Young* (3), and in a judgment of my own, *Roura and Forgas* v. *Townend* (4). It follows that I am unable to find any good reason for the implication of the term which it was contended for the plaintiff should be implied in the agreement of settlement. There will therefore be judgment for the defendant with the costs of the action.

Judgment for defendant.

Solicitors: *Oswald Hickson, Collier & Co.*; *Andrew Wood, Purves & Sutton.*

[*Reported by* R. A. YULE, ESQ., *Barrister-at-Law.*]

HUMPHREYS *v.* DREAMLAND (MARGATE), LTD.

[HOUSE OF LORDS (Lord Buckmaster, Lord Dunedin, Lord Blanesburgh, Lord Warrington and Lord Tomlin), November 6, 7, December 9, 1930]

[Reported 100 L.J.K.B. 137; 144 L.T. 529; 74 Sol. Jo. 862]

Negligence—Amusement ground—Right granted by landowner to S. to erect and run amusement machine—Invitation by landowner to public to visit ground—Sole right in S. to possession of land and to permit persons to use machine—Negligence by S. resulting in injury to person on machine—Liability of landowner.

By an agreement dated Jan. 30, 1928, and made between the respondents and one S., the respondents agreed to "let" to S., "for the purpose of erecting and running" an amusement machine known as the Atlantic Flyer, part of land belonging to them, and S. agreed to pay to the respondents one-third of the gross receipts and sums in respect of electric current consumed and wages for cashiers appointed by the respondents. The respondents published advertisements inviting people to visit their land, but the House took the view that these advertisements could not be construed as inviting any person to enter any show or amusement building on the land. On June 17, 1928, the son of the appellant was killed by being thrown from the Atlantic Flyer which was in a defective condition through the negligence of S. In an action by the appellant against the respondents under Lord Campbell's Act,

Held: the agreement between S. and the respondents gave S. the right to the possession of the land on which the machine stood and the right to exclude therefrom all except those who came there by his express invitation and the respondents had no such right, and, therefore, S. alone, and not the respondents, was liable in respect of the negligence which resulted in the death of the appellant's son.

Notes. As to the duty owed by an occupier of premises to his visitors in respect of dangers thereon, see the Occupiers' Liability Act, 1957: 37 HALSBURY'S STATUTES (2nd Edn.) 832.

Considered: *Murray* v. *Harringay Arena, Ltd.*, [1951] 2 All E.R. 320.

As to negligence in regard to property generally, see 23 HALSBURY'S LAWS (2nd Edn.) 596 et seq.; and for cases 36 DIGEST (Repl.) 45 et seq.

Appeal by the plaintiff in the action from an order of the Court of Appeal (SCRUTTON, GREER and SLESSER, L.JJ.), ordering that a judgment made in favour of the respondents (the defendants) by SHEARMAN, J., be affirmed.

The respondents were the proprietors of and in occupation of a space of land known as "Dreamland," situated at Margate, which was a place for the entertainment of the public. The appellant was the mother and partial dependant of Walter Charles Humphreys deceased, who at the time of his death was earning £2 10s. a week, of which he gave the plaintiff £2 a week. His age was twenty-two. On June 17, 1928, Humphreys, with other persons, went on the respondents' land for his amusement. He went on a machine known as the "Atlantic Flyer," A in which he was a passenger for reward, and was killed by being thrown out of the machine. The "Atlantic Flyer" was one of the attractions or amusements on the respondents' land and had been placed upon their property by one Fritz Carl Wilhelm Schmidt by virtue of an agreement between the respondents and Schmidt. No payment was made by the deceased for admission to "Dreamland." A payment of 6d. for riding in the "Atlantic Flyer" was made by or on behalf of the B deceased. Such payment was made at the desk or ticket office in the "Atlantic Flyer."

The appellant claimed from the respondents damages for negligence under the Fatal Accidents Act, 1846 (Lord Campbell's Act). The action was tried before SHEARMAN, J., and a common jury. At the close of the appellant's case counsel for the respondents submitted there was no case to answer and the learned judge C upheld this submission and entered judgment for the respondents, but took the verdict of the jury upon the following three questions: (i) Was the "Atlantic Flyer" on the date in question by the nature of its construction dangerous to passengers invited to take a seat?—Yes. (ii) If yes, was the defendant Schmidt guilty of want of reasonable care in not discovering that it was dangerous?—Yes. (iii) Were the defendants, Dreamland, Ltd., guilty of want of reasonable care in D not discovering that it was dangerous?—Yes. The jury assessed the damages at £400, and on their findings the learned judge entered judgment for the appellant against the defendant Schmidt for the said amount and costs. He held that the respondents had by their agreement with Schmidt parted with the control of the land on which the "Atlantic Flyer" was erected and that the agreement was equivalent to a tenancy, that the only person who invited the deceased to ride in the E "Atlantic Flyer" was a servant of the defendant Schmidt, and that there was no relation of invitor and invitee between the deceased and the respondents.

On appeal, the Court of Appeal held that there was no contract between the deceased and the respondents upon which the respondents could be held liable, and further that there was no duty owed by the respondents to the deceased to take reasonable care to see that the "Atlantic Flyer" was safe, since the relation F of invitor and invitee had not been established.

Doughty, K.C., and *C. J. A. Doughty* for the appellant.
Hilbery, K.C., and *Wilfrid Lewis* for the respondents.

Cur. adv. vult.

Dec. 9. The following opinions were read.

G

LORD BUCKMASTER.—The appellant was the mother of and was partially dependent upon Walter Charles Humphreys. On June 17, 1928, he went upon land, the property of the respondents—"Dreamland"—and was killed whilst riding on a machine known as the "Atlantic Flyer." This machine was the property of one F. C. W. Schmidt, whose liability for the accident is no longer disputed, but, apparently, is incapable of being discharged. H

The circumstances that led up to this deplorable accident are these. The respondents, Dreamland, Ltd., owned an area of land in Margate, about fifteen acres in extent. Upon this land they arranged with showmen and itinerant owners of various amusements to set up their entertainments on terms which provided that part of the profit went to "Dreamland." Advertisements were extensively issued by the respondents, inviting people to come to "Dreamland" in the hopes, no I doubt, that when there they would be induced to patronise the various shows and amusements, and by this means bring profit to the respondents. Sometimes a charge is made for admission to the ground, but sometimes it is not. The occasion of the present accident was a free day. The "Atlantic Flyer" was erected upon this ground by F. C. W. Schmidt under an agreement made between him and Dreamland, Ltd., dated Jan. 30, 1928. It is not stated, but it certainly seems probable, that this is a common form of agreement under which the various shows are erected on Dreamland property, for the agreement, in part printed, suggests that it is in common use. It is certainly one of the most confusing documents that can be imagined. It begins with the provision that "Dreamland," who are called "the owner," agrees to let to F. C. W. Schmidt, called "the concessionnaire," "only and the concessionnaire agrees to take over for the summer season, 1928, commencing Whitsun and terminating on or about Sept. 22" a space of land not exactly defined, "for the purpose of erecting and running the 'Atlantic Flyer.'" Then it is provided:

> The owner reserves the right to use any space not required in the owner's opinion for the reasonable running or operation of the concession hereby granted in any way the owner desires. For this concession the concessionnaire shall pay to the owner 33⅓ per cent. of the gross receipts, electric current consumed at the rate of 6d. per unit, rates and cashiers' wages, such cashiers to be appointed by the owner. All monies taken shall be paid in to the offices of the owner daily and concessionnaire's percentage will be paid weekly, payable as to on signing agreement and the remainder.

The blank spaces were not filled in and they remain blank. Certain rules and regulations are agreed to as an integral part of the agreement, and in case of breach it is provided that the owner may determine "this agreement forthwith without prejudice to exercise any legal claim for damages, distraint or injunction." The rules are as confusing as the agreement, but some of them require special notice:

> 14. The owner reserves the right to refuse admission to any person or to eject any person whose presence in his opinion is detrimental to the business of the owner.
>
> 19. The owner reserves the right to charge admission to the ground or any part thereof.
>
> 22. In any concession let for the purpose of a side show or exhibition or device which comes within the scope of the entertainment tax the concessionnaire shall provide at his own expense a ticket taker whose duty it shall be to see that a ticket is issued to each and every person entering the building or booth and that the said ticket is destroyed in compliance with the regulations governing this class of entertainment.

The result of it all appears to me to be that the cashiers are appointed by the respondents who primarily pay their wages, which each concessionnaire must repay. But so far as issuing the tickets are concerned, or refusing admittance to the show as apart from the grounds, that rests with the concessionnaire. Subject to innumerable restrictions as to the way in which he is to use the ground allotted for his show, the control of the show itself is in his hands, and the right of interference on the part of the owner is confined (see r. 27) to "the state and condition of the premises, or the nature and character of the said concession, exhibition or entertainment."

What happened was this. Humphreys came and took tickets for himself and three others at the entrance to this "Atlantic Flyer." The machine consisted of a number of boats hung on iron rods, which, as they were rotated, proceeded to go upwards and outwards by centrifugal force. One of the bolts holding the car in which Humphreys was seated gave way, and of the eight occupants of the boat four were killed and four were badly injured. The question is, in these circumstances: Can Dreamland be made responsible for the accident? In order to determine this it is essential to consider what was the invitation that Dreamland issued. That the advertisements in the town asking people to come to "Dreamland" were their advertisements is made perfectly plain by the answers to interrogatories which do not appear to have been effectively called to the attention of the Court of Appeal, as GREER, L.J., states that the origin of these advertisements is not known. The advertisements, being admitted, do no more than invite people to this area of land owned by the respondents. They cannot, in my opinion, be construed as an invitation to enter any side show or building which happens to be on the land, any more than it would include an invitation to enter a lodge-keeper's cottage or any other similar building. It cannot be more than an invitation to come to that part of the land to which "Dreamland" are entitled to invite them, and I cannot see how it can be construed as an invitation to enter the shows. If this be so, the action based upon the view that there was an invitation to property on which there was a hidden danger under the control of the inviter, fails, and it becomes necessary to see whether the circumstances arising out of the contract with Schmidt involves such a responsibility. The appellants allege that the gatekeeper was the respondents' servant, and that, consequently, the contract for admission was made with them. I do not think this contention can prevail. That the person who received the money was the respondents' servant is, I think, true, but only for a limited purpose. He was not their servant for the purpose of either admitting or excluding people to the show. For this purpose he was responsible to Schmidt. When, therefore, he issued the ticket he made no contract expressed or implied with Humphreys on behalf of Dreamland, and for this reason in my opinion the appeal must fail. It is plain that reference to authorities cannot assist in the elucidation of this appeal, some indeed were quoted, but none need be chosen.

LORD DUNEDIN.—I concur.

LORD BLANESBURGH.—I also concur.

LORD WARRINGTON.—I agree. Counsel for the appellant in the course of his argument expressly stated that he did not rely on any claim arising out of contract; there remains only the contention that the respondents owed a duty to the deceased man as their invitee. I entirely agree that on the fact, although the respondents invited him to enter "Dreamland," it was Schmidt alone and not "Dreamland" who invited him to pass their pay box and make trial of that through which he met his death. I should like to add a few words on one point, namely, the construction and effect of the agreement between the respondents and Schmidt. There was much discussion in the course of the argument on the question whether the agreement constituted the relation of lessor and lessee between the parties. Without for a moment saying I disagree with those who thought that it did, my own view is that it does not matter; it is enough for this purpose if it gave to Schmidt the right to the possession of the land on which the machine stood and the right to exclude therefrom all except those who came there by his express invitation. By the agreement the respondents agreed to let land for the particular purpose, reserving only such part as was not required for the reasonable running or operation of the particular concession. Power is reserved for the owner forcibly to take possession of the land in certain events, thereby clearly implying that until that was done the possession was in the concessionnaires. The owner also reserves the right to enter and inspect. In my opinion, the only conclusion that can be drawn is that, whether or not the technical relation of lessor and lessee was created, it was the concessionnaire alone who had the right to invite customers to make use of his machine, and that the respondents neither had the right in law, nor did in fact invite the deceased man to incur the risk resulting in his death. I agree that the appeal fails and must be dismissed.

LORD TOMLIN.—The liability, if any, of the respondents must either rest upon a contractual relation between the deceased and themselves or be founded in tort. There was in fact no contractual relation between the deceased and the respondents unless it arose from the payment and receipt of the entrance money to the "Atlantic Flyer." I think that Schmidt who operated the flyer was lessee of the site of the flyer, and that the attendant who took the entrance money was the agent of Schmidt only. I do not think that the attendant became the agent of the respondents or the agent of the respondents and Schmidt jointly because he was selected by the respondents or because he handed the money collected to the respondents or because the respondents were entitled to a share in the gross receipts. It follows, therefore, in my opinion that there was no contract between the deceased and the respondents. Further, I think that any claim founded on tort also fails. Admittedly an invitation to "Dreamland" was extended by the respondents to the deceased, but unless in that invitation "Dreamland" included the "Atlantic Flyer" the respondents cannot be fixed with liability in respect of what happened on the "Atlantic Flyer." Upon the evidence it is, in my opinion, impossible to hold that the invitation was an invitation to visit the "Atlantic Flyer." The "Atlantic Flyer" was not in the occupation of the respondents, and it was only by paying to the real occupant of the flyer the appropriate entrance money that a visitor to "Dreamland" was entitled to enter the flyer at all. In my opinion, the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Schultess-Young, Warren & Bird*; *William Hurd & Son.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

UNITED FRUIT CO., LTD. *v.* FREDERICK LEYLAND & CO., LTD.

[COURT OF APPEAL (Scrutton, Lawrence and Greer, L.JJ.), October 16, 17, 1930]

[Reported 144 L.T. 97; 47 T.L.R. 33; 74 Sol. Jo. 735]

Injunction—Interim injunction—Perishable goods—Order for sale and payment of proceeds into court.

In exercising its discretion to grant an interim injunction the court ought not to make an order which may have the result of keeping perishable goods in statu quo until the hearing of the case, by which time they may be completely perished.

The plaintiffs had entered into contracts with banana growers in Colombia under which all the produce of certain estates were to be sold to them by the growers. They alleged that the defendants had acquired and were importing to England cargoes containing bananas covered by these contracts which were thereby infringed. On the application of the plaintiffs, BENNETT, J., granted an interim injunction restraining the defendants, their servants or agents, from converting to their own use or dealing with or in any way disposing of 2,041 stems of bananas the property of the plaintiffs, on board the steamship *D.*, or any other bananas, the property of the plaintiffs on that ship, save by delivery of the same to the plaintiffs or their agents.

Held: the order was unsatisfactory because it did not identify the 2,041 stems which were to be dealt with and it did not order delivery to the plaintiffs, but simply forbade anything being done except delivery to them with the result that under the order the defendants might do nothing and the bananas would go bad; the learned judge should have made an order under R.S.C., Ord. 50, r. 2, for the sale of those bananas the ownership of which was in dispute and payment of the proceeds into court.

Notes. As to the form of orders for injunctions, see 21 HALSBURY'S LAWS (3rd Edn.) 419 et seq.; and for cases see 28 DIGEST 510–512.

Case referred to:

(1) *Hollins* v. *Fowler* (1875), L.R. 7 H.L. 757; 44 L.J.Q.B. 169; 33 L.T. 73; 40 J.P. 53, H.L.; 43 Digest 471, *102*.

Appeal from an order of BENNETT, J.

The facts appear from the headnote and the judgment of SCRUTTON, L.J. The order made by BENNETT, J., in the Vacation Court was as follows:

> "It is ordered that upon the plaintiffs' paying into court to the credit of this A action . . . as security for the performance of their . . . undertakings as to damages, £2,500 . . . the defendants, Frederick Leyland & Co., Ltd., and Roberts, Brining & Co., Ltd., their respective agents and servants, and every of them be restrained, and an injunction is hereby granted restraining them, and every of them, from converting to their own use or dealing with or in any way disposing of 2,041 stems of bananas, the property of the plaintiffs now B on board the steamship *Daytonian* or any other bananas, the property of the plaintiffs on that ship, save by delivery of the same as to the plaintiffs or their agents."

The defendants appealed.

Sir Walter Greaves Lord, K.C., and *H. I. Nelson*, for the defendants, Roberts, Brining and Co. C

James Dickinson, K.C., and *W. L. McNair*, for the defendants, Frederick Leyland and Co.

D. N. Pritt, K.C., *S. O. Henn Collins*, and *A. T. Denning* for the plaintiffs.

The facts and arguments appear in the judgments.

SCRUTTON, L.J.—This is a troublesome matter, but what the court has to do D is, before the trial of the action, to make such an order as will deal satisfactorily with the perishable subject-matter which is in dispute.

The plaintiffs, the United Fruit Co., are a very well-known and large United States company, who have very large dealings in importing fruit to Europe and elsewhere, in this case in connection with bananas. It appears that the republic of Colombia, in Central America, is a very extensive grower of bananas, and that E about 97 per cent. of the bananas grown in that country are covered by contracts which the United Fruit Co. have with the growers. Those contracts are for periods of years, four years, five years, six years, and ten years. Under their terms the bananas, which are to be sold to the United Fruit Co., become the property of the United Fruit Co. when they are severed from the trees; and the contracts provide that all the produce of the named estates is to be sold to the F United Fruit Co. That, of course, is very nearly a monopoly of Colombian bananas; and one can understand that other shipowners or fruit importers may, perfectly legitimately, desire to break down that monopoly. That they may do it by getting the growers, when their contracts expire, not to renew their contracts with the United Fruit Co., but to contract with them. Equally, of course, they cannot do it by going to the growers—I am putting an extreme case—and saying: "It is quite G true you have contracted to sell to the United Fruit Co. Sell to me. Break your contract." It appears that, in June of this year, the United Fruit Co. got information that the first defendants, Leyland & Co., as shipowners, and the second defendants, Roberts, Brining & Co., as having some not very clear connection with Leyland & Co., but as being people who want to import and sell bananas, were contemplating action which might have the result of Leyland & Co. carrying and H Roberts, Brining & Co. selling bananas which were covered by the contracts which the United Fruit Co. had with the growers. The United Fruit Co. had interviews with the responsible people, either in Leyland & Co. or in the company which is behind Leyland & Co., an American company called the International Marine, and pointed out to them that this action would be a breach of their contracts. Mr. Franklin, the president of the International Marine, seems to have taken the I view: "Well, if I don't carry these, somebody else will; so I may as well carry them." That is a very odd position to take up if the things he is going to buy and carry are the property of the United Fruit Co. It is not much good saying: "If I do not steal these, somebody else will, so I will steal them." The only relevance of that matter is that Leyland & Co., Roberts, Brining & Co., and the controlling company behind them, the International Marine, had lots of notice of the position. They had also notice of the position that, apparently in Colombia you register your contracts, making them public documents, so that anybody wanting to see what the position is as to particular goods or particular estates may go to the public register and see what are the contracts.

I am not deciding anything finally what is the position, but it would seem that some entity called the Co-operative, as to the nature of which there is practically no evidence, has been dealing extensively with the growers. What will be proved is a matter upon which I cannot speculate, but I understand, as far as it has got at present, that the evidence stands in this way, that the manager of the Co-operative says, in general terms, "I have not bought and I have not shipped any bananas which come from estates which are covered by the contracts of the United Fruit Co." He does not commit himself to any details as to which estates he has bought from, or which growers, and the plaintiffs have adduced very detailed evidence that the particular bananas in question, on board the *Daytonian*, the ship in question in the case, were cut from estates the subject-matter of contracts with the United Fruit Co., estates belonging to growers who had contracts with the United Fruit Co. Looking at the evidence at present before the court about the *Daytonian*, the strong impression left on my mind is that the bananas which are in question in this case did come to the Co-operative from growers and estates which were parties to and the subject of contracts with the United Fruit Co. But I do not think I am entitled to decide that definitely, because, as counsel has pointed out, there are details in which the evidence put forward on behalf of the plaintiff company varies. There are differences of detail as to the numbers of the trucks in which the goods came down to the ship; there are small differences in detail as to the number of bananas said to have come down in particular trucks. There is the general allegation of the Co-operative manager that he has not bought goods the produce of any estate covered by contracts with the United Fruit Co., but he does not go on positively to say, "I did buy from such and such an estate, from such and such a grower."

In the *Daytonian Case* the United Fruit Co. were on the watch and had what they thought to be sufficient evidence that numbers of shipments were being sent down to this ship from growers who had contracts with the United Fruit Co. and from estates which were covered by those contracts. Some of the evidence, if it is accepted, shows that the growers knew they were doing wrong and tried to conceal the fact that bananas were coming from their estates by sending them to stations belonging to other estates; but, anyhow, on the same day on which these particular goods were loaded on the *Daytonian* two trains at least came down, as to which in great detail the plaintiffs produced evidence that a specified number of the stems came from estates and growers who had monopoly contracts with the United Fruit Co. It is said in the evidence that the trains came down at half-past nine in the morning; that shipment did not begin till twelve o'clock in the day; that at half-past one the representatives of the United Fruit Co. handed to the agent of Roberts, Brining & Co., and the agent of Leyland & Co., and the captain detailed letters alleging that a specified number of these stems were the property of the United Fruit Co. and calling upon them not to ship them. It appears, on the evidence, that the captain took the view as he stated: "I am bound to take anything that is tendered to me," and paid no attention to the fact that certain persons were saying: "These are my property and you must not ship these goods." It is perfectly true that these goods were mixed, that is to say, that there were in some of the trains stems of bananas which the plaintiffs are not claiming, but the ship was given particulars, whether they were accurate or not, of the trucks in which the bananas in which the United Fruit Co. claim an interest were stowed, and of the numbers of stems of bananas in those trucks. The captain paid no attention to that. I do not know that it would have mattered if he did not know, because since *Hollins* v. *Fowler* (1) if you do convert other people's property it does not matter that you did not know and that you acted in good faith.

The goods came to England. The question then was: What is to be the relation between the United Fruit Co., who claimed that the goods were theirs, and Leyland & Co., the shipowners, who carried the goods and had to deliver them to somebody, and Roberts, Brining & Co., who wanted to sell the goods which the United Fruit Co. said was their property? So, first an ex parte injunction was obtained. The matter came before BENNETT, J., and he made an order and the appeal is against the order that he made. The order that he made was this:

> "It is ordered that upon the plaintiffs paying into court to the credit of this action on or before Friday, Sept. 12, 1930, as security for the performance of [an undertaking to pay any damages in case the court or a judge should be of opinion that the defendants should have sustained damage by reason of this order which the plaintiffs ought to pay] as to damages £2,500. . . . Messrs Frederick Leyland & Co., Ltd., and Messrs. Roberts, Brining & Co., Ltd., their respective agents and servants and every of them be restrained and an injunction is hereby granted restraining them and every of them from converting to their own use or dealing with or in any way disposing of 2,041 stems of bananas, the property of the plaintiffs now on board the S.S. *Daytonian* or any other bananas, the property of the plaintiffs on that ship, save by delivery of the same to the plaintiffs or their agents."

It strikes one at once that that is not a very satisfactory and rather an embarrassing order, because bananas are perishable. You cannot stock bananas for a year in a warehouse and expect to find anything but rubbish at the end of it. The order does not identify the 2,041 stems of bananas which are only to be dealt with, if at all, by delivery to the plaintiffs; and the order does not order delivery to the plaintiffs: it simply says nothing is to be done except delivery to the plaintiffs, so that they may, under the order, do nothing with the result that the bananas will go bad. The parties themselves very sensibly recognised the difficulties in the order and, by agreement, they arranged that the bananas should be selected in a way with which I need not trouble, but which the parties agreed was a proper way of dealing with it, and sold, and that the proceeds should be put in joint names until the trial of the action, so that, as far as the subject-matter of this appeal is concerned, it has been dealt with. The bananas have been disposed of and, I suppose, by this time, all eaten. The plaintiffs have paid £2,500 into court, which is there for the court to deal with. I do not think the order which BENNETT, J., made was a satisfactory one, because it does not provide for the fact of their being perishable goods. It does not, on the face of it, identify the goods, and it does lead to the possibility of the bananas simply staying in the warehouse with nobody doing anything with them until they go bad. The question, in the first instance, is what order does the court think should have been made in these circumstances?

The contention of the defendants is that the court should have made no order—that it should have let Leyland & Co. deliver to Roberts, Brining & Co.; let Roberts, Brining & Co. sell and take the proceeds, and leave the plaintiffs to the possibility of obtaining damages when at some considerable time in the future the case is tried. I do not think that would be a satisfactory or businesslike way of dealing with the matter. On the evidence as it stood a large quantity of bananas in the *Daytonian* were in all probability the property of the plaintiffs and that in these circumstances goods which are in all probability the property of the plaintiffs should be sold by somebody who does not own them, and the proceeds appropriated by somebody who does not own them, on the chance of damages being recoverable from that person, when at some considerable time later the case comes to be tried, does not appear to me to be at all a businesslike or a satisfactory legal arrangement, having regard to the evidence in the case of the strong probability of a considerable quantity of these goods being the plaintiffs'. What then should be done? It appears to me that the course that the learned judge should have taken should have been under R.S.C., Ord. 50, r. 2, to make an order for the sale of the perishable articles, the ownership of which was in dispute and which would have perished if nothing had been done except to keep the goods themselves in medio till the trial of the action. It appears to me further that, in the whole of the circumstances, when the goods were sold, the money should come into court. If that is hard on anybody it is hard on the plaintiffs. The plaintiffs were told to bring £2,500 into court.

Some goods which are probably theirs are sold and they are not allowed to have the proceeds, and they have to pay £2,500 into court as well. On the other hand it may be said as alleviation for what seems to be hardship upon them (i) they have not paid any freight and the goods got to England without their paying freight; (ii) they have not yet had to pay for the goods. If they get the goods without having to pay the price or the freight that is some compensation for the hardship of having to pay £2,500 into court and not getting the proceeds of the goods which were sold. I myself do not see any hardship on the defendants. With ample notice of the rights which the plaintiffs claimed, and with, in my view, quite insufficient inquiry as to what goods they were getting, though they were told that they were getting the plaintiffs' goods, they have chosen to run the risk. Whether the position was: "If I do not take them somebody else will, so I may as well be irregular," or whether it was: "I will run the risk and chance it, relying on the manager of the Co-operative," I do not much care, but they have run the risk, and I do not think it is any hardship on them that, running the risk, if it turns out that they have incurred a risk they should suffer for it. The view, therefore, that the court takes is that the order of BENNETT, J., should be varied as follows: On the plaintiffs giving an undertaking in damages and paying into court £2,500 as security for the performance of the undertaking order for sale of 2,041 stems of bananas to be selected jointly by representatives of each party, or, in case of dispute, by a person nominated by a judge and payment of net proceeds into court to abide the result of the action. Costs here and below costs in the cause.

I only want to say this further. This court is not deciding what will happen in future shipments unless the evidence is exactly or substantially the same. When another ship comes forward the evidence may or may not be quite different. The defendants have now had a warning that the plaintiffs are conducting their proceedings with great skill and have affidavits ready the moment when shipment takes place. If the defendants want to succeed, they must be equally careful and foreseeing. It may be they must obtain from the manager of the Co-operative rather more detailed statements as to where he is getting these bananas from. I expect, when he does make those statements, if they are true, there will be some revelations, but that is only conjecture. The court is not deciding that in every shipment, whatever the evidence is, this should be the order made. What order should be made in respect of future shipments depends upon the evidence tendered in respect of those shipments. But, if any opinion of mine is of any value to the parties, I think that Leyland & Co. and Roberts, Brining & Co. should be a little careful of the risks they take in their attempt to break up this monopoly, with which attempt I am not interfering so long as it is carried on upon legitimate lines. The order of the court will be as I have said.

LAWRENCE, L.J.—I entirely agree.

GREER, L.J.—I agree. This case is concerned with the rights of the plaintiffs or the defendants as the case may be, in 2,041 stems of bananas, on a ship called the *Daytonian*. The argument on behalf of the defendants has satisfied me that the order which was made by the learned judge in chambers was wrong. One has only to read the order to see that it would be a wholly ineffective order, because it only identifies 2,041 stems out of a larger cargo as stems which are the property of the plaintiffs, and until this case is decided it cannot be determined whether they were or are the property of the plaintiffs or not. Therefore, the order was wrong and could not be carried out, because nobody could identify the 2,041 stems to which it referred, and if any attempt was made to enforce the order by punitive methods it could not have been enforced, because it could not have been established, if the defendants had dealt with some portion of the cargo, whether the portion with which they dealt was the portion to which the order referred. I think that is quite sufficient to show that the order was wrong and ought not to have been made, and I also believe that the fact that the goods are perishable shows that, in any case, in exercising its discretion the court ought not to have made an order which might have had the result of keeping perishable goods in statu quo until the hearing of this case, when they might not have been perishable goods but completely perished goods.

Fortunately for the court, I think the difficulty about identifying the goods for the purpose of an order for their sale has disappeared by reason of the fact that the parties have themselves identified them by the one delivering and the other accepting the 2,041 stems as the stems which are claimed in this action by the plaintiffs. There is now no difficulty in making the order which my Lord has made, and there will be no difficulty in carrying it out, because it has actually been carried out a few months ago.

Appeal allowed.

Solicitors: *Godfrey Warr & Co.*, for *Weightman, Pedder & Co.*, Liverpool; *Hill, Dickinson & Co.*; *Biddle, Thorne, Welsford & Gait.*

[*Reported by* T. W. Morgan, Esq., *Barrister-at-Law.*]

RALSTON *v.* RALSTON

[King's Bench Division (Macnaghten, J.), February 10, 11, 1930]

[Reported [1930] 2 K.B. 238; 99 L.J.K.B. 266; 142 L.T. 487]

Husband and Wife—Action by wife for tort of husband—Right of wife to sue—Protection of property—Wife chief shareholder in and chairman and managing director of trading company—Libel—Allegation of unchastity—Married Women's Property Act, 1882 (45 & 46 *Vict.*, c. 75), *s.* 12.

Libel—Defamatory words—Inscription on tombstone—"In loving memory of J., dearly beloved wife of [defendant]"—Plaintiff wife of defendant.

By the Married Women's Property Act, 1882, s. 12: "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies . . . for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort."

During the lifetime of a wife, who had separated from her husband, the husband caused to be erected in a churchyard a tombstone bearing the inscription: "In loving memory of J. the dearly beloved wife of W.R.C.R. [the husband] of the Bungalow, Valley, died 20th May 1916." The wife, who carried on business as a garage proprietor, brought an action against the husband, in which she claimed damages for libel and other remedies.

Held: (i) as the marriage between the plaintiff and the defendant had never been dissolved the inscription was capable of a defamatory meaning, but (ii) assuming that the facts that the plaintiff owned the majority of the shares in the garage company and that she was chairman and managing director of the company constituted her a trader, the imputation made on her by the inscription on the tombstone did not affect her credit or character in her trade, and, therefore, the action was not one "for the protection and security of her own separate property" within s. 12 of the Act of 1882, and so not maintainable by her.

Notes. Section 12 of the Act of 1882 was amended (immaterially from the point of view of this case) by the Law Reform (Married Women, &c.) Act, 1935, Sched. I.

Considered: *Chant* v. *Read*, [1939] 2 All E.R. 286.

As to actions by a wife against her husband for tort, see 19 Halsbury's Laws (3rd Edn.) 876, 877, and, as to libel, 23 Halsbury's Laws (2nd Edn.) 392. As to what constitutes an actionable libel, see ibid. 384. For cases, see 27 Digest (Repl.) 260 et seq. and 32 Digest 12, 17 et seq. For Married Women's Property Act, 1882, see 11 Halsbury's Statutes (2nd Edn.) 799.

Cases referred to:

(1) *Cassidy* v. *Daily Mirror Newspapers*, [1929] 2 K.B. 331; 98 L.J.K.B. 595; 141 L.T. 404; 45 T.L.R. 485; 73 Sol. Jo. 348; Digest Supp.

(2) *Summers* v. *City Bank* (1874), L.R. 9 C.P. 580; 43 L.J.C.P. 261; 31 L.T. 268; 38 J.P. 744; 3 Digest 217, *552*.

(3) *R.* v. *Lord Mayor of London* (1886), 16 Q.B.D. 772; 55 L.J.M.C. 118; 54 L.T. 761; 50 J.P. 614; 34 W.R. 544; 2 T.L.R. 482; 16 Cox, C.C. 81, D.C.; 32 Digest 11, *29*.

(4) *Tinkley* v. *Tinkley* (1908), 24 T.L.R. 691, D.C.; affirmed (1909), 25 T.L.R. 264; 53 Sol. Jo. 242, C.A.; 27 Digest (Repl.) 261, *2113*.

Further Consideration of action tried before MACNAGHTEN, J., and a special jury at Chester Assizes.

The plaintiff, Mrs. Ralston, was married to the defendant, Mr. W. R. Crawshay Ralston, on Jan. 12, 1893. In 1899 they agreed to separate, and a deed of separation, giving the wife the custody of the two children, was drawn up. From that time the parties lived apart. Subsequently, the plaintiff became the chief shareholder in and chairman and managing director of the Temeside Garage, Ltd., Ludlow. In 1916 the defendant caused the following inscription to be placed on a tombstone in the parish churchyard at Llanfair-yn-Neubwll, Anglesey: "In loving memory of Jennie, the dearly beloved wife of W. R. Crawshay Ralston of the Bungalow, Valley. Died 20th May, 1916." An entry to a similar effect was made in the register kept by the registrar of deaths for the Holyhead district. The plaintiff brought an action against the defendant, in which she claimed damages for the libel alleged to have been published in the inscription on the tombstone and in the official register of deaths. The innuendo alleged was that the plaintiff was not the lawful wife of the defendant and that her children were not born in lawful wedlock, and, further, that she was not a fit and proper person to be managing director of the Temeside Garage, Ltd. She further claimed an injunction calling upon the defendant to erase the inscription and to rectify the entry in the register, and a declaration that she was the lawful wife of the defendant. The defendant, in his defence, denied all the allegations, and relied on s. 12 of the Married Women's Property Act, 1882, and on the Limitation Act, 1623. The damages, in the event of the husband's liability, were agreed between the parties at £100.

Trevor Hunter, K.C., and *S. P. J. Merlin* for the plaintiff.
Austin Jones for the defendant.

MACNAGHTEN, J.—This is an action brought by a wife against a husband claiming, inter alia, damages for libel, and, in view of the provisions of s. 12 of the Married Women's Property Act, 1882, the question arises at the outset whether such an action is maintainable in law. That section, which, so far as this question is concerned, is to the same effect as s. 11 of the Married Women's Property Act, 1870, provides that:

> "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies . . . for the protection and security of her own separate property as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort."

The plaintiff and the defendant were married on Jan. 12, 1893. They were in a good social position. A settlement of £25,000 was made by the husband on the marriage; he had a place at Talgarth, in the county of Brecon, and it was there that the matrimonial home was established. There are two children of the marriage. The elder, Williams Allen Crawshay Ralston, was born on Feb. 5, 1894, and the younger, Charles Gerard Grant Crawshay Ralston, on Jan. 23, 1897. After the parties had lived together for six years, unhappy differences arose between them, and they agreed to separate. A deed of separation dated March 10, 1899, was duly executed, and from that time to this they have always lived separate and apart. Mrs. Crawshay Ralston went to live at Ludlow, in Shropshire, and her husband went to Valley, in Anglesey, and they were still residing at those places when this action began. Under the deed of separation Mr. Crawshay Ralston covenanted for himself and his executors to pay his wife an annuity of £400 a year, and she was given the custody of the two children of the marriage until they were eight years old, when, as the deed provided, some fresh arrangement for their maintenance and education and for the expense thereof was to be made. Mrs. Crawshay Ralston was, it seems, always interested in motoring, and she established a business as a garage proprietor called the Temeside Garage, at Ludlow. After a time she converted this business into a private limited company called the Temeside Garage, Ltd. She owns the majority of the shares in that company and holds the offices of chairman and managing director.

It so happened that in the summer of 1929 the plaintiff was motoring with two friends of hers in Anglesey, and in consequence of information which she received she visited a church in the neighbourhood of her husband's residence, and there in the churchyard they saw over one of the graves a tombstone on which the following words were inscribed: "In loving memory of Jennie, the dearly beloved wife of W. R. Crawshay Ralston, of the Bungalow, Valley. Died 20th May, 1916." The defendant is the W. R. Crawshay Ralston mentioned in the inscription, and it is admitted that he caused the inscription to be made. The meaning of the inscription is obvious, namely, that the person who was buried in that grave was at the time of her death the lawful wife of the defendant. Since the plaintiff was married to the defendant in 1893, and that marriage has never been dissolved, it is obvious that the inscription is capable of a defamatory meaning. That is clearly established by the recent decision of the Court of Appeal in *Cassidy* v. *Daily Mirror Newspapers, Ltd.* (1). Mrs. Crawshay Ralston was not unnaturally indignant that an imputation so injurious to herself should be made in a manner so permanently injurious by her husband, and she, accordingly, consulted her solicitors, who wrote on Aug. 3, 1929, to the defendant demanding among other things that the inscription should be erased. They received a reply from the defendant's solicitors, dated Aug. 9, refusing to make any alteration in the inscription. Thereupon this action was commenced on Aug. 20 claiming damages for libel and certain other relief. It should be mentioned that since the action has been commenced the inscription has in fact been altered by removing therefrom the statement that the deceased was the wife of the defendant.

At the close of counsel's opening speech for the plaintiff to the jury, objection was taken by counsel for the defendant, that the action was not maintainable by reason of s. 12 of the Married Women's Property Act, 1882, and, so far as it is an action for damages for libel, this is plainly the case unless it is an action for the protection and security of the plaintiff's own separate property. It was argued on behalf of the plaintiff that it was an action for the protection or security of her property in that an action for libel affecting her credit and character as a trader was such an action, and reliance was placed upon the interlocutory observations of Brett, J., in *Summers* v. *City Bank* (2). That was an action in which a married woman who carried on the business of a restaurant keeper in the city of London separately from her husband claimed damages against the City Bank, of which she was a customer, for breach of the duty subsisting between the bank and her, by reason of the relationship of banker and customer, in that the bank had failed to present a bill of exchange for payment, had failed to notify her of its dishonour on presentation, and had, in breach of their duty, dishonoured cheques which she had drawn upon her account. In the course of the argument in that case, Brett, J., is reported to have said: "Is not a married woman suing for protection of her trade or business when she sues for a libel which affects her credit and character as a trader?" Since in that case the action was an action for damages for breach of the duty arising from the relationship of banker and customer it is clear that the observation was obiter, and no decision was given by the court with regard to that matter. The court held that the provisions of s. 1 and s. 11 of the Act of 1870 enabled Mrs. Summers to maintain her action.

The next case that was brought to my attention was *R.* v. *Lord Mayor of London* (3). Mr. Vance, a comedian, published in a newspaper a paragraph asserting that Mrs. Vance was not his wife, and she thereupon initiated criminal proceedings against her husband before the Lord Mayor of London. The Lord Mayor refused to grant a summons upon the ground that Mrs. Vance, being the wife of Mr. Vance, could not in the circumstances prosecute or give evidence against her husband. The Divisional Court, consisting of Mathew and Smith, JJ., dismissed a rule calling upon the Lord Mayor to issue a summons, but in the course of his judgment Smith, J., said that, while it was impossible for them to hold that criminal proceedings instituted by the wife for such a libel were proceedings for the protection and security of her own separate estate, they expressly gave no opinion on the question whether an action for libel in a case like that could be maintained, and, so far as that case is concerned, the question before me remains open.

Assuming, however, that the fact that the plaintiff owns the majority of the shares in the Temeside Garage, Ltd., and that she is chairman and managing director of the company constitutes her a trader within the dictum of Brett, J. (a question on which I have considerable doubt), can it be said that the imputation made upon her by the inscription on the tombstone is an imputation which affects her credit or character in her trade? In my opinion, it does not, and in coming to that conclusion I am fortified by the decision of the Court of Appeal in *Tinkley* v. *Tinkley* (4), to which also my attention was called. *Tinkley* v. *Tinkley* (4) is a decision of the Court of Appeal, consisting of Lord Alverstone, C.J., Lord Cozens-Hardy, M.R., and Buckley, L.J. Mrs. Tinkley was separated from her husband, and, indeed, at the time of the action she had instituted divorce proceedings against him. In order to maintain herself she had entered domestic service, and while she was in domestic service her husband gave her into custody on a charge of theft. She was brought before the magistrate at the South-Western Police Court in London and the charge was dismissed. She thereupon commenced an action, not indeed for libel, but for malicious prosecution, against her husband, and the action came on for trial before Scrutton, J., who held that it was not maintainable because it could not be regarded in any sense as an action for the protection and security of her separate property. From that judgment there was an appeal to the Court of Appeal, and the Court of Appeal unanimously affirmed the decision of the learned judge. It might well be said of a person engaged in the occupation of a domestic servant, that her credit and character for honesty was a matter of the very gravest importance, and where there has been a false charge of theft, whether giving rise to an action for libel or malicious prosecution—if, indeed, it be true that any statement reflecting on the credit or character of a wife in her occupation or trade is an imputation—it might well be said an action brought in respect of such an imputation is an action for the protection of her separate property. The decision of the Court of Appeal in that case, however, seems to me, even if I was disposed otherwise to do so, to preclude me from holding that the imputation which the inscription on the tombstone made upon Mrs. Crawshay Ralston was an imputation upon her character as a trader. In my opinion, therefore, the action fails.

[His Lordship then dealt with two points which do not call for report, and continued :] The order in this action will be in the following form :

> "It is agreed that if the claim herein for damages be maintainable, judgment should be entered for the plaintiff for the sum of £100, but the judge being of opinion that the said claim is not maintainable in law it is ordered that the same be dismissed without costs, and as to the rest of the claim the defendant having already altered the inscription on the tombstone by erasing the word

'wife' and by his counsel undertaking to raise no objection to a similar alteration of the entry in the register of deaths, the judge does not think fit to make any further order except that each party do bear her or his costs of the action.''

Judgment for defendant.

Solicitors: *Crosse & Sons* for *Clark & Co.*, Ludlow; *Lawrence, Graham & Co.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

R. *v.* LAPWORTH

[COURT OF CRIMINAL APPEAL (Avory, Swift and Acton, JJ.), October 20, 1930]

[Reported [1931] 1 K.B. 117; 100 L.J.K.B. 52; 144 L.T. 126; 95 J.P. 2; 29 L.G.R. 61; 29 Cox, C.C. 183; 47 T.L.R. 10; 74 Sol. Jo. 735; 22 Cr. App. Rep. 87]

Criminal Law—Evidence—Husband and wife—Wife competent witness at common law—Charge involving personal injury by husband—Wife compellable to give evidence—Criminal Evidence Act, 1898 (61 *& 62 Vict., c.* 36), *s.* 4 (2).

Where one spouse is at common law a competent witness against the other spouse, as on a charge involving personal violence committed by the one against the other, the first-mentioned spouse is not merely a competent but also a compellable witness.

The observations in the opinions of the House of Lords in *Leach* v. *R.* (1) ([1912] A.C. 305) on the non-compellability of a spouse as a witness are to be regarded as referring only to a case where the spouse is not a competent witness at common law, and becomes so only by virtue of the Criminal Evidence Act, 1898, or some other statute.

Notes. Considered: *Tilley* v. *Tilley*, [1949] P. 240.

As to the evidence of the wife or husband of an accused person, see 10 HALSBURY'S LAWS (3rd Edn.) 483–485; and for cases see 14 DIGEST (Repl.) 519 et seq.

Cases referred to:

(1) *Leach* v. *R.*, [1912] A.C. 305; sub nom. *Leach* v. *D.P.P.*, 81 L.J.K.B. 616; 106 L.T. 281; 76 J.P. 203; 28 T.L.R. 289; 56 Sol. Jo. 342; 22 Cox, C.C. 721; 7 Cr. App. Rep. 158, H.L.; 14 Digest (Repl.) 523, *5070*.

(2) *R.* v. *Phillips*, [1922] S.A.S.A. 276; 14 Digest (Repl.) 521, **3439*.

(3) *R.* v. *Lord Audley* (1632), Hut. 115; 3 State Tr. 402; 123 E.R. 1140; sub nom. *Earl Castlehaven's Case*, 1 Hale, P.C. 629, H.L.; 14 Digest 520, *5032*.

Appeal against conviction.

The appellant was convicted at Warwick Assizes before ROWLATT, J., of causing grievous bodily harm to his wife, with intent to do her grievous bodily harm, and was ordered to be bound over in the sum of £10 for twelve months. At the trial the wife was unwilling to give evidence against her husband, and a submission was made by counsel for the accused that her evidence ought not to be given, on the ground that she was merely a competent and not a compellable witness. ROWLATT, J., ruled that she could be compelled to give evidence, and her evidence was accordingly given.

Douglas Jenkins, for the appellant, referred to *R.* v. *Phillips* (2); *Leach* v. *R.* (1).

E. A. Hawke, for the Crown, distinguished *Leach* v. *R.* (1), and referred to *R.* v. *Lord Audley* (3).

By s. 4 (2) of the Criminal Evidence Act, 1898:

> "Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person."

The judgment of the court was delivered by

AVORY, J.—The interesting argument to which we have listened is somewhat academic, because, on the facts of the case, the appellant was in the result only bound over in the sum of £10 to keep the peace and to be of good behaviour for twelve months, and from the account of the proceedings the parties appear to have made up their differences and to have left the court happily together, but as a point of law has been raised and discussed, it is necessary to give a decision on it.

The short point is whether in a case where personal violence has been used by a wife towards a husband, or by a husband towards a wife, the injured husband or wife, as the case may be, is not only a competent, but also a compellable, witness. There is no question, to my mind, that at common law in such cases a husband or wife was always a competent witness, and from the very nature of things it must have been so; otherwise, when the assault has been committed by one spouse upon the other in secret, there would be no means of proving it. Whatever the reason be, I am satisfied that at common law, in such circumstances, a wife was always a competent witness on a charge against her husband of having assaulted her. If it is once established that she was competent, I think it follows that she was compellable at common law, and remains so under s. 4 (2) of the Criminal Evidence Act, 1898, that is to say, when either she has made her complaint or independent testimony has been given of an assault by the husband on the wife, as soon as she is summoned to appear as a witness to prove the facts of the case she is, in my opinion, like any other witness and is bound to answer the questions put to her. In other words, she becomes a compellable witness.

It is said that there is no direct authority on this point. It does sometimes happen that, where it has never been questioned that an established state of the law exists, there is to be found no direct authority. I doubt whether the question has ever been raised before in this direct form. It has always been assumed in practice that in such cases, even though the wife, when she comes into court, either expresses reluctance to give evidence, or definitely desires not to give evidence against her husband, it is the duty of the tribunal to ascertain the facts and, if necessary, to compel her to give that evidence. It has been suggested that in *Leach* v. *R.* (1)—a charge of incest which was argued in the House of Lords in 1912—there are expressions in the opinions of the learned Lords which are inconsistent with this view, and, in particular, the following passage from the opinion of Lord Atkinson has been cited:

> "The principle that a wife is not to be compelled to give evidence against her husband is deep-seated in the common law of this country, and I think if it is to be overturned it must be overturned by a clear, definite and positive enactment. . . ."

There are passages in the opinion of Lord Halsbury and also in the opinion of the Lord Chancellor to the same effect, but it must be borne in mind that the House of Lords in that case was dealing with the effect of a statute—the Criminal Evidence Act, 1898—which had expressly authorised a wife or husband to give evidence in certain cases. The view I have expressed is confirmed by the following observations of Lord Halsbury during the argument:

> "I should have thought that if the known state of the law was that in order to confer competency you had to enact it, the fact that you simply used the word 'competent' did not necessarily mean 'against his or her will.' "

I read that as meaning that if the known state of the law is such as to confer competency without any statute, then compellability follows as a matter of course from that competency, and I am satisfied that in *Leach* v. *R.* (1) the learned Lords had not present to their mind the case which is now before this court, where A personal violence has been done by a husband to a wife. I am satisfied that in the general observations which they there made and which have been relied on on behalf of the appellant they had no intention of including cases such as the one with which we have to deal to-day. For these reasons we think that the learned judge was right in telling this witness that she was bound to give evidence and that there was no misdirection by him in law. The appeal therefore fails. B

Appeal dismissed.

Solicitors: Registrar of the Court of Criminal Appeal; Director of Public Prosecutions.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

C

D

TAYLOR *v.* TWINBERROW

[KING'S BENCH DIVISION (Scrutton and Lawrence, L.JJ., sitting as additional judges of the King's Bench Division), February 26, March 7, 1930]

[Reported [1930] 2 K.B. 16; 99 L.J.K.B. 313; 142 L.T. 648] E

Limitation of Action—Recovery of land—Effect of extinguishment of title—Tenancy from year to year—Sub-tenant in possession at will—Twelve years' adverse possession by sub-tenant—Merger of yearly tenancy by purchase of freehold—Right of freeholder to possession—Real Property Limitation Act, 1833 (3 *& 4 Will.* 4, *c.* 27), *ss.* 7, 34—*Real Property Limitation Act,* 1874 (37 *& 38 Vict. c.* 57), *s.* 1. F

The plaintiff's father, who was the yearly tenant of a cottage, allowed his brother-in-law to live therein from 1900 till 1927 as a sub-tenant rent free, first as his foreman, and then as a relative whom he was benefiting. In 1927 the brother-in-law died and his widow, the defendant, continued to occupy the cottage rent free. In February, 1919, the plaintiff's father had become the freeholder of the cottage by purchasing the reversion, and the yearly tenancy G merged in the freehold. In 1928 the plaintiff's father died and under his will the plaintiff became the freeholder. He then brought an action for possession of the cottage, but the defendant refused to leave, contending that her late husband had acquired a yearly tenancy by twelve years' adverse possession under s. 7 of the Real Property Act, 1833, and that she, as his successor in title, could not be ejected without having been served with a notice to quit H legally terminating her tenancy.

Held: the plaintiff was entitled to possession, as the effect of the expiry of the twelve years' adverse possession by the sub-tenant was merely negative, in that it destroyed the power of the then tenant to claim as landlord against him, but was not to be treated as if it gave a title, and it did not destroy the right of the freeholder, who was not bound by relations between tenant and I sub-tenant, to eject the sub-tenant; a new tenancy at will for the sub-tenant was to be regarded as having been created upon the merger of the yearly tenancy in the freehold; time began to run against the freeholder, under s. 7 of the Real Property Limitation Act, 1833, only from February, 1920, i.e., from one year after the merger, and, therefore, the freeholder's right to possession was not barred.

Tichbourne v. *Weir* (1) (1892), 67 L.T. 735, applied.
Walter v. *Yalden* (2), [1902] 2 K.B. 304, distinguished.

Notes. The Real Property Limitation Acts, 1833 and 1874, were repealed by the Limitation Act, 1939, of which see ss. 4, 6.

As to when time begins to run, see 20 HALSBURY'S LAWS (2nd Edn.) 688 et seq.; and as to extinguishment of title, see ibid., 740 et seq. For cases see 32 DIGEST 431 et seq., 483 et seq. For Limitation Act, 1939, see 13 HALSBURY'S STATUTES (2nd Edn.) 1159.

Cases referred to:

(1) *Tichbourne* v. *Weir* (1892), 67 L.T. 735; 8 T.L.R. 713; 4 R. 26, C.A.; 32 Digest 486, *1485*.

(2) *Walter* v. *Yalden*, [1902] 2 K.B. 304; 71 L.J.K.B. 693; 87 L.T. 97; 51 W.R. 46; 18 T.L.R. 668, D.C.; 32 Digest 445, *1140*.

(3) *Rankin* v. *McMurtry* (1889), 24 L.R.Ir. 290.

(4) *Incorporated Society in Dublin* v. *Richards* (1841), 1 Dr. & War. 258; 1 Con. & Law. 58; 4 I.Eq.R. 177; 35 Digest 652, *t*.

(5) *Doe d. Jukes* v. *Sumner* (1845), 14 M. & W. 39; 14 L.J.Ex. 337; 9 Jur. 413; 153 E.R. 380; 32 Digest 485, *1478*.

(6) *Pleasant* (*Lessee of Hayton*) v. *Benson* (1811), 14 East, 234; 104 E.R. 590; 31 Digest (Repl.) 585, *7056*.

(7) *Peakin* v. *Peakin*, [1895] 2 I.R. 359; Digest Supp.

(8) *Lynes* v. *Snaith*, [1889] 1 Q.B. 486; 68 L.J.Q.B. 275; 80 L.T. 122; 47 W.R. 411; 15 T.L.R. 184; 43 Sol. Jo. 246, D.C.; 31 Digest (Repl.) 34, *1909*.

(9) *Oxley* v. *James* (1844), 13 M. & W. 209; 13 L.J.Ex. 358; 3 L.T.O.S. 222; 153 E.R. 87; 31 Digest (Repl.) 56, *2130*.

(10) *Scott* v. *Nixon* (1843), 3 Dr. & War. 388; 40 Digest (Repl.) 164, **684*.

Appeal from Winchcombe County Court.

In 1900 Mrs. Emma Ferguson granted a tenancy from year to year to Alfred Henry Taylor, father of H. J. Taylor, of a cottage and lands. A. H. Taylor allowed his brother-in-law, Twinberrow, to live in the cottage rent free from 1900, at first as his foreman, then as a relative whom he was benefiting. In 1919 A. H. Taylor purchased the freehold from the executors of Emma Ferguson, and himself became the freeholder. In 1927 Twinberrow died, and his widow stayed on in the cottage rent free. In 1928 A. H. Taylor died, and under his will his son, H. J. Taylor, became freeholder of the cottage. On an action being brought by H. J. Taylor against Mrs. Twinberrow for possession of the cottage, the defendant claimed a title by adverse possession under the Real Property Limitation Acts, 1833 and 1874. The county court judge gave judgment for the plaintiff for possession, and the defendant appealed.

The Real Property Limitation Act, 1833, provides:

> "Section 7: When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined. . . .
>
> Section 34: At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any . . . action or suit, the right and title of such person to the land [or] rent . . . for the recovery whereof such entry, distress, action or suit respectively might have been made or brought within such period, shall be extinguished."

The Real Property Limitation Act, 1874, provides:

> "Section 1: After the commencement of this Act no person shall . . . bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right . . . to bring such action or suit shall have first accrued to some person through whom he claims. . . ."

A. T. Adams for the defendant.
H. J. Barclay for the plaintiff.

Cur. adv. vult.

March 7. The following judgments were read.

SCRUTTON, L.J.—The question in this appeal is whether an order made by HIS HONOUR JUDGE MACPHERSON granting to the plaintiff, Horace James Taylor, possession of a cottage then occupied by the defendant, Isabella Twinberrow, widow of Mr. Twinberrow, deceased, was rightly made. The defendant argued that the operation of the statutes of limitation prevented H. J. Taylor from recovering possession from her. It was argued for her, as I understood the argument, that her husband was at first a tenant at will, and that, by virtue of s. 7 of the Real Property Limitation Act, 1833, time began to run against A. H. Taylor one year after the commencement of the tenancy and, therefore, that in 1913 Twinberrow acquired a title against A. H. Taylor; that such title was the same title as Taylor had, a tenancy from year to year; that the merger of Taylor's title as tenant in his title as freeholder by purchase did not affect Twinberrow's title as tenant from year to year which passed on his death to his widow; that there had never been any notice to determine that tenancy from year to year, and, consequently, the widow remained in possession till a proper notice to terminate such a tenancy was given and expired.

The fallacy of this argument rests, in my opinion, on a misunderstanding of the legal effect of the expiry of the twelve years' adverse possession under s. 7 of the Act of 1833. It is treated as if it gave a title, whereas in effect it is merely negative to destroy the power of the then tenant, A. H. Taylor, to claim as landlord against the sub-tenant in possession. It would not destroy the right of the freeholder, if Taylor's tenancy was determined, to eject the sub-tenant. The freeholder would not be in any way bound by the legal relations between tenant and sub-tenant after the expiry of the tenant's tenancy. That this is so appears to follow from the decision of the Court of Appeal in *Tichbourne* v. *Weir* (1). A freeholder in 1802 granted a lease to B.—a tenant—for eighty-nine years, with a repairing covenant. B. equitably mortgaged the lease to G., who, in 1836, entered into possession against B. and did nothing to acknowledge B.'s title for forty years, thereby, as against B., obtaining a defence under the statutes of limitation. G., and the subsequent assignee of his interest, paid the rent named in B.'s lease to the freeholder, and in 1891, on the expiry of the term in the lease, delivered up the house to the freeholder, who sued the assignee on the repairing covenant. It was held by the Court of Appeal that the statutes of limitation had not the operation of transferring to G., B.'s rights against and obligations to the landlord, but only of extinguishing B.'s rights as against G.

> "The statute [said BOWEN, L.J. (67 L.T. at p. 737)] makes no transfer of any kind. . . . The most that can be said is that [G.] acquired an absolute title to the land as against everybody but the landlord."

The result of this case is, in my opinion, correctly stated in DARBY AND BOSANQUET (2nd Edn.), p. 493:

> "It has been said that the effect of the statute is to execute a conveyance to the person in possession, and not only to extinguish the right of the former owner, but to transfer the legal fee simple. But the truer view is, that the operation of the statute in giving a title is merely negative; it extinguishes the right and title of the dispossessed owner, and leaves the occupant with a title gained by the fact of possession, and resting on the infirmity of the right of others to eject him."

The defendant relied on a passage in the same work on p. 494, where it is suggested that the person taking the benefit of the statute does acquire a title commensurate to the title lost. The authority cited for this is the Irish decision of *Rankin* v. *McMurtry* (3). But that case proceeds on the authority of statements

A of LORD ST. LEONARDS in *Incorporated Society in Dublin* v. *Richards* (4), and PARKE, B., in *Doe d. Jukes* v. *Sumner* (5), which BOWEN, L.J., in *Tichbourne* v. *Weir* (1) held to be overstrained in construction, and not to have the effect attributed to them. I prefer to follow the decision of the English Court of Appeal, and think the second passage in DARBY AND BOSANQUET is inconsistent with the first passage in that work, and is incorrect.

B A further argument of the defendant was to this effect: That the decision in *Walter* v. *Yalden* (2) showed that a surrender by tenant to landlord did not defeat the rights of a sub-tenant who had acquired a right against his immediate landlord by virtue of the statutes of limitation, and such a sub-tenant's right lasted as long as the original lease from landlord to tenant would have lasted but for the surrender, but that the statute did not begin to run against the landlord till that time. But C this decision shows, first, that time did not begin against the landlord till 1919, the date of the merger, and had, therefore, not expired in 1929 when the action was brought; and, secondly, while a surrender cannot affect the lawful title of an under-lessee, whose sub-lease must be properly determined by notice in a regular manner, because a surrender has only the same effect as an assignment—*Walter* v. *Yalden* (2), *Pleasant* (*Lessee of Hayton*) v. *Benson* (6)—which would not destroy a sub- D lease, there is no decision that merger resulting from the tenant's purchase of the landlord's reversion has any such effect. If the merger takes place the original lease is determined; there is no need to give six months' notice to terminate a tenancy from year to year. The new reversioner cannot give notice to himself as the old tenant; and as has been seen the sub-tenant has no term which requires such a notice to be given to him.

E For these reasons the appeal fails and must be dismissed with costs. There must be an order for the payment out of court to the plaintiff of the sum paid into court as the condition of a stay.

LAWRENCE, L.J.—The first question which arises is: In what character did the defendant and her late husband occupy the cottage? It is contended on behalf of the plaintiff that the true inference to be drawn from the facts is that A. H. F Taylor remained throughout in possession of the cottage and merely allowed the defendant and her husband to live in it as his guests. In support of this contention counsel relied upon the decision in the Irish case of *Peakin* v. *Peakin* (7). In my judgment, that case is distinguishable on the facts from the present case, which in turn is indistinguishable from and governed by the decision of the Divisional Court in England in *Lynes* v. *Snaith* (8). In the last-mentioned case it was held G that the defendant, who had been allowed by the owner—her father-in-law—to take possession of a cottage belonging to him and to live there rent free, became a tenant at will although the owner paid the rates and taxes and did the repairs. On this point, therefore, the plaintiff fails.

The next and principal question is, what is the legal effect of the defendant's husband having been allowed to remain in possession of the cottage rent free after H his employment as foreman had ceased, when, in my opinion, he became tenant at will. Under s. 7 of the Real Property Limitation Act, 1833, time began to run against A. H. Taylor at the expiration of one year from the commencement of Twinberrow's tenancy at will. Under the joint operation of the Real Property Limitation Act, 1874, and s. 34 of the Real Property Limitation Act, 1833, A. H. Taylor's right and title to the cottage became extinguished in or about the year I 1913. His only title immediately before the extinction was that of a yearly tenant whose interest is defined by PARKE, B., in *Oxley* v. *James* (9) (13 M. & W. at p. 215) as being "for an indefinite period subject to determination by notice to quit from his landlord." It is clear, therefore, first, that the right which A. H. Taylor had during the subsistence of his yearly tenancy to dispossess Twinberrow had become extinguished in 1913, and, secondly, that the right of the freehold reversioner on the termination of A. H. Taylor's yearly tenancy to obtain possession of the cottage had not in any way been affected by the extinction of A. H. Taylor's rights against Twinberrow. It is also clear that on the purchase of the freehold reversion by A. H. Taylor in 1919, his yearly tenancy terminated by merger.

Primâ facie, therefore, it would seem that with the termination of A. H. Taylor's yearly tenancy the right to possession which Twinberrow had acquired under the limitation Acts against everybody except the freeholder also terminated and that on Twinberrow being allowed by A. H. Taylor to remain in occupation of the cottage after such termination a new tenancy at will was created and time first began to run under the statute at the expiration of one year from the commencement of that tenancy, namely, in February, 1920. The defendant, however, contended that A. H. Taylor could not, by acquiring the freehold reversion, deprive Twinberrow of the right which he had then acquired under the limitation Acts, which right was alleged to be a yearly tenancy only determinable by the freeholder on giving a notice appropriate to such a tenancy. This contention was based mainly on the decision of the Divisional Court in *Walter* v. *Yalden* (2). In that case a lease of certain premises had been granted in 1837 for a term of ninety-nine years if three named persons should so long live, at a nominal rent of 1s. The lessees apparently vacated the premises which were taken possession of by the defendant's predecessor in title as a trespasser in or about the year 1854. In 1885 the executors of the surviving lessee by deed surrendered the lease to the freeholder reversioner, and thereupon the term became merged and extinguished. In 1895 the last of the three lives named in the lease dropped. In 1902 the freeholder commenced an action for possession against the person then in possession who claimed title under the original trespasser. In these circumstances, the defendant pleaded that the statute began to run from the date of the surrender of the lease in 1885, when the reversioner acquired an immediate right of re-entry. The court negatived that contention on the ground that the defendant and his predecessors in title, having acquired the right to possession of the premises as against the lessees, the latter could not by assignment or underlease deprive him of that right, and consequently that the statute did not begin to run against the freehold reversioner until the dropping of the last life in 1895. Lord Alverstone, C.J., in delivering the leading judgment, approved of the passage in Darby and Bosanquet's Statutes of Limitation (2nd Edn.), p. 494, to the effect that the title gained under the statute by possession is commensurate with the interest which the rightful owners have lost and must, therefore, have the same legal character. The authority cited for this passage is *Rankin* v. *McMurtry* (3), where the Divisional Court in Ireland approved of and followed the dicta of Parke, B., in *Doe d. Jukes* v. *Sumner* (5) (14 M. & W. at p. 42), that "the effect of the Act is to make a parliamentary conveyance of the land in possession after the period has elapsed," and of Lord St. Leonards in *Scott* v. *Nixon* (10) (3 Dr. & War. at p. 407), that "the statute has executed a conveyance to the party whose possession is a bar."

Counsel for the defendant in the present case contended with much force that the principle upon which *Walter* v. *Yalden* (2) was decided applied equally to the converse case, such as the present, where the tenant has brought about the merger by acquiring the reversion. I confess to finding it difficult to reconcile the decision of the Divisional Court in *Walter* v. *Yalden* (2) with the decision of the Court of Appeal in *Tichbourne* v. *Weir* (1), which case was not cited to the Divisional Court. Be that as it may, however, *Walter* v. *Yalden* (2) is, in my opinion, distinguishable on the facts from the present case. There the lease was for a definite term on the expiration of which the lease would automatically come to an end, and no notice was required to bring about its termination, whereas in the present case the tenancy was for an indefinite period determinable only by a proper notice and such a notice could not be given after the estate of the landlord and the estate of the tenant had become united in the same person. Moreover in that case the merger had been brought about by an assignment of the lease of the remainder of the term, and it might plausibly be contended that until the term created by the lease had expired by effluxion of time the lessor was practically in the position of a person deriving title under the lessee, whereas in the present case A. H. Taylor never was in such a position. For these reasons I am of opinion that the decision in *Walter* v. *Yalden* (2) does not govern the present case.

In *Tichbourne* v. *Weir* (1) the question was whether the defendant, whose predecessor in title had under the statute acquired a right to the possession of the property comprised in the lease and had paid the rent reserved by the lease to the reversioner, was liable under the repairing covenants in the lease. The Court of Appeal, in negativing such a liability, held that s. 34 of the Real Property Limitation Act, 1833, did not operate to transfer the title of the lessee to the person who gained a title to the property under the statute. This decision definitely settled the controversy which had previously existed as to the legal operation and effect of the limitation Acts, and it is somewhat surprising that it did not find a place in the Law Reports. BOWEN, L.J., after having stated that the statute made no transfer of any kind, but only barred the remedy and extinguished the title of the lessee, said (67 L.T. at p. 737) that the argument on behalf of the lessor was overstraining the dicta of LORD ST. LEONARDS and PARKE, B.—to which I have already referred—and construing them to mean more than what is said in the Act. The learned lord justice then cited and approved of the opinions expressed in DART'S VENDOR AND PURCHASER, and in HAYES ON CONVEYANCING, that the statute does not operate as an alienation of the estate of the rightful owner.

If one applies the principle laid down by *Tichbourne* v. *Weir* (1) to the present case, it follows that A. H. Taylor's yearly tenancy of the cottage was never transferred to Twinberrow and that A. H. Taylor never came under any contractual or other obligation to Twinberrow which precluded him from terminating his yearly tenancy by acquiring the reversion or from exercising his rights as the freeholder after such acquisition. In the result, for the reasons stated, I think that the learned county court judge was right and that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Braund & Hill*, for *Baker & Smith*, Tewkesbury; *Lyde & Yates*, for *Ivens & Thompson*, Cheltenham.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

Re BOWER. BOWER *v.* MERCER

[Chancery Division (Clauson, J.), July 4, 1930]

[Reported [1930] 2 Ch. 82; 99 L.J.Ch. 17; 141 L.T. 639; 143 L.T. 674]

Power of Appointment—Special power—Exercise by will—Later power to appoint under another settlement—Confirmation of will by codicil—Validity of appointment under later settlement.

In 1916, a testatrix by her will, in exercise of a power of appointment given to her by a settlement to appoint to her husband a life interest in certain trust funds, appointed such life interest to her husband and also appointed to her husband a life interest in other trust funds of which life interest she might be given at some future date a power of appointment to her husband. By a settlement executed in 1918, she was given a similar power of appointment of a certain other trust fund. In 1919 she executed a codicil in which, after dealing with certain legacies, she in all other respects confirmed her will. In 1924, by another settlement, she was given a similar power of appointment of other trust funds. The testatrix died in 1929, not having, since 1919, executed any further codicil or any deed of appointment in favour of her husband.

Held: (i) the effect of the codicil was to bring the 1918 settlement fund within the power of appointment by the will, and, therefore, the joint effect of the will and codicil was that the husband became entitled to a life interest in the fund of that settlement.

(ii) the 1924 settlement only gave the testatrix a power to appoint after that date, and, therefore, as there had been no confirmation of her will after that date, there had been no valid appointment of any interest in her share of the 1924 settlement funds.

Notes. Referred to: *Re Welford's Will Trusts, Davidson* v. *Davidson*, [1946] 1 All E.R. 23.

As to the time from which execution of a power of appointment by will operates, see 25 Halsbury's Laws (2nd Edn.) 561–562, para. 1004; and for cases on the subject, see 37 Digest 446–449, *491–521*.

Adjourned Summonses.

The testatrix, Elizabeth Mercer, having power under a settlement to appoint a life interest in certain trust funds to her husband, by her will, made in 1916, appointed such life interest to her husband and also, after reciting that she might be given a share in other trust funds by the will of her father, and that such will might also give to her the power of appointing a life interest in such share to her husband, she appointed such life interest in such share to her husband and also appointed to him a life interest in any other property of a life interest in which she might be given a power to appoint to him. By a deed of settlement made in 1918, a share in a certain trust fund was settled by the testatrix's father in favour of the testatrix and her children as therein mentioned, and there was a power of appointment given to the testatrix to appoint by will to her husband a life interest in such share until re-marriage as therein mentioned. In 1919, the testatrix executed a codicil to her will, in which, after dealing with certain legacies, she in all other respects confirmed her will. By another deed of settlement made in 1924, her father settled a share in other trust funds in favour of the testatrix and her children in similar respects to the settlement of 1918, and a power of appointment of a life interest to her husband was in similar respects given to the testatrix. In both the 1918 and 1924 settlements there were provisions as to settlement by way of accruer on trusts in favour of the testatrix's brothers and sisters subject to her husband's life interests, if any, in the event of the testatrix dying without issue. The testatrix died on Feb. 11, 1929, without having any issue.

Summonses were taken out by the trustees of each of the settlements of 1918 and

1924 respectively to determine the question whether in the case of each of such settlements the testatrix by her will and codicil had effectively exercised the power of appointment in favour of her husband given to her by each settlement.

C. P. Sanger for the plaintiffs.

Charles Harman for the defendant, Herbert Mercer.

Baden Fuller for the defendant, Robert Bower, who claimed to be interested in the testatrix's shares, and other defendants similarly interested in the 1918 settlement.

L. W. Byrne for other defendants claiming to be similarly interested in the 1918 settlement.

CLAUSON, J.—I am indebted to counsel on all sides for a most interesting argument. I find myself in the somewhat unusual position of having to decide a point which everyone agrees is not covered by authority. I have been referred to a number of cases through which I do not propose to travel, because, although they may point in one direction or another, I do not think that the fact that none of them is a direct authority on the matter with which I have to deal is disputed. To avoid having to refer again to the matter and to prevent any misconception, may I say that it is agreed on all hands that the provisions of s. 24 and s. 27 of the Wills Act, 1837, have no bearing on the point which I have to decide.

On Aug. 2, 1916, Mrs. Mercer made a will, the material part of which is in these terms:

> "Whereas by a settlement of 1906 . . . I have power to appoint by deed or will that after my decease the whole or any part of the income of my share of the trust funds mentioned in the said indenture shall be paid to my husband during his life or any less period."

I pause to say I have nothing at all to do with the fund referred to in the settlement of 1906.

> "And whereas under the will of my father the said Thomas Bower the elder [I mention parenthetically that he was then living and is still living] I may have power to appoint by my will that after my decease the whole or any part of the income arising from the share which may be settled upon me by my said father Thomas Bower by his said will shall be paid to my husband during his life or any less period, now in exercise of the said power contained in the said indenture of the 27th day of August 1906, or which may be given to me by the will of my said father Thomas Bower as aforesaid and also in exercise of all and every other power now or at the time of my decease me hereunto enabling I appoint that the whole of the income arising from my share in the said trust funds mentioned in the indenture of the 27th day of August 1906, and also the whole of the income arising from any share which I may become possessed of under the will of my said father Thomas Bower [then come the important words] or otherwise howsoever shall be paid to my husband the said Herbert Mercer during his life."

Let me construe that will at the date on which it was executed, namely, Aug. 2, 1916, and see what the lady said. I understand her to say this: "Whereas I now have a power under the settlement of 1906, and whereas I think I am going to have a power in the future, which I hope will be given to me by my father's will, in exercise of those powers and also in exercise of all and every other power now, that is to say, on Aug. 2, 1916, or at the time of my decease enabling me to do what I am about to attempt to do, namely, give my husband a limited interest in the income, I appoint that the whole of the income arising from my share under the 1906 settlement and also the whole of the income arising from any share in other property of which I may become possessed under my father's will after to-day, Aug. 2, and also the whole of the income arising from any of the shares in other property of which I may become possessed after to-day, that is Aug. 2, 1916, by any other means whatsoever shall be paid to my husband Herbert Mercer during his life."

On Feb. 4, 1918, the father executed a settlement by which he provided this—I am not reading the words quite literally, because the trust in favour of this lady is given by reference and I am substituting her name in the clause which declares the trusts, with reference to which her share of the settlement funds is settled: the trustees are to stand possessed of certain property and to pay the annual income to Elizabeth Mercer during her life, with certain protective provisions about which I need not trouble; and from and after her death, if she shall by deed or will appoint, pay the whole or any part of the annual income thereof to or for the benefit of the husband of Elizabeth Mercer during his life or for any less period, and, subject to any such appointment, on trust for the children of Elizabeth Mercer. It appears to me that the fund which was comprised in the settlement of 1918 and in which Elizabeth Mercer was given a life interest is aptly described by the words "share which I may become possessed of otherwise than under the will of my father Thomas Bower."

The next matter is this. On Sept. 26, 1919, Elizabeth Mercer executed a codicil by which, after dealing with some specific bequests, she said this: "And in all other respects I confirm my said will." I understand the effect of those words to be that, by her codicil, she says: "I confirm my will and I repeat that in exercise of every power which I at the date of my will on Aug. 2, 1916, or at the time of my decease may enable me to confer a benefit on my husband I appoint the whole of the income arising from any share which subsequently to the date of my will, namely, Aug. 2, 1916, I may become possessed of by any means whatsoever shall be paid to my husband, Herbert Mercer, during his life." It appears to me that the effect of the execution of that codicil by Mrs. Mercer was to appoint, subject, of course, to her own life interest, an interest for life or, rather, during widowerhood—for it was agreed that he was entitled under the referential trusts to no greater interest than an interest during widowerhood—to her husband in the income of the fund of which she had become possessed by virtue of the settlement of 1918, the fund being one the income of which she became possessed of otherwise than under the will of her father within the language of the appointment. In my view, there is quite sufficient in the will, as re-published in the codicil, to point clearly to her intention to utilise any power at that time—that is, at the date of the codicil or at the time of her decease, enabling her to appoint a life interest or similar interest in favour of her husband. She was then possessed of such a power; she became possessed of it before the date of her codicil, so that the codicil has this effect on the will, that it brought the 1918 settlement fund, the income of which Mrs. Mercer was given a power to appoint in favour of her husband, within the operation of the appointment by her will, an operation which that appointment would not have had, but for the codicil. Accordingly, I hold that, by the joint effect of the will and codicil on the 1918 settlement, Colonel Mercer became entitled to a life interest in that settlement fund determinable on his re-marriage.

After that settlement was executed, something further occurred. Before the lady died, her father executed another settlement, that was the settlement of 1924, between the date of the codicil and the date of the death. By that settlement, he settled a certain fund in such a way that a part was to be held on trust to pay the annual income to Mrs. Mercer during her life and from and after her death, if she should by deed or will so appoint, the whole or any part of the income of her share was to be paid to her husband, Colonel Mercer, during the period that he continued a widower. On the construction of the settlement of 1924, it appears to me to be plain that the husband would not get any interest in the fund unless, after the execution of the settlement, namely, after July 2, 1924, Mrs. Mercer did by her will appoint that interest to him. On the language of the will and codicil it may well be that, if she had written out her will or confirmed it by a further codicil after this date, the same result would have occurred as occurred in the case of the 1918 settlement. But, although she lived for some years after the execution of the 1924 settlement, she did not make any further codicil, and it is impossible for me to hold that she did anything after July 2, 1924, which created an interest in her husband. The authority given to her by the settlement is to do something in the future, the effect of which would be to give an interest to her husband. I mentioned that it is agreed on all hands that s. 24 and s. 27 of the Wills Act do not apply, and I must deal with the case as though they had never been enacted. If there had been any statutory provisions on the lines of s. 24 of the Wills Act, which provided that, for such a purpose as that with which I have to deal, the will and codicil should take effect as if they had been executed immediately before the death of the testatrix, that would have produced exactly the same result as regards the 1924 settlement as has been produced, in my view, by the re-publication of the will after 1918, in respect of the fund comprised in the 1918 settlement. In my view, I cannot treat a testamentary disposition which has been made in the year 1919 of a testatrix who died in 1929, as having been executed in 1929, immediately before her death. If I could, the result would be different.

Solicitors for all parties: *Withers, Bensons, Currie, Williams & Co.*

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law.*]

BUNDY *v.* MOTOR CAB OWNER DRIVERS' ASSOCIATION

[King's Bench Division (Talbot and Finlay, JJ.), May 1, 15, 1930]

[Reported 143 L.T. 334; 46 T.L.R. 422]

County Court—Enforcement of judgment—High Court judgment—Judgment summons—Death of one of several successful parties since judgment—R.S.C., Ord. 42, *r.* 23*—County Court Rules*, 1903–1929, *Ord.* 25, *r.* 14.

In an action by the plaintiff against an unincorporated body and seventeen named persons, described as its committee, in which the plaintiff claimed damages for libel, judgment was given in the High Court for the defendants with costs. On a bankruptcy notice founded on that judgment not being complied with, the defendants presented a petition in bankruptcy, but this was dismissed by the registrar as being wrong in form, on the ground (inter alia) that the petition was by an agent on behalf of an unincorporated association and others, whereas such an association could not sue or be sued, either in its own name or by a purported agent. The defendants took out a judgment summons in the county court, and the county court judge ordered the plaintiff to pay by instalments the sum due under the judgment of the High Court, together with the costs of the summons. After the hearing of the plaintiff's action, at least one of the defendants had died.

Held: (i) the procedure by judgment summons was a mode of enforcing the judgment and directly in connection with the plaintiff's action, which a bankruptcy petition was not, and, therefore, the county court judge had power to make the order;

(ii) the death of one of the successful defendants since the date of the plaintiff's action did not render it necessary for the surviving defendants to obtain the leave of the court to enforce the judgment under the County Court Rules, 1903–1929, Ord. 25, r. 14.

Notes. The County Court Rules, 1903–1929, Ord. 25, r. 14, has been replaced by the County Court Rules, 1936, Ord. 25, r. 6.

As to the power of the county court to enforce judgments, see 9 Halsbury's

Laws (3rd Edn.) 269–273, paras. 634–641. For the Debtors Act, 1869, s. 5, see 2 Halsbury's Statutes (2nd Edn.) 294.

Cases referred to:

(1) *Re Debtor (No. 7 of 1910)*, [1910] 2 K.B. 59; 79 L.J.K.B. 1065; 102 L.T. 691; 26 T.L.R. 429; 54 Sol. Jo. 459; 17 Mans. 263, C.A.; 4 Digest 138, *1281*.

(2) *Swan* v. *Dakins* (1855), 16 C.B. 77; 24 L.J.C.P. 131; 25 L.T.O.S. 54; 19 J.P. 358; 1 Jur.N.S. 378; 3 W.R. 369; 3 C.L.R. 602; 139 E.R. 684; 11 Digest (Repl.) 590, *290*.

(3) *Bailey* v. *Plant*, [1901] 1 K.B. 31; 70 L.J.Q.B. 63; 83 L.T. 459; 65 J.P. 52; 49 W.R. 103; 17 T.L.R. 48; 45 Sol. Jo. 57; 3 W.C.C. 209, C.A.; 5 Digest 1035, *8467*.

(4) *East End Benefit Building Society* v. *Slack* (1891), 60 L.J.Q.B. 359, D.C.; 5 Digest 1033, *8451*.

Appeal from Westminster County Court.

The facts are set out in the judgment of the court.

E. Clayton, K.C., and *G. F. Kingham* for the plaintiff.

Geoffrey Howard for the defendants.

Cur. adv. vult.

May 15. **TALBOT, J.**, read the following judgment of the court. This is an appeal from an order of the judge of Westminster County Court on a judgment summons ordering the plaintiff to pay £2 a month on a judgment of the High Court for costs. The notice of motion asks that the order of the county court be set aside and discharged. In the notice, the order is stated to be that the plaintiff pay to the defendants £2 a month. In fact, the order is (in the usual form) that the plaintiff make those payments to the registrar of the county court. The grounds of the motion are that the county court judge had no jurisdiction to make the order, and that he was wrong in enforcing a judgment which had already been held to be unenforceable. The judgment of the High Court was given in November, 1921, in an action brought by the plaintiff against an unincorporated body, styled the Motor Cab Owner Drivers' Association, and seventeen named persons described as the committee of that association, to recover damages for libel. Originally the action was brought against the association only, the other defendants being added before statement of claim. The defence was, amongst other things, that the letter complained of was written on a privileged occasion without malice. At the trial the judge held that the letter was privileged and that there was no evidence of malice, and gave judgment for the defendants, with costs. The plaintiff appealed to the Court of Appeal which affirmed the judgment. The costs were taxed at £428 19s. 7d. No part of that sum has been paid. On Nov. 1, 1929, the defendants took out a judgment summons against the plaintiff. It recited that the defendants, described as in the statement of claim in the action, had obtained a judgment against the plaintiff in the High Court on Nov. 25, 1921, for £428 19s. 7d., that that sum was then due and payable under the said judgment, and that the defendants had required the judgment summons to be issued against the plaintiff, and summoned the plaintiff to appear to be examined on oath touching his means and to show cause why he should not be committed to prison for his default or why a receiving order should not be made against him pursuant to s. 107 (4) of the Bankruptcy Act, 1914. The summons having been duly served, the plaintiff appeared, and on Feb. 11, 1930, it was ordered that he should pay to the registrar of the court the sum due under the judgment amounting, with the costs of the summons, to £435 9s. by instalments of £2 a month beginning on March 11, 1930. It is this order which the court is now moved to set aside. The order to pay by instalments is made under s. 5 of the Debtors Act, 1869.

This is not the first attempt which the defendants have made to obtain payment of their judgment debt. On March 7, 1922, a bankruptcy notice founded on the judgment not having been complied with, the defendants presented a petition in bankruptcy which Mr. Registrar Hope dismissed after consideration on two grounds: first, that the bankruptcy notice was embarrassing; and, secondly, that the petition was wrong in form, being by an unincorporated association and others by an agent, whereas such an association cannot sue or be sued either in its own name or by an agent purporting to be authorised by its rules to sue and be sued on its behalf. The plaintiff relies on the second branch of this decision, not as an estoppel, but as correctly applying the principle which governs equally the question now before the court. The learned registrar considered that the bankruptcy notice might be misleading or embarrassing because it did not clearly explain to the debtor who had authority to receive the sum mentioned in it or to compound for a less amount. He did not, however, decide the matter on that point alone, but proceeded to deal with the form of the petition, and he held that, inasmuch as the association could not be sued in its own name nor could the other defendants be sued on its behalf, it and they were equally incompetent to present a bankruptcy petition. He said: "An action in the form of this petition would, I think, be bad, and if so I think that a petition is also bad." It had been argued that such a contention was not open to the plaintiff because he himself had sued the defendants in the form which appears on the pleadings. On this point the learned registrar said this:

> "Whatever may be the effect of the debtor's mode of procedure in the action, when considered directly in connection with the action, I do not think he is estopped by what he did from taking any otherwise available point in answer to bankruptcy proceedings. Such proceedings are of a special and penal nature as pointed out in the judgment in *Re Debtor* (1) and they may affect status. My experience is that the courts have been ready to give effect to defences in bankruptcy proceedings however technical. It would, I think, be going too far to say that where a debtor has taken some proceedings in wrong form, and the other side has not corrected him in those proceedings, he is debarred from insisting on a proper form when he is faced with possible bankruptcy and consequences such as I have mentioned."

There was an appeal by the defendants which was dismissed with the usual order, that the plaintiff's costs of and incidental to the appeal be taxed and the amount paid to him or his solicitor by the defendants. No definite information could be given us whether the Court of Appeal agreed with the registrar on both the points dealt with in his judgment, but we assume for the present purpose that they did.

It was contended before us that, on the principle on which the bankruptcy petition was dismissed, this order made in the county court for payment of the judgment debt should be set aside. That principle was said to be that proceedings such as a bankruptcy petition must be instituted by persons who would be proper plaintiffs in an action and that, inasmuch as they are of a penal nature, the party proceeded against is entitled to object that the proceeding is incompetent, although it is incompetent because it is in the names of those against whom he himself brought the action in which the judgment debt, which is the foundation of the proceedings, was incurred. It is said further, and rightly, that a judgment summons under the Debtors Act has a penal element, as appears on the face of it, inasmuch as it may lead to the imprisonment of the debtor and that, moreover, by s. 107 (4) of the Bankruptcy Act, 1914, the court may under it make a receiving order. In my opinion, this argument is fallacious. The procedure by judgment summons in the county court is now regulated by the Debtors Act, 1869, and Ord. 25, rr. 25–56, of the County Court Rules, 1903 to 1929. The general heading of Ord. 25 is "Enforcement of Judgments and Orders." The Debtors Act, 1869, s. 4, abolished with certain exceptions imprisonment "for making default in payment of a sum of money." Section 5 authorises commitment to prison of persons who make default in payment of any debt or instalment of debt due under an order or judgment of any competent court. By sub-s. (2) this jurisdiction may only be exercised where means to pay and refusal or neglect to pay either at the time or previously are proved. The section (as already mentioned) empowers the court to direct a judgment debtor to pay by instalments. It is plain that this procedure is, in truth, a form of execution introduced by successive statutes in connection A with the abolition in all ordinary cases of the old execution by caveat. It is a mode of enforcing the judgment: see *Swan* v. *Dakins* (2) and *Bailey* v. *Plant* (3). Accordingly, as soon as the judgment of the High Court whereby the plaintiff was ordered to pay a certain sum to the defendants was produced to the county court the judge had, in our opinion, the power and, if he thought it just and if the conditions of the statute were fulfilled, the duty to do what he did—namely, order B the payment by instalments of the judgment debt. He had no power to inquire whether the judgment of the High Court was correct or not. Moreover, it is against reason to suppose that a party who has brought an action against defendants of his own selection and failed, can, when the defendants seek to enforce their judgment for costs, by one of the methods provided by law for that purpose, take the objection that they have no locus standi. The procedure by judgment summons is, to C use Mr. REGISTRAR HOPE's words, "directly in connection with the action." A bankruptcy petition, on the other hand, is not in any accurate sense a mode of enforcing a judgment. The objects of the procedure, of which it is the first step, are to preserve the assets of the debtor and to secure that they are rateably distributed amongst the creditors. In our opinion, there is no good ground for the suggestion that the county court judge had not the power to make the order under D appeal.

It was also argued that, inasmuch as one at least of the successful defendants in the plaintiff's action is dead, the survivors cannot enforce the judgment without obtaining leave under R.S.C., Ord. 42, r. 23 (a), or the County Court Rules, Ord. 25, r. 14. In our opinion, this is based on a misconception. Order 42, r. 23, has nothing to do with the procedure under the Debtors Act. Moreover, it seems E that with regard to execution proper the old practice remains (as to which, see ARCHBOLD KING'S BENCH PRACTICE (2nd Edn.), vol. 2, p. 92; (11th Edn.), p. 1,119; TIDD'S PRACTICE (9th Edn.), p. 1,120, and Common Law Procedure Act, 1852, s. 128). In the later edition of CHITTY'S ARCHBOLD, the case of parties entitled to enforce a judgment as distinguished from those against whom a judgment may be enforced appears to have been omitted by inadvertence, and it is not there stated F that no leave is needed to issue execution in favour of several plaintiffs or defendants —of whom one or more have died since judgment—in the names of the original parties: see the YEARLY PRACTICE, 1930, p. 721. The same would, in our opinion, be true if Ord. 25, r. 14, of the County Court Rules applies to a judgment summons under the Debtors Act: see *East End Benefit Building Society* v. *Slack* (4). No point was taken in the county court or before us that the summons was out of time. G

The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Edmond O'Connor & Co.*; *Lawson & Lawson.*

[*Reported by* T. R. F. BUTLER, ESQ., *Barrister-at-Law.*]

Re MILLS. MILLS *v.* LAWRENCE

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), March 25, 26, 1930]

[Reported [1930] 1 Ch. 654; 99 L.J.Ch. 396; 143 L.T. 409; 46 T.L.R. 328; 74 Sol. Jo. 437]

Power of Appointment—Release—Power appendant or appurtenant—Power to trustee to appoint to member of class selected by him—In default fund to go to appointor absolutely.

By his will dated May 24, 1922, the testator, who died on Aug. 21, 1922, appointed the plaintiff and the defendant to be the executors and trustees thereof, and directed them in certain events, which happened, to accumulate the income of the residuary trust fund at compound interest for twenty-one years and stand possessed thereof and of the said fund for the benefit of all or any one or more of the children and remoter issue of the testator's father who, in the plaintiff's opinion, should evidence an ability and desire to maintain the family fortune by replacing the sums of which it had been despoiled by death duties and other taxation as the plaintiff should, by any deed revocable or irrevocable, appoint, and in default of and until and subject to any such appointment for the plaintiff absolutely.

Held: it was not possible to release a power which was in the nature of a trust or was coupled with a duty, but in the present case neither of those conditions were fulfilled; the plaintiff had an interest in the fund which was capable of being affected, diminished, or disposed of by the exercise of the power and so the power was appendant or appurtenant to his interest in the fund; and, therefore, he could release the power.

Notes. As to extinguishment of powers, see 25 Halsbury's Laws 588 et seq.; and for cases see 37 Digest 518 et seq.

Cases referred to:

(1) *Weller* v. *Ker* (1866), L.R. 1 Sc. & Div. 11, H.L.; 37 Digest 518, *1102*.

(2) *Saul* v. *Pattinson* (1886), 55 L.J.Ch. 831; 54 L.T. 670; 34 W.R. 561; 37 Digest 519, *1104*.

(3) *Re Eyre*, *Eyre* v. *Eyre* (1883), 49 L.T. 259; 37 Digest 519, *1103*.

(4) *Re D'Angibau*, *Andrews* v. *Andrews* (1879), 15 Ch.D. 228; 49 L.J.Ch. 182; 41 L.T. 645; 28 W.R. 311; affirmed (1880), 15 Ch.D. 236; 49 L.J.Ch. 756; 43 L.T. 135; 28 W.R. 930; 24 Sol. Jo. 816, C.A.; 37 Digest 385, *9*.

(5) *Re Somes*, *Smith* v. *Somes*, [1896] 1 Ch. 250; 74 L.T. 49; 44 W.R. 236; 12 T.L.R. 152; 40 Sol. Jo. 210; sub nom. *Re Somes*, *Somes* v. *Somes*, 65 L.J.Ch. 262; 37 Digest 504, *971*.

(6) *Re Radcliffe*, *Radcliffe* v. *Bewes*, [1892] 1 Ch. 227; 61 L.J.Ch. 186; 60 L.T. 363; 40 W.R. 323; 36 Sol. Jo. 151, C.A.; 37 Digest 520, *1111*.

(7) *Smith* v. *Death* (1820), 5 Madd. 371; 56 E.R. 937; 37 Digest 518, *1093*.

(8) *King* v. *Melling* (1671), as reported in 1 Vent. 225; 86 E.R. 151; on appeal, 1 Vent. 232, Ex. Ch. 44 Digest 537, *3535*.

Appeal from an order of Eve, J.

By his will, dated May 24, 1922, the testator, Algernon Henry Wills, appointed his brother, Egremont John Mills, the plaintiff, and his brother-in-law, General Sir Herbert Alexander Lawrence, the defendant, to be his executors and trustees. He died on Aug. 21, 1922, and in the events which happened the trustees stood possessed of his residuary estate upon trust (for the purpose of replacing the heavy sums of death duties and other taxes payable on his death in respect of his estate or which he had discharged in his lifetime) to accumulate in the way of compound interest the annual income of the trust fund for a period of twenty-one years from his death by investing the same and the resulting income thereof as in his will mentioned, and so that all accumulations so made should be added to the capital of the trust fund and should thereinafter be included in the description of the fund. Subject to such trust for accumulation, the fund was to be held upon trust for such purposes generally for the benefit of all or any one or more exclusively of the other or others of the children or remoter issue of his, the testator's father, who should, in the opinion of the plaintiff, evidence an ability and desire to maintain the family fortune by replacing the sums of which it had been despoiled by death duties and other taxation, as the plaintiff should by any deed, revocable or irrevocable, appoint and in default of and until and subject to any such appointment in trust for the plaintiff absolutely. By a deed dated June 18, 1925, the plaintiff purported to release this power, and the question raised by a summons taken out by the plaintiff was whether or not the power was coupled with a duty so that, although it was not a trust inasmuch as there was no one who could enforce the execution of it, it was in the nature of a trust and could not be released.

Eve, J., held that the power was a power coupled with a duty. The donee was a trustee of the will and the testator had made his wishes and intentions abundantly manifest. The income of the trust fund was to be accumulated for the full statutory period. The testator obviously hoped that some member of the class might be found to prolong the period of accretion and he committed to the plaintiff the power to select from the class the individual or individuals who, in his judgment, evidenced an ability and desire to maintain the family fortune by the capital recoupment he indicated. It was impossible to believe that he ever intended or contemplated that the plaintiff could at any time after his death, by releasing the power or exercising it in his own favour constitute himself absolute owner of the whole residue, and put an end to the trusts including that for accumulation. The testator's intention was that the powers should be retained and be exercisable at least down to the expiry of the primary trust for accumulation. He gave the power to the plaintiff for the benefit of those who formed the class from which he could select those who should become possessed of the fund increased by the accumulations, and he (his Lordship) could not accede to the view that in those circumstances the plaintiff was free to divest himself of the power or to do anything which would preclude him from exercising it hereafter. [He referred to *Weller* v. *Ker* (1), *Saul* v. *Pattinson* (2), and *Re Eyre* (3).] The defendant appealed.

F. D. Morton, K.C., and *Cleveland Stevens, K.C.*, for the defendant.
Gavin T. Simonds, K.C., and *A. G. Mathews* for the plaintiff.

LORD HANWORTH, M.R.—The testator, Algernon Henry Mills, made his will on May 24, 1922. I give his age at the time, because some question arises as to the possible intentions he might have had under the will. He was, at that time, sixty-six years of age, and he died on Oct. 21, immediately following. He had a brother, Egremont John Mills, who is referred to in the will, and to whom a power is given which is in question. Algernon Henry Mills was a son of the first Lord Hillingdon and he was the elder brother of Egremont John Mills. Under the scheme of the will, Algernon Henry Mills made provision for his grandson, who, I think, at that date, was aged eight years, and the will deals with a number of matters, bequests as to plate, personal jewellery, and jewellery stored at his bank, and as to portraits, medallions and so on; it gives the residue of his chattels to trustees, and an annuity for the benefit of his son and his family and other persons, and then there are various other bequests. Ultimately, by cl. 18, there is a bequest to the trustees for the purpose of holding and standing

> "possessed of the investments hereinbefore directed to be made or authorised to be retained (including any part of my residuary estate remaining unconverted) and the investments for the time being representing the same (in my will called 'the trust fund') and of the annual income thereof upon the trusts following, that is to say: upon trust (for the purpose of replacing the heavy sums of death duties and other taxes which will on my death be payable in respect of my estate or which I have discharged in my lifetime) to accumulate

> in the way of compound interest the annual income of the trust fund for a period of twenty-one years from my death by investing the same and the resulting income thereof in the names or under the control of my trustees in any of the investments hereinafter authorised with power from time to time to vary the investments and so that all accumulations so made shall be added to the capital of the trust fund and shall hereinafter be included in the description of that fund."

There was a discretionary trust for a grandson, which failed as the grandson died when aged fourteen on April 1, 1928. By cl. 19 there is an ultimate gift of residue as follows:

> "Subject to the trusts and powers hereinbefore contained the trust fund and the income thereof and all statutory accumulations (if any) of income or of so much thereof respectively as shall not have become vested or been paid or applied under any trust or power affecting the same shall be held upon such trusts and for such purposes generally for the benefit of all or any one or more exclusively of the other or others of the children and remoter issue of my father who shall in the opinion of my said brother evidence an ability and desire to maintain the family fortune by replacing the enormous sums of which it has been despoiled by death duties and other taxation as my brother the said Egremont John Mills shall by any deed revocable or irrevocable appoint and in default of and until and subject to any such appointment in trust for my said brother absolutely."

As a matter of history there was a revocable appointment made by the brother at some time before June 18, 1929, but on June 18, 1929, Egremont John Mills executed a deed whereby he released

> "the trust fund and the premises subject to the power of appointment conferred on him by cl. 19 of the testator's will from the said power of appointment to the intent that the said power of appointment may be absolutely extinguished and that the premises subject to the said power of appointment may henceforth be held upon trust and go and devolve as in default of appointment under the said power."

In other words, he released the power absolutely, and the question that we have to determine is whether or not that release is effective. Eve, J., has held that the release is not effective, and from that decision the appeal is brought to this court. I need hardly say that I differ from Eve, J., on a point of this nature, as, indeed, on all other matters, with diffidence; but, at the same time, I have come to the conclusion that this appeal ought to be allowed, and that it ought to be determined that this release is effective. I have read cl. 19, and it is important to bear in mind that this power of appointment, which is given to Egremont John Mills, is one over which he has a discretion, and not merely a discretion to appoint, but a discretion not to make any appointment at all if he should come to the conclusion that there was no one of the children or remoter issue of the first Lord Hillingdon who fulfilled the qualifications contained in the clause. He is under no specific duty to make any appointment at all by the very terms of the clause "in default of and until and subject to any such appointment in trust for my said brother absolutely." To go by steps, in the case of such a power, as stated in the rules set out in Farwell on Powers (3rd Edn.), at p. 12:

> "Before the 1st Jan., 1882 [when the Conveyancing Act came into force] a power simply collateral could not be extinguished or suspended by any act of the donee, or of any other persons; nor could it be released, where it was to be exercised for the benefit of another."

The second rule stated, at p. 16:

> "Before the 1st Jan., 1882, all powers, other than powers collateral and powers coupled with a trust or duty might have been, and since the 1st Jan., 1882, all

> powers, other than powers coupled with a trust or duty, may be, suspended or destroyed, either wholly or in part by the donees thereof."

This power falls into the third branch of the definition which is given by SIR GEORGE JESSELL in *Re D'Angibau*, *Andrews* v. *Andrews* (4), where he says (15 Ch.D. at p. 232):

> "Then the third kind of power is a power exercisable by a person who has an interest in the property, which interest is capable of being affected, diminished or disposed of to some extent by the exercise of the power. That power is commonly called a power appendant or appurtenant."

It is plain from the terms of cl. 19 that this power falls into that category, because, if the power is not exercised, the trust remains in favour of Egremont John Mills until and in default of his making any appointment. If and so far as he did make any appointment, his interest would be undoubtedly affected, and, indeed, most probably diminished, by the exercise of the power. The Conveyancing Act, 1881, by s. 52, enacts that:

> "A person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the power." .

That section now finds its place in, or is reproduced by, two sections in the Law of Property Act, 1925, namely, ss. 155 and 160. Although s. 52, and the sections which replace it, would appear to embrace all powers, it has long since been a rule that it is not possible to release the power where it would be a breach of trust to release it, or where the power is coupled with a duty.

For my part, I am not quite certain that I find a distinction in those two words, because I think that, as was said by KAY, J., they are really only two limbs or two illustrations of the case where the power is in the nature of a trust or is coupled with a trust. What he says in the opening part of his judgment in *Re Eyre*, *Eyre* v. *Eyre* (3) (49 L.T. at p. 260) is this:

> "A trustee who has a power which is coupled with a duty is, I conceive, bound, so long as he remains trustee, to preserve that power, and to exercise his discretion as circumstances arise, from time to time, whether the power should be used or not, and he could no more, by his own voluntary act, destroy a power of that kind than he can voluntarily put an end to or destroy any other trust that may be committed to him."

In other words, as I said in the course of the argument, it would appear that where one has a trust in relation to the power, or the power is embedded in a trust, so that one cannot exercise the power without committing a breach of trust, the authority given under s. 52 of the Conveyancing Act, and s. 155 of the Law of Property Act does not enable one to do what one cannot do under the general law, namely, commit a breach of trust, and if there is a fiduciary duty connected with the power, then that is another illustration of the fact that the power, being in the nature of a trust, cannot be released, because a breach of trust must not be committed.

In *Re Somes*, *Smith* v. *Somes* (5) ([1896] 1 Ch.D. at p. 255), CHITTY, J., referred to *Re Eyre* (3) and *Saul* v. *Pattinson* (2) as

> "both cases of trustees who had a power coupled with a duty—a fiduciary power in the full sense of the term; and it was held that neither before nor after the Conveyancing Act, 1881, s. 52, were trustees capable of getting rid of or releasing that part of their trust."

He says, as I say, that those two cases do not apply to the present case. I go back, therefore, to consider what is the nature of this power, and I find it impossible to treat it as one so connected with a duty or to hold that it is a power in the nature of a trust, so that it cannot be released by the donee. It appears to be one in which there is a gift over, but a gift to the donee himself. In the rule, which is stated and has been referred to in FARWELL ON POWERS (3rd Edn.) at p. 528:

> "If there is a power to appoint among certain objects, but no express gift to those objects, and no gift over in default of appointment, the court implies a trust for or a gift to those objects equally, if the power be not exercised."

But in the present case, there is a gift over in default of appointment and there is a gift until the appointment, and, therefore, it is not, to my mind, possible so to construe this clause as one in which there is a gift to the possible objects of the power, namely, the children or remoter issue of the first Lord Hillingdon. In other words, it is not a power which is coupled with or embedded in a trust. Eve, J., in his judgment, said this:

> "It is impossible to believe that the testator ever intended or contemplated that the plaintiff could, at any time after his death, by releasing the power or exercising it in his own favour, constitute himself absolute owner of the whole residue and put an end to the trusts, including that for accumulation."

I find it difficult to follow those words, because, by the very terms of the will, unless and until there is an exercise of the power, the trust is in favour of the brother absolutely, and it is to be observed that cl. 19, which is made "subject to the trusts and powers hereinbefore contained" in the will does not come into play until the whole scheme for the benefit of the grandson and the accumulation of the money for the grandson has come to nought, as unhappily it did, by the death of the grandson.

I will only add a word or two about the cases to which our attention has been called, and on which, I think, Eve, J., relied. *Weller* v. *Ker* (1) was a case in 1866, before the Conveyancing Act, 1881, was passed, and it was held in that case that the trustees did not in fact give up a power which enured until the date fixed for the coming of age of the young man, which was when he attained twenty-five years. I cannot myself find any assistance in that case which is applicable to the present case. Equally, the case that I have already mentioned of *Re Eyre* (3) does not seem to be a case which has any bearing by reason of the great difference in the terms of this clause which we have to construe. *Saul* v. *Pattinson* (2) is a case to which I have already referred, because it was distinguished by Chitty, J., in the judgment to which I have alluded; and again, with regard to that case, I cannot see that it is applicable. We have in all these cases to determine the meaning of the words which are in the will which are before us. Here the trust is in favour of Egremont John Mills, in default of and until he makes an appointment, and, having regard to the definite terms of that trust I cannot see that there is any trust for the benefit of the children or remoter issue of the first Lord Hillingdon or that there is thereby placed upon him any fetter to prevent his executing the release, as he has done.

In these circumstances, and for these reasons, I have come to the conclusion that we must allow the appeal and answer the question which has been put to the court—Is the release of June 18, 1929, effective?—in the affirmative.

LAWRENCE, L.J.—The summons in this action raises two questions, the answers to which depend upon the true meaning and effect of cl. 19 of the will of the testator, namely, first, whether the plaintiff can, by deed, release the power thereby conferred upon him, and, secondly, whether the plaintiff can exercise that power in his own favour. By cl. 19 the testator directs that, in the events which have happened, the residue of his estate should, subject to the trusts hereinbefore declared, be held

> "upon such trusts and for such purposes generally for the benefit of all or any one or more exclusively of the other or others of the children and remoter issue of my father who in the opinion of my said brother evidence an ability and desire to maintain the family fortune by replacing the enormous sums of which it has been despoiled by death duties and other taxation as my brother the said Egremont John Mills shall by any deed revocable or irrevocable appoint and in default of and until and subject to any such appointment in trust for my said brother absolutely."

In construing this clause, due regard must, of course, be had to the other provisions of the will. In the first place, it is to be noted that, although the plaintiff is named one of the two trustees of the will, and although various powers and discretions are conferred in the earlier parts of the will upon the trustees as such, the power conferred by cl. 19 is conferred upon the plaintiff by name in his character of brother. It is a power which can only be exercised by the plaintiff personally, and does not devolve upon a future trustee of the will. In the next place, it has to be observed that the primary trust of the residue is in favour of the testator's grandson, Henry Algernon Seymour Mills, who was then an infant, and of any wife whom he might marry and of any issue he might have, subject to an overriding trust for accumulation during a period of twenty-one years in order to replace the amount which would have to be expended on death duties and thus to ensure that this grandson should come into possession of an undiminished estate. It is only owing to the death of the grandson during his infancy unmarried and without issue that cl. 19 of the will has come into operation. That clause is introduced by the words: "Subject to the trusts and powers hereinbefore contained." Those introductory words, however, do not, in my opinion, operate to postpone either the vesting of the beneficial interest or the right to exercise the power thereby given to the plaintiff. The power came into existence and could properly have been exercised immediately after the death of the testator; it is not a power arising on a future event or upon a contingency. The plaintiff could, on the death of the testator, by an exercise of the power, have conferred on an appointee an absolute interest in the trust fund (subject to any overriding trust then in operation), which interest on the death of the grandson unmarried and without issue, would have enabled the appointee to put an end to the trust for accumulation and have entitled him to a transfer of the trust fund. The testator seems to have anticipated such an eventuality as he has indicated the desire that the appointee's shares should be persons able and willing to replace the amount of the death duties.

I turn now to the question whether the plaintiff can release the power so conferred upon him. Section 155 of the Law of Property Act, 1925, enacts that "a person to whom any power, whether coupled with an interest or not, is given, may by deed release, or contract not to exercise, the power"; and s. 160 enacts that this provision applies to "powers created or arising either before or after the commencement of this Act." By a deed dated June 18, 1925, the plaintiff purported to release the power conferred upon him by cl. 19 of the will. The effect of that release, if valid, was to extinguish the power and to place the plaintiff in a position to stop the accumulations and to obtain a transfer of the trust fund to himself. It is contended, however, that s. 155 of the Act does not apply to the power conferred on the plaintiff, and that the release of June 18, 1929, is ineffectual and void. This contention is based on the proposition that the power was conferred on the plaintiff as a trustee, coupled with a duty, and that, therefore, any release of it would be a breach of trust. In my judgment, that proposition is unsound. The power is clearly one which falls under the third head in the classification of powers stated by SIR GEORGE JESSEL in *Re D'Angibau, Andrews* v. *Andrews* (4), i.e., a power appendant or appurtenant. Under the will the trust fund is to be held in default of and until and subject to any appointment in trust for the plaintiff absolutely; it is, therefore, plain that the plaintiff has a beneficial interest in the trust fund, which interest will be affected, diminished, or disposed of by an exercise of the power. I know of no case either before or since the Conveyancing Act, 1881, which it has been held that a power appendant or appurtenant could not be released, and counsel were unable to refer me to any decision to that effect. As regards a power in gross it is firmly established that such a power may be released by the donee, even though the release be for his own benefit: see, for instance, *Re Radcliffe, Radcliffe* v. *Bewes* (6) ([1892] 1 Ch. at p. 231), in which case LINDLEY, L.J., speaking of a power in gross, says:

> "There was a time when it was doubtful whether such a power could be released; but all doubt on that point was removed more than fifty years ago,

A and no doubt can be thrown or ought to be thrown on the doctrine that was then established, even independently of the 52nd section of the Conveyancing Act, 1881."

As regards powers simply collateral, the matter stands on a different footing. Before s. 52 of the Act of 1881 was enacted such a power could not be released; but since the passing of that Act even a simply collateral power can be released B unless it is conferred on trustees coupled with a duty, in circumstances which would render a release of it a breach of trust. EVE, J., has held that in this case the power conferred on the plaintiff is a power coupled with a duty, and, although not a trust, is in the nature of a trust, and, therefore, cannot be released. With the greatest respect for the opinion of the learned judge, I do not agree with this view. The learned judge has based his decision primarily upon an intention to be C gathered from the will that the testator did not desire that the power should be released. In his judgment the learned judge says:

> "It is impossible to believe that the testator ever intended or contemplated that the plaintiff could at any time after his death by releasing the power or exercising it in his own favour constitute himself absolute owner of the whole residue and put an end to the trusts, including that for accumulation. His D intention was that the powers should be retained and be exercisable at least down to the expiry of the primary trust for accumulation, he gave the power to the plaintiff for the benefit of those who formed the class from which he could select those who should become possessed of the fund increased by the accumulations, and I cannot accede to the view that in these circumstances the plaintiff is free to divest himself of the power or to do anything which will preclude him E from exercising it hereafter."

Although there can be no doubt that an intention, either expressed or implied, that a power should not be released by the donee is relevant in considering whether that power has been conferred upon the donee as a trustee, coupled with a duty, yet if it appears from the will that the power is in fact not so conferred, then, in my judgment, it is immaterial whether or not the testator, either expressly or by F implication, indicates an intention that the power should not be released. A donor rarely if ever indicates an intention that a power conferred by him should be released. The right of release is either given to the donee by statute, or is inherent in the donee, unless the power be conferred upon him as a trustee, coupled with a duty. In the present case it cannot be contended that the power is a power in the nature of a trust, in the sense in which that expression is understood by lawyers. G Counsel for the defendant has called our attention to FARWELL ON POWERS (3rd Edn.), c. 12, which deals exhaustively with that class of powers, and has demonstrated, to my satisfaction, that the power in the present case differs essentially from any of those referred to in that chapter. The plaintiff is admittedly not under any duty to exercise the power, and there is nobody who could enforce its exercise or complain of a breach of trust if it were not exercised. Moreover there H is a gift in default of its exercise to the plaintiff himself, so that no gift can be applied to the persons indicated as possible appointees in the event of the plaintiff making no appointment. All the arguments addressed to us by counsel for the plaintiff seem to me to apply a fortiori to a power in gross. A power conferred upon a tenant for life to appoint among his own children seems to me to be very much on a par, but not such a strong case as the present. The only difference is I that in the case of a tenant for life the donee, by exercising the power, does not diminish or affect his own beneficial interest whereas in the case of a power appendant or appurtenant, such as we have here, the donee, on an exercise of the power, necessarily diminishes or extinguishes his beneficial interests. Such difference as there is between the two cases, therefore, is a difference which tells in favour of the present plaintiffs' contention.

The three cases, to which the learned judge has referred as supporting his view, are, in my judgment, distinguishable from the present case. Taking them in order of date there is, first, *Weller* v. *Ker* (1) which was decided in 1866, before the Act of 1881. In that case a duty was laid on the trustees to convey the trust estate to the eldest son of the testator for an estate tail on attaining the age of twenty-five years, subject to a declaration that in case the son should marry, or otherwise conduct himself so as not to merit the approbation of the trustees, the estate to be then conveyed to him should be a life estate only with remainder to his children in fee. It is clear, therefore, that there was an imperative duty imposed upon the trustees to convey some estate to the son when he attained twenty-five years, and until that event happened it was impossible for the trustees to determine whether the estate which they ought then to convey was an estate in tail or only an estate for life. The power which was vested in the trustees was plainly a purely collateral power in the nature of a trust; and in order to perform their duty they were bound to keep the power alive until the son attained the age of twenty-five, as it would obviously have been a breach of trust to have released it before that date.

The next case is the one which was chiefly relied upon by the learned judge, namely, *Re Eyre, Eyre* v. *Eyre* (3). In that case again the power in question was a power simply collateral, which is the most common form of power coupled with a duty. The power was given to the two trustees of the will by name, without calling them trustees, but the property, the subject-matter of the power, was vested in them as trustees and they had no beneficial interest in it. Kay, J., while pointing out that it was a power given to the two donees nominatim and, therefore, would not pass to any future trustee of the will, held that it was nevertheless a power given to them as trustees, and that it was a power coupled with a duty which prevented it being released without a breach of trust. The last of the three cases is *Saul* v. *Pattinson* (2), before Pearson, J. In that case it is to be observed that the power with which the learned judge had to deal was again a power simply collateral to be exercised by trustees who had no beneficial interest in the property, the subject-matter of the power. It was conferred upon the trustees as such, and the learned judge founded himself upon *Weller* v. *Ker* (1), which he considered was on all fours with the case which he had to decide. It follows, from what I have said, that, in my opinion, the three cases upon which the learned judge has, to a large extent, founded his judgment do not apply to the present case. It seems to me, as I have said before, that in the present case the testator has given his trust fund in the events which have happened, to his brother absolutely with a power appendant or appurtenant to appoint the fund to some person or persons of the donee's own selection, the class from which the selection might be made being limited to the descendants of the testator's father. There is no obligation on the donee to exercise the power, and unless and until he exercises it he remains the beneficial owner of the trust fund, his absolute interest in which is only to be displaced if and to the extent to which he should choose to exercise the power. In my judgment such a power comes directly within s. 155 of the Act of 1925, and the plaintiff can release it or contract or covenant not to exercise it.

In the result I agree that the proper order to make is to declare that the release of June 18, 1929, is a valid and effectual release of the power of appointment conferred by the testator's will on the plaintiff. In these circumstances it is unnecessary to decide the second question raised by the summons, and not having heard any argument on that question I prefer not to express any opinion whether the plaintiff is himself one of the objects of the power or not.

ROMER, L.J.—I have arrived at the same conclusion. Before the Conveyancing Act, 1881, the donee of every power, other than a collateral power, and since the coming into operation of that Act, the donee of every power, whether coupled with an interest or not, has power to release the power. Of course, no donee can exercise that power of release where he would commit a breach of trust by so doing. It has, accordingly, been held in cases, both before and since the passing of that Act, that where trustees have conferred on them, as incident to the execution of their trusts, certain powers, trustees cannot release those powers pending the duration of their trust; and that, of course, is obvious, because a

A trustee can no more divest himself of such a power than he could divest himself of the property given to him for the purpose of enabling him to carry into effect the trusts of the particular document. The question, therefore, that we have to determine in the present case is whether this particular power is conferred upon the plaintiff, the testator's brother, as a trustee. It is not contended by his counsel, and it could not be contended, that the power is conferred upon him as B one of the general trustees of the will. But I agree with counsel that that does not conclude the matter; the brother may, nevertheless, be a trustee of this particular power. The learned judge arrived at the conclusion that he was a trustee of this power and did so because he came to the conclusion that the testator had indicated in his will the intention that the power should be retained and be exercisable at least down to the expiry of the primary trust for accumulation.

C With all deference to the learned judge, I find myself unable to arrive at the same conclusion. I do not, for myself, see how it would be possible for us to hold that this power, given to the brother, is a power in the nature of a trust or a power coupled with a duty, unless we are prepared to hold that every power of selection given to a beneficiary is a power in the nature of a trust, even where there is a gift over in default of exercise of the power of selection. It is true D that here the brother is given power, by the testator, to select among the descendants of the testator's father, certain of them to succeed to the residuary trust fund which, pending the exercise of that power, and in default of the exercise of that power, is vested in the brother himself absolutely. In the ordinary case, where a trust fund is directed to be held upon trust for a tenant for life, and after his death upon trusts or for such of his children as he may select, and in default E of his exercising that power, in trust for the children equally, the testator always, in one sense, hopes and intends that the donee of the power will, when the time comes, carefully and wisely select which of the class indicated by the testator should succeed to the capital of the fund. In such a case as that, it has been held over and over again that the power is not a power in the nature of a trust or a power coupled with a duty. The reason for that is stated in FARWELL ON POWERS (3rd F Edn.), p. 17, to be this. He says:

> "Such powers cannot be called trusts, for the alleged cestuis que trust cannot compel their execution; and as it is at the option of the donee to exercise it or not, any dealing with the estate inconsistent with its exercise must determine the option."

The learned author referred to, among other authorities for the proposition, *Smith* G v. *Death* (7). I find it is a case of that description.

> "The plaintiff's title depended upon the will of Edward Wise, who devised the property in question to Charles Brown for life, with remainder to the use and behoof of such child and children of the body of the said Charles Brown, and him surviving, who should be brought up and educated as a member of the H Established Church of England, and should be a constant frequenter or frequenters thereof, in such parts and proportions, &c., as he the said Charles Brown should by deed or will appoint; and in default of such appointment, to the use of the first son of the body of the said Charles Brown, lawfully begotten, who should be brought up and educated as aforesaid, and should be a constant frequenter of the said church of England, and the heirs of the body of such son, with divers remainders over. The first son of Charles Brown attained his I majority in 1817, and soon afterwards joined with his father in suffering a recovery, under which, the plaintiff claimed."

The effect of that recovery was to extinguish the power, unless it was a power in the nature of a trust, a power coupled with a duty, and in giving judgment, LEACH, V.-C., said this:

> "It made no difference that here the power was a particular power in favour of children; that *King* v. *Melling* (8) was a particular power in favour of the wife; that such a power could not be called a trust, for the alleged cestui que

> trust could not compel the execution of it, and being at the option of the grantee for life to exercise or not, any dealing with the estate inconsistent with its exercise must determine his option."

A

In the present case the plaintiff has been given, as I say, a power of selection; but inasmuch as none of the persons forming the class from which he can select has any power to insist upon the exercise by him of his power of selection and appointment, the power, in my opinion, is not a power coupled with a trust, and could, therefore, be validly released by the plaintiff. For these reasons, I am of opinion that this appeal should be allowed.

B

LORD HANWORTH, M.R.—The form of the order will be "that upon the true construction of the will of the above-named testator, Algernon Henry Mills, having regard to the deed of release executed by the plaintiff of the power of appointment conferred by cl. 19 of the said will, the plaintiff is now absolutely and beneficially entitled to the property, subject to the said power subject only to the provision thereout of such sums as are required to meet such of the annuities and legacies bequeathed by the said will as have not been paid or provided for."

C

Appeal allowed.

Solicitors: *Murray, Hutchins & Co.*; *Bircham & Co.*

D

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

E

FRANKENBURG *v.* FAMOUS LASKY FILM SERVICE, LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Slesser, L.JJ.), December 15, 1930]

F

[Reported [1931] 1 Ch. 428; 100 L.J.K.B. 187; 144 L.T. 534]

Costs—Taxation—Costs incurred before action brought—Costs of more than two expert witnesses.

A taxing master has a discretion, under R.S.C., Ord. 65, r. 27 (29), to allow costs incurred before action brought if they relate to matters that prove of use and service in the action: *Pêcheries Ostendaises (Soc. Anon.)* v. *Merchants' Marine Insurance Co.* (1), [1928] 1 K.B. 750, 762, applied; and also to allow more than two expert witnesses in a case which is exceptionally weighty or complex. A proper and wide discretion must always be left to the taxing master in such matters. With regard to the number of expert witnesses the rule laid down by TOMLIN, J., in *Graigola Merthyr Co., Ltd.* v. *Swansea Corpn.* (2), [1927] W.N. 30, is a general rule, to be followed or not by the court in each case at its discretion.

G

H

Notes. Applied: *Reed* v. *Gray*, [1952] 1 All E.R. 241. Followed: *Re A Solicitor*, [1955] 1 All E.R. 257; *Re A Solicitor*, [1955] 2 All E.R. 283. Referred to: *Gibbs* v. *Gibbs*, [1952] 1 All E.R. 942.

I

As to the amount of costs to be allowed as taxation, see 26 HALSBURY'S LAWS (2nd Edn.) 100 et seq.; and for cases see DIGEST: Pleading and Practice, 928 et seq.

Cases referred to:

(1) *Pêcheries Ostendaises (Soc. Anon.)* v. *Merchants' Marine Insurance Co., Ltd.*, [1928] 1 K.B. 750; 97 L.J.K.B. 445; 138 L.T. 532; 44 T.L.R. 270; 72 Sol. Jo. 102; 17 Asp.M.L.C. 404, C.A.; Digest Supp.

(2) *Graigola Merthyr Co., Ltd.* v. *Swansea Corpn.* (1926), 71 Sol. Jo. 142; 163 L.T.Jo. 163; [1927] W.N. 30; 22 Digest (Repl.) 503, *5579*.

(3) *Re Scarre* (1920), 149 L.T.Jo. 176; 43 Digest 695, *1335.*

(4) *Bright's Trustee* v. *Sellar*, [1904] 1 Ch. 369; 73 L.J.Ch. 245; 90 L.T. 155; 20 T.L.R. 210; Digest Supp.

Appeal from an order of BENNETT, J.

The plaintiff, Phillip Frankenburg, issued the writ in the action on Sept. 7, 1929, to restrain the defendants from interfering with his ancient lights by the erection of a cinema or theatre in St. James' Street, Manchester, on the opposite side of the street to the plaintiffs' premises. The statement of claim was delivered on Oct. 30, 1929, and the defence on Nov. 28, 1929. The defendants' solicitors wrote after the issue of the writ that the defendants intended to continue building unless restrained by interim injunction which the plaintiff did not apply for on the ground that it was not a case for such an application. An order was made on Jan. 14, 1930, that all further proceedings be stayed, the parties having agreed to compromise on the following terms:

> "(1) Defendants to pay to the plaintiff his costs of this action to the date of this order as between solicitor and client, such costs to be taxed in default of agreement; (2) P. J. Waldram and D. Y. Pitts should be appointed to inquire into and decide what damages the plaintiff was entitled to in respect of any illegal obstruction of the access of light to such of the windows in the plaintiff's buildings as might be ancient lights by reason of the erection by the defendants of a cinema or theatre on the north-west side of St. James' Street, Manchester, in accordance with the defendants' drawings, copies of which were in the plaintiff's possession, with power if they disagreed to appoint an umpire; (3) the fees and expenses of Waldram and Pitts and the umpire to be paid by the defendants; (4) the defendants to pay to the plaintiff the amount of the damages assessed immediately they were ascertained."

The costs were taxed by the district registrar acting as taxing master. The defendants objected to certain items allowed on the ground that the general principle on which the taxation proceeded was wrong in law and contrary to the provisions of Ord. 65, r. 27, sub-r. 29, which provided that items should be disallowed which had been incurred through overcaution, and also because some items allowed related to work done before action brought solely to enable the plaintiff to decide whether to take action or not: *Re Scarre* (3). The registrar allowed these items on the basis that they were instructions for the statement of claim, but in fact they were all incurred before the issue of the writ. It was also contended that the costs of expert witnesses before the issue of the writ were not chargeable, being unnecessary, improper, and unusual charges incurred through the plaintiff's overcaution within Ord. 45, r. 27, sub-r. 29, and so far as they were incurred after that date they were special and unusual charges and expenses to witnesses. The registrar allowed the items on the ground that the case was an exceptional one. On Nov. 27, 1930, BENNETT, J., made the following order:

> "Disallow such part of the charges of J. H. Maybury as were incurred before action brought. Disallow such portion of the charges of Joseph Swarbrick as related to work done before action brought with a view of considering whether the action ought to be brought. Disallow charges of D. Y. Pitts on the ground that there were no exceptional circumstances to justify the employment of a third expert witness."

BENNETT, J., said that the items in Maybury and Swarbrick's accounts incurred before the writ, were incurred, not for the purposes of the action, but to enable the plaintiff to ascertain his position and were not costs of the action: *Bright's Trustee* v. *Sellar* (4).

The plaintiff appealed.

Fortune for the plaintiff.

Stenham for the defendants.

LORD HANWORTH, M.R.—This appeal must be allowed.

The point we have to determine is whether or not Bennett, J., was right in reversing a decision which had been arrived at by the taxing master upon a review of taxation asked for by the parties. In July, 1929, the defendants were minded to pull down some existing premises and build others upon the site on a more extensive scale. On July 1, 1929, a Mr. Mason, acting on behalf of the plaintiff, wrote a letter saying that he had been consulted as to the proposed erection by them of a theatre in Manchester.

> "From the plans which have been submitted by Mr. Dunks on behalf of your client, the proposed new building will seriously interfere with the ancient lights attached to the premises fronting St. James' Street, belonging to my client, and I have, therefore, been instructed to inform you that my client will apply for an injunction unless I hear from you that you do not intend to exceed the height of the present buildings belonging to you."

The reply, on July 15, states that Mr. Ryder has been retained and instructed by the defendants to deal with the matter. On July 16, Mr. Ryder says:

> "I took up with the architect acting for my client, your remarks that the plans deposited at the Town Hall differed in height from the plans as submitted by Mr. Dunks. . . . I shall be obliged if you will kindly inform me at your earliest convenience that your architect (that is the architect acting for the plaintiff) has checked the elevation I left with you yesterday, as my client is desirous of starting demolition of the building."

Demolition of the building, of course, would remove a part of the materials which it was necessary to lay before the court if and when the matter passed into litigation. Mr. Ryder again asks on July 20 whether the plaintiff's architect has checked the elevation, and on Aug. 6, Mr. Ryder, for the defendants, again speaks about the plaintiff's architect and of a conference that they were all to have.

> "After the conference I will be in a position to deal with the proposal made at our interview on the 15th ultimo with yourself, Mr. Dunks, and the writer, that I should on behalf of my clients make an offer to compensate your clients for any damage to light which may be sustained."

It is quite clear that negotiations were pending between the parties; that the plaintiff had taken up a firmer attitude; that he had expressed his intention of obtaining an injunction unless his desires were met; that the defendants had pointed out that it might be possible to reach an agreement; and on both sides it had been clearly indicated that both of them were armed with the advice of architects who would be required to give expert opinion in order to guide the respective parties. After that matters proceeded, there were various drawings made and the like, until on Sept. 7, 1929, the writ was issued asking for an injunction to restrain the defendants from causing a nuisance to the plaintiff's buildings. On Jan. 14 the action was settled on the terms of the defendants paying costs as between solicitor and client, and it being referred to some experts to determine how much ought to be paid by way of damages to the plaintiff. Those damages have recently been fixed, and we are told that they amount to a sum of over £1,400. That figure clearly indicates that there was substantial, indeed serious, injury to the plaintiff's premises. If the action had gone on it is clear that expert evidence would have had to be called from the plaintiff's side in order to establish that he had suffered the nuisance, and certainly to quantify it as not being one of what might be called partial injury, but one of serious disturbance to the plaintiff's enjoyment of light for which a sum of not less than £1,400 was required for compensation.

In the course of taxing the costs, which are to be taxed as between solicitor and client, objection has been taken by the defendants that the amount allowed by the master has been too liberal in respect of two points. First, it is said that an allowance has been made in respect of fees incurred to architects before the writ

A was issued, and those fees must have been incurred in order to advise the plaintiff whether to bring an action or not and what his true legal rights were, and were not incurred in reference to the presentment of the case to the court. The second point is that the master has allowed three experts to the plaintiff and required the defendants to make payment in respect of those three experts, whereas there is a rule, applied by TOMLIN, J., in the moving mountain case, *Graigola Merthyr Co.,*
B *Ltd.* v. *Swansea Corpn.* (2), that two experts, even in a very serious subsidence case, and two only, should be allowed. The master, when the matter was brought to his attention for the purposes of review, answered the objections taken in this way. With regard to the first, the objection was taken:

> "The total amount of this charge is excessive and the whole of the work done is not chargeable as against the defendants, because a large portion is in
> C respect of advising the plaintiff prior to and during the action."

To that the master answered:

> "I have again gone carefully through the charges of this witness and have disallowed a further £5 5s. I am satisfied that the remaining charges are reasonable and necessary for the plaintiff's case."

D When did the plaintiff's case begin? It is quite clear that it did not begin at the time of the issue of the writ. The action was threatened as early as the first letter to which I have made reference, namely, July 1, 1929. It was then that the plaintiff's solicitor said he would apply for an injunction. It is obvious that at that time any prudent plaintiff or intending plaintiff would have taken the trouble to be advised as to what his rights were and as to the evidence that he would have
E to adduce in order to make his claim successful. More than that, the letter of July 16 contemplates on the part of the defendants that the plaintiff was being advised by an architect and also gave notice fairly enough to the plaintiff of the defendants' intention of starting demolition of the building at once. Before that demolition took place it was obviously necessary that there should be an expert examination, with drawings and the like, for the presentation of the evidence as
F to the condition of the building before demolition. This is all passing after July 1, 1929, during the two months that elapsed while negotiations were going on, before the writ was issued; and the letter on Aug. 6, shows that the plaintiff was wisely incurring these expenses on advice, for there was then a suggestion that it would be possible for the defendants to make an offer to compensate the plaintiff for any damage done to light.

G I think that counsel for the defendants would go so far as to say that, broadly speaking, there cannot be any claim for costs incurred before the writ is issued, because one must mark a wide divergence between expenses which are incurred with a view to proof at the trial and expenses incurred with a view to advice to a plaintiff whether or not he should incur the expenses of litigation. It appears to me that *Pêcheries Ostendaises (Soc. Anon.)* v. *Merchants' Marine Insurance Co.,*
H *Ltd.* (1), to which reference has been made, is both a binding and a guiding authority to us on this point. I do not at all shrink from or desire to vary the words which I used in that case ([1928] 1 K.B. at p. 757):

> "It appears to me, therefore, that there is power in the master to allow costs incurred before action brought, and that if the costs are in respect of materials,
> I ultimately proving of use and service in the action, the master has a discretion to allow these costs, which he probably will exercise in favour of the party incurring them, because they have been made use of during the course of the action."

It is said that those words are too wide, that they ought not to be "in respect of materials ultimately proving of use and service in the action," but that they ought to be cut down to the words which ATKIN, L.J., used: "Where necessary or proper for the attainment of justice." As I say, I do not shrink from the words I used. I think that, when I speak of costs "ultimately proving of use and service in the action,'' I mean as being proper for the attainment of justice in that case. They would not be of value or service in the action unless they were relevant to some of the issues which had to be tried and in respect of which justice was sought. I do not desire to embellish or to withdraw from the words used. It appears to me that that case is abundant authority for allowing, as the master has allowed, these costs before action. It is to be observed that in the *Pêcheries Ostendaises Case* (1) the plaintiff's bill of costs which were to be paid was taxed on the basis of party and party. In the present case they are to be taxed on the basis of solicitor and client, not solicitor and own client, I agree, but the difference between party and party and solicitor and client costs is undoubtedly that solicitor and client costs are intended to embrace a more generous allowance for the actual costs which have been incurred by the plaintiff. It appears to us, therefore, that these costs incurred before action are costs which may be fairly attributable to the conduct of the defendants and were within the costs which were contemplated would have to be paid by the defendants. The master has said: "I am satisfied that the remaining charges are reasonable and necessary for the plaintiff's case." A proper and wide discretion must always be left to the taxing master in such matters. It appears to us on this point that he has clearly advised himself in accordance with the authorities, and certainly it is not right on the part of this court or any court to upset his discretion, exercised judicially, upon a matter which is emphatically for the discretion of the taxing officer, an officer charged with a very difficult duty, a duty which is only made possible by his experience.

With regard to the second point, that is the allowance of the third expert, on that the master has said this:

> "I have carefully considered the question of expert witnesses. This is an action for infringement of the plaintiffs' right to light by reason of building operations of the defendants. The plaintiff's case involved the preparation of elaborate plans and investigation by an architect, and founded on these very intricate calculations and drawings by two skilled experts. I have, therefore, allowed, as an exceptional case, three expert witnesses."

It is quite clear from that that the learned master has treated this as an exceptional case. Counsel for the defendants has rightly called our attention to what Tomlin, J., did in the *Graigola Case* (2), and I will also call attention to the terms of the Acquisition of Land Act, 1929, by s. 3 (1) of which:

> "In any proceedings before an official arbitrator, not more than one expert witness on either side shall be heard unless the official arbitrator otherwise directs."

The case before Tomlin, J., and the statutory provision which I have just referred to clearly and cogently indicate that the number of expert witnesses should be limited as far as possible. At the same time, in the statutory provision which I have read there is a possible exception where the official arbitrator "otherwise directs." I am also clear that Tomlin, J., did not intend that this rule should be a rigid and iron rule for all cases. That being so, we have to consider whether this is an exceptional case. The learned master says it is, and there is evidence, I think, on which he could come to that conclusion. It would be highly inconvenient if these matters were debatable again before the court, for the court is not well equipped for coming to a conclusion on these detailed matters of a bill. The learned master has said, going through the matter carefully, that the plaintiff's case did involve elaborate plans and investigation by an architect, and so on, and he says that he has, therefore, allowed, as an exceptional case, three expert witnesses. I agree with him that it must be an exceptional case for the allowance of three expert witnesses. I should be very sorry that our judgment in this case tended in any way to enlarge the number of expert witnesses to be called or showed any variance from the principle which underlies Tomlin, J.'s decision in the *Graigola Case* (2). It is rather because we affirm the principles of that case that we have come to the conclusion that we cannot accept Bennett, J.'s decision to overrule the taxing master. This was a case in which there was difficulty. It was a case of substance; it was a case in which considerable damages were allowed, and in view of those facts it appears to us one which lies in the field of the master for determination. We cannot interfere with that decision, although we do issue the caution that it must be an exceptional case if three expert witnesses are to be allowed, and it can only be that that allowance should be made in cases where either because of the weight of the matter or the complexity of the matter, or for some other reason, it is wise to give that third assistant to the one side or the other.

In these circumstances the appeal from BENNETT, J., must be allowed, and the review of the taxation by the master must be restored, and his decision upheld; that will be on the terms that the respondents pay the costs both here and below.

LAWRENCE, L.J.—I agree. It is clear that Ord. 45, r. 27, sub-r. 29, gives the taxing master a very wide discretion:

> "On every taxation the taxing master shall allow all such costs, charges, and expenses as shall appear to him to have been necessary or proper for the attainment of justice. . . ."

The real question on this appeal, therefore, is whether the court ought to interfere with the conclusion reached by the taxing master that the costs incurred before action and the costs of the third expert were costs which would have been "necessary or proper for the attainment of justice" if the action had proceeded to trial. It is well established that the court will not interfere with the discretion of the taxing master unless it is shown that he has gone wrong on some question of principle. Counsel for the defendants contended that the only costs before action which could properly be allowed in any case were costs incurred for the purpose of obtaining evidence to be used in the action, and that all costs incurred for the purpose of obtaining advice whether an action should be brought must in every case be rigorously excluded. In my judgment, if the court were to lay down any such hard and fast rule it would be unduly fettering the discretion of the taxing master. *Bright's Trustee* v. *Sellar* (4), and *Pêcheries Ostendaises* (*Soc. Anon.*) v. *Merchants' Marine Insurance Co., Ltd.* (1), show conclusively that some costs before action may be allowed, provided that they were necessary or proper for the attainment of justice. *Pêcheries Ostendaises* (1) furnishes a useful example of costs before action which are proper to be allowed. The Master of the Rolls there says ([1928] 1 K.B. at p. 757): "If the costs are in respect of materials ultimately proving of use and service in the action, the master has a discretion to allow these costs." Applying that principle to the present case it is for the taxing master to form an opinion whether the costs incurred by the plaintiff before action brought were costs of obtaining such materials as would have been of use and service at the trial of the action if it had not been stayed.

The second point, the allowance of the cost of qualifying as third expert, stands on a somewhat different footing. TOMLIN, J., in *Graigola Merthyr Co., Ltd.* v. *Swansea Corpn.* (2) said that he laid it down as a rule to guide himself in future cases that he would not hear more than two expert witnesses in cases where expert evidence was required, unless there were special circumstances. That seems to me to be an admirable working rule, and I am glad to hear that it has been adopted by the other Chancery judges. But, after all, it is only a general rule, to be followed by each judge at his discretion. Moreover, it is frequently difficult at the commencement of an action to foretell whether special circumstances will or will not arise which would induce the learned judge at the trial to make an exception to the rule. In the present case the taxing master has had a difficult task to perform, as he has had to judge whether or not if the case had proceeded to trial the judge would have allowed a third expert witness to be called. It is clear that the taxing master's attention was called to the rule and that he gave due weight to it. He, therefore, has not misdirected himself on any question of principle, but has, after careful investigation of the facts, satisfied himself that there were special circumstances which would have induced the trial judge to make an exception and to hear the evidence of a third expert witness. In my opinion, this A was a matter upon which the taxing master could properly exercise his discretion. It must not be lost sight of that the taxation was one as between solicitor and client and that the court has not the same opportunity of going fully into the details as the taxing master. I agree that this appeal ought to be allowed with costs.

B

SLESSER, L.J.—I agree.

Appeal allowed.

Solicitors: *Grundy, Kershaw, Samson & Co.*, London and Manchester; *Kerly, Sons & Karuth* for *Marco Blumberg*, Manchester.

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*] C

D

TERRONI AND ANOTHER *v.* CORSINI

[CHANCERY DIVISION (Maugham, J.), October 31, December 3, 1930]

[Reported [1931] 1 Ch. 515; 100 L.J.Ch. 289; 145 L.T. 95]

Landlord and Tenant—Repair—Damages for failure to repair—Value of reversion —"Reversion"—Further lease granted before termination of existing lease— Landlord and Tenant Act, 1927 (17 & 18 *Geo.* 5, *c.* 36), *s.* 18 (1). E

Plaintiffs and defendant were partners owning a lease of business premises granted in 1909 and expiring at Lady Day, 1930. On Oct. 7, 1929, the landlord granted to them a reversionary lease for fourteen years from Lady Day, 1930. On Oct. 29, 1929, the parties entered into an agreement for a dissolution, the assets to go to the highest bidder of the partners, and division of the proceeds, the defendant taking a moiety. The date fixed for completion was F Nov. 18, 1929, the defendant to pay meantime rent, rates, taxes, and outgoings, and "all trade debts and other liabilities whatsoever in respect of the said premises and business." This agreement was construed by the court in October, 1930, and it was declared that the words "other liabilities" included damages under a repairing covenant in the lease. The question now raised was whether the damages recoverable on Nov. 18, 1929, were to be estimated on G the basis of the amount of the depreciation in value of the reversion expectant on the determination of the lease of 1909 or on that of the reversionary lease.

Held: the reversion, for the purposes of s. 18 (1) of the Landlord and Tenant Act, 1927, was the reversion immediately expectant on the lease of 1909 irrespective of that expectant on the reversionary lease.

H

Notes. Considered: *Westminster* v. *Duncombe* (1938), 82 Sol. Jo. 235. Referred to: *Re Windmill St. Nos. 38, 39, 40, St. Pancras, London*, [1950] 1 All E.R. 59; *Smiley* v. *Townshend*, [1950] 1 All E.R. 530.

As to damages for breach of covenant to repair, see 20 HALSBURY'S LAWS (2nd Edn.) 219 et seq.; and for cases see 31 DIGEST (Repl.) 366 et seq. For Landlord and Tenant Act, 1927, see 13 HALSBURY'S STATUTES (2nd Edn.) 883. I

Cases referred to:

(1) *Joyner* v. *Weeks*, [1891] 2 Q.B. 31; 60 L.J.Q.B. 510; 65 L.T. 16; 55 J.P. 725; 39 W.R. 583; 7 T.L.R. 509, C.A.; 31 Digest (Repl.) 373, *5042*.

(2) *Re Highett and Bird's Contract*, [1903] 1 Ch. 287; 72 L.J.Ch. 220; 87 L.T. 697; 51 W.R. 227; 47 Sol. Jo. 204, C.A.; 40 Digest (Repl.) 199, *1609*.

(3) *Re Taunton and West of England Perpetual Benefit Building Society and Roberts's Contract*, [1912] 2 Ch. 381; 81 L.J.Ch. 690; 107 L.T. 378; 56 Sol. Jo. 688; 40 Digest (Repl.) 140, *1076*.

Adjourned Summons.

The facts appear in the headnote.

The doctrine of interesse termini was abolished by the Law of Property Act, 1925, s. 149 (1).

By Landlord and Tenant Act, 1927, s. 18 (1):

> "Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid; and in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement."

Henry Johnston, for the plaintiffs, referred to *Joyner* v. *Weeks* (1).

Tooth, for the defendant, referred to *Re Highett and Bird's Contract* (2) and *Re Taunton and West of England Perpetual Benefit Building Society and Roberts's Contract* (3).

MAUGHAM, J.—This point, which arises on an order made by me on Oct. 31, last, is somewhat puzzling. The order which I made involved an inquiry as to what was the amount which, on Nov. 18, 1929, the lessor could have recovered against the lessees for damages. The question of the measure of damage for breach of covenant to repair has been the subject of many decisions, some of which, before the date of the coming into force of the Landlord and Tenant Act, 1927, had led to an unjust state of affairs, because landlords were entitled to recover large sums from tenants at the expiration of the leases in respect of worthless properties which they immediately pulled down. It is true to say that the question of damages in the case where the action is brought during the term was well settled by decisions, the amount being, not that required to put the premises in repair, but that by which the reversion was depreciated in value. Accordingly, it may be said that, in regard to an action brought during the term for damages for breach of covenant to repair, s. 18 (1) of the Act of 1927 does very little, if anything, to limit the damages recoverable, while, on the other hand, the damages recoverable if the action is brought at the expiration of the term may, no doubt, be diminished by reason of the provisions of the subsection, the latter part of which has a most material effect on the damages which a landlord may recover.

The question here is whether the word "reversion" refers to the reversion on the lease irrespective of the reversionary lease granted before the date of the assessment of damages, or whether, as the doctrine of interesse termini has been abolished, and the reversionary lease created a term of years effective in law and equity as from March 25, 1930, I ought to regard the word "reversion" as meaning reversion expectant on the determination of the reversionary lease. The point is not easy to determine, but, in my judgment, the "reversion" is the reversion immediately expectant on the lease, irrespective of that expectant on the reversionary lease. The former, I think, is the "reversion" indicated in s. 18 (1) of the Landlord and Tenant Act, 1927, and I do not think that the fact that a term of years has been created to take effect from March 25, 1930—a future event at the date when damages must be assessed—affects the question.

I come to that conclusion with some reliance on *Joyner* v. *Weeks* (1). In that case the plaintiff, as lessor, was suing upon a covenant contained in a lease by which the defendant, as lessee, covenanted to leave the demised premises in repair. While the term was running the plaintiff made a demise of the premises to a third person to take effect from the termination of the lease to the defendant, and that demise contained a covenant to pull down and alter the premises. The official referee, to whom the matter was referred, found that, in the circumstances, the plaintiff had suffered no loss, and gave judgment for the plaintiff for one farthing. The Court of Appeal, however, took a different view, and held that the correct measure of damages was the cost of putting the premises into the state of repair required by the covenant, and that this was not affected by the grant of a subsequent lease to another lessee from the expiration of the defendant's term. The value of that decision is less than it was because the doctrine of interesse termini has been abolished; but the decision of the Court of Appeal is based, not only upon that doctrine as then extant, but also upon the ground that the covenants contained in the subsequent lease in force at the date when the plaintiff's right of action arose, but unperformed at that date, could not be held to take away or modify that right. In that connection I would add that it was not certain on Nov. 18, 1929, that the tenants under the lease would perform the covenants. They might not have done so, and the landlord might have re-entered a few days after that date. On these grounds I am of opinion that the plaintiffs succeed.

Solicitors: *G. D. Freeman & Son*; *Saville & Mannoch.*

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

RESTALL *v.* RESTALL

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), April 29, 1930]

[Reported [1930] P. 189; 99 L.J.P. 123; 143 L.T. 225; 46 T.L.R. 398; 74 Sol. Jo. 319]

Divorce—Permanent maintenance—Amount—Conduct of parties—Conduct of wife before marriage—Dum casta clause—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 190 (1).

On any decree for divorce or nullity of marriage the court, in considering the conduct of the parties with a view to ordering the husband to secure payments for the permanent maintenance of the wife under s. 190 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, [now replaced by s. 19 (2) of the Matrimonial Causes Act, 1950] have a right to take into consideration conduct before, as well as during, the marriage.

Kettlewell v. *Kettlewell* (1), [1898] P. 138, applied.

Per Lord Hanworth, M.R.: I should deprecate this decision being taken as justifying a large number of petty or irrelevant acts between the parties being included in the matters which the court must consider, but when there is a petition for maintenance for possibly a long term, and also, perhaps, the question of a dum casta clause, I think that it is most essential that the court should have before it the relevant evidence to enable it to look into the conduct of the parties very thoroughly. . . . I need hardly say that we do not desire in any way to fetter the discretion of the court.

Notes. Followed: *Mould* v. *Mould*, [1933] All E.R. Rep. 122. Considered: *Lindsay* v. *Lindsay*, [1934] All E.R. Rep. 149; *Duchesne* v. *Duchesne*, [1950] 2 All E.R. 784. Referred to: *Horniman* v. *Horniman*, [1933] All E.R. Rep. 790; *Robinson* v. *Robinson*, [1943] 1 All E.R. 251.

A As to permanent maintenance, see 12 HALSBURY'S LAWS (3rd Edn.) 430 et seq.; and for cases see 27 DIGEST (Repl.) 611 et seq. For Matrimonial Causes Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 388.

Cases referred to:

(1) *Kettlewell* v. *Kettlewell*, [1898] P. 138; 67 L.J.P. 16; 77 L.T. 631; 14 T.L.R. 96; 27 Digest (Repl.) 619, *5785*.

B (2) *Wood* v. *Wood*, [1891] P. 272; 60 L.J.P. 66; 64 L.T. 586; 7 T.L.R. 463, C.A.; 27 Digest (Repl.) 625, *5846*.

Appeal by the husband from an order of BATESON, J., striking out paragraphs in his answer to his wife's petition for maintenance, which paragraphs referred to his wife's conduct before marriage.

C *Serjeant Sullivan, K.C.*, and *G. C. Tyndale* for the husband.
W. Willis, K.C., and *T. D. Bucknill* for the wife.

LORD HANWORTH, M.R.—This appeal raises an important point under s. 190 of the Judicature (Consolidation) Act, 1925. The facts are as follows. The marriage took place on June 7, 1911, and proceedings were commenced in January, D 1929, by the wife to obtain a decree of nullity of marriage on the ground of the consanguinity of the parties. On May 31, 1929, a decree nisi was pronounced, which was made absolute in the following December. On Dec, 31, 1929, the wife petitioned for maintenance as she was entitled to do under s. 190 of the Act of 1925. On Jan. 31, 1930, the husband filed his answer to the petition. On March 5 the wife swore an affidavit in which she dealt with certain allegations of miscon- E duct by her which the husband had made in his answer. On May 5 she filed an affidavit with regard to the payment of the maintenance. The registrar made an order that paras. 25 to 28 of the answer filed by the husband should be struck out and refused leave to him to file a rejoinder, and it is with reference to these paragraphs that this appeal arises. Paragraphs 25 and 26 referred to matters which had taken place before the marriage, alleging that in 1902 and 1905 the wife had F given birth to illegitimate children, and stating that the husband was not aware of the birth of the second child until three years after the marriage. In para. 28 there were references to the conduct of the wife, such as her having treated her husband badly, and having associated with persons of whom he disapproved. At the end of his answer the husband asked that "dum sola" and "dum casta" clauses should be inserted in any order for maintenance. The affidavit of the wife filed G in reply dealt with the allegations, but the order of the registrar got rid of all that by taking a short cut and striking out those four paragraphs. An appeal was taken to BATESON, J., to test the question whether the registrar was right in eliminating those paragraphs, and on March 31, BATESON, J., who did not have the advantage of the careful argument addressed to this court, made an order dismissing the appeal in the following terms:

> H "Upon hearing counsel for the [wife] and [husband] upon the [husband's] appeal from the registrar's order, dated March 21, 1930, I do order that the said appeal be dismissed and that the whole of the [husband's] affidavit in reply, sworn Feb. 26, 1930, be struck out."

He, therefore, confirmed the registrar's order, and the result was that both the registrar and the judge held that irrelevant matter had been introduced into the I proceedings. An appeal is now taken to this court to determine the broad question whether the matters alleged in the paragraphs in question, dealing, as the first two of them do, with the conduct of the wife before marriage, are matters germane to this issue of maintenance and ought to be looked at by the court in considering this petition by the wife under s. 190 of the Act of 1925.

I differ from BATESON, J., upon a matter affecting the practice in his Division with hesitation and the greatest reluctance; but as the matter was dealt with by him in chambers, he did not have the opportunity of considering the authorities which have been brought to our attention. Also this court does not intend to go beyond what is absolutely necessary in deciding the question on the facts before us, or to limit the general discretion of the judge in dealing with the case. The material parts of s. 190 are as follows:

> "The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money, or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and the conduct of the parties, the court may deem to be reasonable. . . ."

Here the marriage was declared null and void on account of the consanguinity of the parties, and the wife had a right to take advantage of s. 190, under which the court has a discretion to order the husband to secure a certain sum to the wife for her maintenance. The court will decide whether or not it will do so by considering, first, the wife's fortune or circumstances; secondly, the duration of the term of payment; thirdly, the ability of the husband to pay; and fourthly, the conduct of the parties. It is plain in considering the period over which this payment should extend, that, although there is a limit in the section that the term of annual payments is not to exceed the life of the wife, there may be another term imposed, and that may be by inserting a clause dum sola et casta vixerit. These are matters which, under the section, the court must consider; and in considering them must have regard to the conduct of the parties.

The obvious question then arises, do the words "conduct of the parties" in the section mean conduct since the marriage, or before the marriage, or both? Counsel for the husband says that it refers to conduct generally, either before or during marriage, and I think that is the right view. In *Wood* v. *Wood* (2), Lindley, L.J., considered the question whether a dum casta clause should be inserted, and he thought that it would be an insult to do so in the case of a wife of spotless character. I think that there Lindley, L.J., was considering the conduct of the wife throughout, both before and after marriage, and her general character was shown by that conduct. In *Kettlewell* v. *Kettlewell* (1), decided seven years after the decision in *Wood* v. *Wood* (2), Sir Francis Jeune came to the conclusion that it would be right to insert a dum casta clause in making an order for maintenance, having regard to the wife's conduct before marriage. She had not been chaste, she had previously been divorced, and so he was compelled to find that her reputation was not spotless, and that there was a danger she might lapse again, and accordingly he thought it only right to impose the clause. That is a definite decision, carrying out the terms of the Act, but, in ordering an allowance for maintenance, taking the conduct of the wife before marriage into consideration. Those two cases are illustrations of how the duty imposed on the court by s. 190 should be carried out, and I think it is plain that the words "conduct of the parties" must apply to conduct before as well as after the marriage, for upon all the facts of the case relating to the wife's conduct the court may have to decide whether or not it is necessary to impose a dum casta clause or not. It is said that so to hold means that a heavy burden will be cast upon the court. I do not think so; I think that the registrar will be able to avoid that, and keep matters at issue within reasonable limits. It is not in every case that the question of the imposition of a dum casta clause arises, and I should deprecate this decision being taken as justifying a large number of petty or irrelevant acts between the parties being included in the matters which the court must consider, but when there is a petition for maintenance for possibly a long term, and also, perhaps, the question of a dum casta clause, I think that it is most essential that the court should have before it the relevant evidence to enable it to look into the conduct of the parties very thoroughly. It is quite true that generally in these cases it is simply the financial standing of the parties which is before the court; but there are certain cases in which it is necessary for the court to go outside that, and to make full inquiry into the general conduct of the parties.

The order of the registrar and the judge to strike out the paragraphs in question

A will be set aside, and the wife will have leave to file a rejoinder dealing with the counter-charges made by the husband in his affidavit in reply. I need hardly say that we do not desire in any way to fetter the discretion of the court. All that we decide is that the paragraphs struck out are admissible in evidence in these proceedings under s. 190. The measure of importance to be attached to them is another matter.

B

LAWRENCE, L.J.—I agree. In exercising its discretion under s. 190, the court is to have regard to the conduct of the parties, and, indeed, in *Wood* v. *Wood* (2), LORD LINDLEY places the conduct of the parties first in order in his enumeration of the circumstances which have to be taken into account. In *Kettlewell* v. *Kettlewell* (1), SIR FRANCIS JEUNE, in reference to the suggestion that the court ought not to C have regard to the conduct of the parties before the marriage, said ([1898] P. at p. 143):

> "I cannot agree with the learned counsel for the petitioner in his contention that the words: 'the conduct of the parties' in the judgment in *Wood* v. *Wood* (2) are intended to refer only to the conduct of the parties during the marriage. I do not consider myself bound to close my eyes to the fact that the petitioner D has been divorced, whoever the man was with whom she committed adultery."

In view of this decision which has never been questioned, and, in my opinion, is clearly right, the order made by the learned judge cannot be justified, as the matters deposed to by the husband in his rejoinder are plainly relevant on the question which the court has to determine. The weight to be attached to the facts deposed to is another matter and is not before us.

E

ROMER, L.J.—I agree.

Appeal allowed.

Solicitors: *Bulcraig & Davis*; *F. G. Bowles.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

F

G

COTTON *v.* HEYL

[CHANCERY DIVISION (Luxmoore, J.), January 24, 28, 31, 1930]

[Reported [1930] 1 Ch. 510; 99 L.J.Ch. 289; 143 L.T. 16]

Contempt of Court—Breach of undertaking—Payment of money on stay of action H *—"Default by person acting in fiduciary capacity"—No time for making payment specified in order—Four-day order—R.S.C., Ord.* 41, *r.* 5*—Debtors Act*, 1869 (32 *&* 33 *Vict.*, *c.* 62), *s.* 4, *exception* 3.

On Jan. 21, 1929, the plaintiff agreed to an order staying an action brought by him against the defendant for specific performance of an agreement to allot shares and assign a proprietary interest in an invention on the defendant undertaking I to pay to the plaintiff £5,000, "as to £1,000 forthwith and as to the balance of £4,000 out of the first moneys received by . . . the defendant . . . upon the sale by him of . .. any right" in the invention in certain countries. On Oct. 7, 1929, the defendant sold all his share in the invention to one G. for £10,000, £2,000 to be paid at once (which sum was paid) and the balance by two bills for £4,000 each at three or six months date respectively. The defendant not having made any payment to the plaintiff, the plaintiff moved for the committal or attachment of the defendant for breach of the undertaking of Jan. 21, 1929.

Held: the failure of the defendant to make any payment to the plaintiff after he had received the £2,000 constituted a breach of his undertaking contained in the order of Jan. 21, 1929; that fell within exception 3 in s. 4 of the Debtors Act, 1869, as being "default by a . . . person acting in a fiduciary capacity, and ordered to pay by a court of equity any sum in his possession or under his control," and, accordingly, the defendant was liable to be committed for his breach; a writ of attachment, however, could not be issued against the defendant because the order of Jan. 21, 1929, which required the defendant "to do an act," within R.S.C., Ord. 41, r. 5, namely, to pay the plaintiff out of the first moneys he received, did not state "the time within which the act is to be done" as provided by the rule; but the plaintiff was entitled to a four-day order against the defendant for the payment of the £4,000.

Notes. Referred to: *Williams* v. *Atlantic Assurance Co.*, [1932] All E.R.Rep. 32.

As to contempt of court by disobedience to orders and breaches of undertakings, see 8 Halsbury's Laws (3rd Edn.) 20 et seq.; and for cases see 16 Digest 38 et seq. For Debtors Act, 1869, see 2 Halsbury's Statutes (2nd Edn.) 292.

Cases referred to:

(1) *Taylor* v. *Roe* (1893), 68 L.T. 213; 3 R. 259; 16 Digest 62, *710*.

(2) *Buckley* v. *Crawford*, [1893] 1 Q.B. 105; 62 L.J.Q.B. 87; 67 L.T. 681; 57 J.P. 89; 41 W.R. 239; 9 T.L.R. 85; 37 Sol. Jo. 67; 5 R. 125, D.C.; 16 Digest 45, *483*.

(3) *Carter* v. *Roberts*, [1903] 2 Ch. 312; 72 L.J.Ch. 655; 89 L.T. 239; 51 W.R. 520; 47 Sol. Jo. 515; 16 Digest 46, *484*.

(4) *Re Oddy*, *Major* v. *Harness*, [1906] 1 Ch. 93; 75 L.J.Ch. 141; 94 L.T. 146; 54 W.R. 291; 50 Sol. Jo. 155, C.A.; 16 Digest 50, *537*.

(5) *Re Launder*, *Launder* v. *Richards* (1908), 98 L.T. 554.

(6) *Bates* v. *Bates* (1888), 14 P.D. 17; 58 L.J.P. 85; 60 L.T. 125; 37 W.R. 230; 5 T.L.R. 155, C.A.; 27 Digest (Repl.) 676, *6451*.

(7) *Legard* v. *Hodges* (1792), 3 Bro.C.C. 531; 1 Ves. 477; 29 E.R. 684, L.C.; 40 Digest (Repl.)

(8) *Hutchinson* v. *Hartmont*, [1877] W.N. 29; 16 Digest 40, *416*.

(9) *Preston* v. *Etherington*, *Etherington* v. *Preston* (1887), 37 Ch.D. 104; 57 L.J.Ch. 176; 58 L.T. 318; 36 W.R. 49; 4 T.L.R. 47, C.A.; 5 Digest 1023, *8354*.

(10) *Re Smith*, *Hands* v. *Andrews*, [1893] 2 Ch. 1; 62 L.J.Ch. 336; 68 L.T. 337; 57 J.P. 516; 41 W.R. 289; 9 T.L.R. 238; 37 Sol. Jo. 247; 2 R. 360, C.A.; 5 Digest 1021, *8338*.

(11) *Marris* v. *Ingram* (1879), 13 Ch.D. 338; 49 L.J.Ch. 123; 41 L.T. 613; 28 W.R. 434; 5 Digest 1027, *8392*.

(12) *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523; 58 L.J.Q.B. 75; 60 L.T. 162; 37 W.R. 513; 4 T.L.R. 726, H.L.; 5 Digest 334, *770*.

(13) *Holroyd* v. *Marshall* (1862), 10 H.L. Cas. 191; 33 L.J.Ch. 193; 7 L.T. 172; 9 Jur.N.S. 213; 11 W.R. 171; 11 E.R. 999, H.L.; 7 Digest 121, *695*.

Motion for committal or attachment of the defendant, George Edward Heyl, for breach of an undertaking given on the compromise of an action.

The plaintiff brought an action against the defendant for a declaration (inter alia) that by virtue of a certain deed he was entitled to have allotted to him shares in a safety glass company, and that by virtue of a written agreement contained in certain letters, he had been granted the right to acquire from the defendant, Heyl, the whole of the proprietary interest for the United States of America in an invention belonging to him relating to such glass.

By order dated Jan. 21, 1929, the action was compromised. It was that:

> "The defendant George Edward Heyl by his solicitors undertaking in the terms of paras. 1 and 2 of the schedule hereto and both defendants undertaking by their solicitors in the terms of para. 5 of the schedule hereto . . . It is ordered

> that all further proceedings in this action be stayed except so far as may be necessary for giving effect to the said terms. . . ."

The undertaking in para. 1 was that:

> "1. The defendant George Edward Heyl do pay to the plaintiff the sum of £5,000 namely as to £1,000 forthwith and as to the balance of £4,000 out of the first moneys received by or on behalf of the defendant (i) upon the sale by him of or (ii) upon the grant by him of any licence to work exercise use or vend any right patent or privilege in respect of the said process and in or in respect of any country other than Great Britain and Northern Ireland and the British Dominions including the Irish Free State that is to say on whichever of them the said date and matters Nos. (i) and (ii) respectively shall first happen."

The plaintiff was then aware that the defendant had, by agreement of Sept. 3, 1928, sold half his interest in the American and foreign rights of the invention to one Greenhill. By an agreement of March 26, 1929, made between the defendant and Greenhill (called "the vendors"), of the one part, and the Anglo-Mexican Trust Co. (called "the purchasers"), of the other part, after reciting that the vendors were jointly entitled to the rights thereinafter mentioned in relation to a process for the manufacture of safety glass and that these rights consisted of (a) the applications for patents in the United States of America shortly specified in the first schedule thereto, and (b) the patents or similar privileges specified in the first part of the second schedule thereto in the foreign countries therein mentioned (therein referred to as "the foreign patents") and the applications for patents or other similar privileges specified in the second part of the second schedule thereto in the foreign countries therein mentioned (called "the foreign applications"), it was agreed that the vendors should sell and that the purchasers should purchase, first, the American applications and the full benefit thereof, and, secondly, the foreign patents and the foreign applications and the full benefit thereof respectively for the sums therein mentioned and that the sales should respectively be completed on July 1, 1929. By another agreement of Oct. 7, 1929, made between the defendant, of the one part, and Greenhill, of the other part, after reciting the above-mentioned agreements, it was agreed that the defendant should sell and Greenhill should purchase for the sum of

> "£10,000 to be paid as to £2,000 part thereof on the signing of this agreement as to a further £4,000 by an acceptance at three months date and as to the remaining £4,000 part thereof by an acceptance at six months date all that the share and interest of him and the vendor (Heyl) of and in the said process and invention as regards foreign countries together with all additions thereto and improvements therein and also of and in the American patent the American application the foreign patents and the foreign applications and the patents or other similar privileges to be granted in pursuance of the American application and the foreign applications respectively and all patents or other similar privileges which may hereafter be granted in any foreign country for or in respect of the said process and invention or any such addition or improvement as aforesaid and also of and in all extensions and renewals of every such patent or other similar privilege whether now granted or hereafter to be granted."

The sale to be subject to the agreement of March 26, 1929. On the same day Greenhill gave the defendant an indemnity in respect of the claims, if any, which might thereafter be made against him in respect of his liability under the order of Jan. 21, 1929.

The plaintiff, learning that a company was being formed to exploit the patents and that a sale was contemplated, made inquiries of the defendant's solicitors. In a letter of Aug. 22, 1929, his solicitors wrote them as to the order of Jan. 21, 1929, and said:

> "It is considered that the undertaking given by the defendant should require him and the company to furnish full information as to what is transpiring in regard to the said balance of £4,000."

The answer was that no completion of the purchase had taken place, the time A having been extended to the end of September, and that the defendant had stated that, if anything was due to the plaintiff, it would be paid in due course. On Aug. 29 the defendant's solicitors wrote again, saying:

> "We are instructed to assure you that as soon as the £4,000 becomes payable it will certainly be paid. . . . We do not, however, consider that it is any part B of the undertaking to give information as to any negotiations which may be proceeding from time to time, indeed it would be most harmful in business if one had to give such information. If any arrangements should be contemplated in connection with the sale of the patents for shares instead of cash, or for partly shares and partly cash, then, of course, you will be consulted, but otherwise, in our view, the undertaking is perfectly clear, and no claim arises unless and until a sale is effected and moneys received." C

On Nov. 19, the plaintiff's solicitors wrote again, and the reply was:

> "We are in receipt of your letter of yesterday . . . , we have already disagreed with you as to the position of matters and as to the information to which your client is entitled. The order of the court speaks for itself, and we do not see how either the company or Mr. Heyl can be called upon to give information, D but only to fulfil the obligation if and when it arises. At the same time we will inquire whether any information can be given voluntarily."

On Dec. 5, they wrote to the defendant's new solicitors asking for definite information as to the completion of the purchase, and whether any sale had been completed or not, and on Dec. 7, they received a reply:

> "With reference to your recent letters we have felt unable to reply to them E hitherto because Mr. Heyl entered into certain arrangements with Mr. Morris Greenhill and one of the terms of these arrangements was that Mr. Greenhill should indemnify Mr. Heyl against all claims by Mr. Cotton under the order of the court. We, therefore, felt that it was only right that Mr. Greenhill should be consulted before our reply to you."

On Dec. 9, the plaintiff's solicitors wrote saying they did not understand why F information had been refused, and why the particulars of the contract that had been entered into for the sale of the foreign patents should not be given and asked for a copy of agreement. On Dec. 10, the defendant's solicitors denied that they had refused to supply the information. On Dec. 17, a motion was heard before Farwell, J., for an order for committal or attachment against the defendant for not paying to the plaintiff the balance of the £4,000 received by or on behalf of the G defendant upon the sale by him to Greenhill of his share in the process and invention for £10,000. At the hearing the defendant gave an undertaking forthwith to direct his bank, with whom the bills of exchange were lodged, to pay the proceeds of the January bills into an account in certain joint names subject and without prejudice to any charge or lien of the bank on the bills or the proceeds thereof. The motion thereupon stood over. Nothing in fact having been done, this motion H was made for the committal or attachment of the defendant for breach of undertaking.

Sir Thomas Hughes, *K.C.*, and *Mulligan* for the plaintiff.

Gover, *K.C.*, and *Alexander Cairns*, for the defendant, referred to *Taylor* v. *Roe* (1); *Buckley* v. *Crawford* (2); *Carter* v. *Roberts* (3); *Re Oddy*, *Major* v. *Harness* I (4); *Launder* v. *Richards* (5) (Ord. 41, r. 5).

Sir Thomas Hughes, in reply, cited *Bates* v. *Bates* (6); *Legard* v. *Hodges* (7); *Hutchinson* v. *Harmont* (8); *Preston* v. *Etherington* (9); *Re Smith*, *Hands* v. *Andrews* (10); *Marris* v. *Ingram* (11).

The learned judge referred to *Tailby* v. *Official Receiver* (12).

LUXMOORE, J.—This is a motion to commit, or, alternatively, to issue a writ of attachment against, the defendant, George Edward Heyl, for breach of an undertaking given by him to the court and for certain relief in the further alter-

A native to which I will refer later. By the undertaking, the defendant Heyl undertook, in effect, to pay £1,000 at once, which was in fact paid, and £4,000 out of the first moneys he should receive in the particular event which is applicable at the present time, i.e., upon the sale by him of the foreign rights in the patent. It was agreed that at the date of the order Heyl had, by an agreement dated Sept. 3, 1928, already sold half his interest in the American and foreign rights of his invention
B to one Greenhill. This the plaintiff knew, so that the undertaking could only apply to what Heyl might subsequently receive in respect of his interests from any dealings with the foreign rights of his invention whether by the sale or grant of licences. After the order of Jan. 21, 1929, was made Heyl and Greenhill entered into an agreement to sell the American and foreign rights to a company called the Anglo-Mexican Trust, Ltd. That agreement is dated March 26, 1929. It is clear
C that the moneys, if any, which were received by Heyl under this agreement would have been bound by the undertaking contained in the order. Nothing was in fact received under the agreement, and on Oct. 7, 1929, Heyl entered into another agreement with Greenhill for the sale of his remaining half interest in the American and foreign rights, subject to and with the benefit of the agreement of March 26, 1929.

It is plain that this is an agreement for the sale by Heyl of his interests in the
D foreign rights in respect of the invention, subject of course to the agreement of March 26, 1929, and as the result of this agreement Heyl was to receive an immediate payment of £2,000 and certain deferred payments. But, even if the agreement of March 26, 1929, had been carried into effect Heyl could never himself have received any part of the moneys payable under that agreement. All he was entitled to was the payment at once of the £2,000 and the payment by the bills
E of the £8,000. This was the only money that Heyl could and would receive in respect of his rights, and in spite of defendant's counsel's protest that it would not be right to treat the agreement of Oct. 7, 1929, as more than a sale by the defendant Heyl of his rights under the agreement of March 26, 1929, I am satisfied that on the plain meaning of the words used in the agreement of Oct. 7, 1929, this was a final sale by Heyl of his interest in the patents, carrying with it the benefit of
F the agreement of March 26, 1929, and that, if that agreement were cancelled, the sale of Heyl's remaining half interest in the invention still remained operative and effective. It is true that at the time this agreement was entered into Greenhill gave Heyl an indemnity in respect of his liability under the order of Jan. 21, 1929, and I think the fact that this indemnity was given shows that Heyl appreciated that the liability under the undertaking was operative and in existence. There is
G no doubt, indeed counsel has admitted it, that on or shortly after the execution of the agreement of Oct. 7, 1929, Heyl received £2,000 in cash and I think four bills each for £2,000 in respect of the remaining £8,000, the first two bills being payable on Jan. 7, 1930, and the remaining two bills on April 7, 1930. The £2,000 was received by Heyl at once, but notwithstanding his undertaking he has apparently used that sum for his own purposes. I have no doubt that this was a breach of
H his undertaking contained in the order of Jan. 21, 1929.

I have also no doubt that Heyl retained this money in breach of his undertaking and with knowledge of it, because for some time before the agreement of Oct. 7, 1929, was entered into, the plaintiff, by his solicitors, was pressing Heyl, through his solicitors, for information with regard to the undertaking. At the time that the undertaking was given in December, during the proceedings before Farwell, J.,
I Heyl's banking account was in debit to a sum considerably in excess of the amount of the two bills and if "subject to the lien of the bank" meant "subject to the payment to the bank of that overdraft" the undertaking was to the knowledge of Heyl when he gave it worthless and wholly illusory and an undertaking which ought not to have been offered. The plaintiff had no idea of the facts and was justified in assuming that the undertaking was at least to some extent operative. But the result is that out of the £10,000 the first money that Heyl was to receive for the sale of his interest in the foreign rights, he has used for his own purposes the first £4,000 at any rate, and the second £2,000 apparently stands in the books

of the bank to some separate account which is subject to the bank's lien. Whether that is available or not to answer the undertaking I am not in a position to say at the present moment. I am satisfied that having received the £8,000 out of the £10,000 he has, by failing to pay the £4,000 to the plaintiff, broken the undertaking which he gave to the court on Jan. 21, 1929, and I have no doubt that that was done deliberately and with knowledge of the order and that there has been in fact a grave contempt of court.

Counsel who appeared for the defendant has, besides arguing that there has been no breach, submitted two technical grounds which he claims to be fatal to the making of an order for committal or giving leave to issue a writ of attachment against the defendant. The first technical objection is that the undertaking is equivalent to an order to pay money, and that an undertaking or order of this nature cannot be enforced by committal or the issue of a writ of attachment unless the case falls within one or other of the exceptions to the Debtors Act, 1869. I agree that this view is correct. Counsel has argued that this case does not fall within any of the exceptions to the Debtors Act, 1869, but I do not agree with him so far as that argument is concerned. In my view, the undertaking to pay the sum of £4,000 out of the first moneys to be received from the sale of the particular rights which have been sold constituted a good equitable assignment of the £4,000 and one which was binding in equity on the defendant Heyl, and by dealing with the £4,000 which he received from the sale of his interest in the foreign rights of his invention in disregard of that equitable assignment he has committed a breach of his fiduciary duty to the plaintiff. If any authority be needed for this conclusion I would refer to the judgment of LORD MACNAGHTEN in *Tailby* v. *Official Receiver* (12), where he says this (13 App. Cas at p. 543):

> "It has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified."

The other passage that I wish to refer to is where, after having dealt with *Holroyd* v. *Marshall* (13), he says this (13 App. Cas. at p. 546):

> "Long before *Holroyd* v. *Marshall* was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done, and in accordance with the maxim which LORD THURLOW said he took to be universal, 'that whenever persons agree concerning any particular subject, that in a court of equity, as against the party himself, and any claiming under him, voluntarily or with notice, raises a trust,' "

and he then refers to the well-known case of *Legard* v. *Hodges* (7).

In my opinion, the undertaking in this case, being an undertaking to pay a specified sum out of the moneys to be received in respect of a future sale is clearly an equitable assignment of that sum, and the fact that in the order of Jan. 21, 1929, the defendant was ordered to pay or, what was equivalent to an order, undertook to pay that sum, brings this case within the third exception to s. 4 of the Debtors Act, 1869. The third exception is:

> "Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control."

My attention has been called to a decision of BYRNE, J., in *Carter* v. *Roberts* (3). In that case the defendant gave an undertaking, as also did the plaintiff,

> "to pay all sums of money which shall be received by them in respect of the matters in dispute in this action to the credit of the partnership account of the plaintiff and defendant with [certain banks]."

There was some doubt whether there had in fact been any breach to which the undertaking applied. The learned judge decided that the Debtors Act, 1869, did not apply to the case, and it was not within any exception to that Act. On that ground the case is distinguishable from the present case. The undertaking in fact was merely to pay into a joint account to await the decision of the court, and with all possible respect to the learned judge it is a little difficult to see how this was an order for payment of money covered by the Debtors Act at all. Indeed the decision hardly seems to be in accord with what was said by the Court of Appeal in *Bates* v. *Bates* (6). In that case an order had been made that the husband should pay into court a sum of money as security for costs, and it is quite true that he was given the alternative of giving a bond for that money. It was argued there that the case came within the Debtors Act, 1869, and the court held that it did not do so. LINDLEY, L.J., in giving judgment, said this (14 P.D. at p. 20):

> "But what do the words 'payment of money' in this section [s. 4 of the Debtors Act, 1869] mean? In my opinion they do not mean depositing a sum of money in court, to abide an order to be subsequently made. If the appellant had been ordered to pay the money to the receiver of the court in discharge of an obligation to which he had been declared liable, that might be different. But that is not so here; he is to deposit the money in court or to give security for it."

Be that as it may, I am satisfied here that there has been a breach of an undertaking which is within the Debtors Act, 1869, s. 4. So far, therefore, as the first technical objection is concerned I am of opinion that it fails.

The second technical objection is this. By the order of Jan. 21, the undertaking is to pay the £4,000 out of the first moneys received by or on behalf of the defendant upon the sale by him of the patents. Obviously this is an order to do an act, and by R.S.C., Ord. 41, r. 5, it is provided:

> "Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment, or order, within which the act is to be done. . . ."

Then it provides for the service of the order with the proper memorandum endorsed on it. Counsel has argued that the undertaking to pay out of the first moneys received is quite indefinite and cannot be construed as an order to pay forthwith or within a fixed time after receipt, and, therefore, unless and until a definite time for payment is fixed there can be no default. It appears to me that this argument is well founded, and, therefore, I feel that on this ground I am unable to make the order for the issue of a writ of attachment asked for by the plaintiff. The plaintiff has, however, asked by his notice of motion for certain additional or alternative relief. Among other relief he asks for injunctions to restrain the parting or dealing with the bills or the moneys which have been received in respect of them without making a payment to the plaintiff. The defendant has stated in the witness-box that the whole of the bills have been dealt with and that it is no longer in his power to make the payments out of the particular moneys, though I think he stated that, if he had to pay, he would be able to do so. So far as that is concerned, I do not think that any injunction which I can order would have any useful purpose. But there is an alternative claim for a four-day order. It is true that the alternative claim asks that the defendant may be ordered to pay into court, but I do not think that the plaintiff is entitled to that order. I think, however, that he is entitled to a four-day order against the defendant for the payment of this £4,000, and I accordingly, on this motion make a four-day order against the defendant that he pay to the plaintiff the sum of £4,000 within four days after service upon him of the order which I now make, and I order the defendant to pay the costs of this motion.

Solicitors: *Castle & Co.*; *Cruesemann & Rouse.*

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

ELLIS *v.* NOAKES

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), April 4, 9, 1930]

[Reported [1932] 2 Ch. 98n.; 101 L.J.Ch., 409n.; 147 L.T. 453n.]

Conversion—Timber—Exception of timber from conveyance of land—Timber to be removed by specified date—Timber not then removed—Right to timber of owners of land.

On July 28, 1925, the defendants purchased from a vendor a smallholding of some ten acres, there being a reservation unto the vendor and his assigns of "all timber . . . with full rights and liberty for . . . the vendor [and his assigns] to enter upon the hereditaments hereby assured . . . at all times up to Oct. 11, 1927 . . . and to fell and remove . . . the said timber. . . ." On April 26, 1926, the plaintiff bought the timber, under a contract which provided, in effect, that the timber should be cleared by Oct. 11, 1927. By June 10, 1927, all the trees he had bought had been felled, and by Sept. 3, 1927, they had been sawn into planks, but the planks were not removed by Oct. 11, after which date the defendants, alleging that the planks had become their property, sold them.

Held: on the true construction of the reservation in the conveyance of July 28, 1925, it absolutely excepted from the parcels in the conveyance all the timber so that no estate or interest therein passed to the defendants, and there was then appended to that exception a right to go on the premises at any time before Oct. 11, 1927, to get the timber; the owner of the timber might be liable to the defendants in damages if he entered on their land and removed the timber after Oct. 11, 1927, but his failure to remove it before that date did not affect his property in it; nor could the defendants rely on the plaintiff's failure to remove the timber by Oct. 11, 1927, as provided by the contract of April 26, 1926, so as to defeat his right to the timber; and, therefore, the defendants were liable for conversion.

Notes. Considered: *Ellis* v. *John Stenning & Son, Ltd.*, [1932] All E.R.Rep. 597. Referred to: *Skipwith* v. *Homewoods Sawmills, Ltd.*, [1938] 2 All E.R. 733.

As to trespass to goods and conversion, see 33 Halsbury's Laws (2nd Edn.) 22 et seq.; and for cases see 43 Digest 469 et seq.

Cases referred to:

(1) Anon. (1584), 1 Leon. 275; 74 E.R. 250; 2 Digest (Repl.) 121, *898*.

(2) *James Jones & Sons, Ltd.* v. *Earl of Tankerville*, [1909] 2 Ch. 440; 78 L.J.Ch. 674; 101 L.T. 202; 25 T.L.R. 714; 39 Digest 679, *2657*.

(3) *Wood* v. *Manley* (1839), 11 Ad. & El. 34; 3 Per. & Dav. 5; 9 L.J.Q.B. 27; 3 Jur. 1028; 113 E.R. 325; 39 Digest 548, *1577*.

(4) *Earl of Cardigan* v. *Armitage* (1823), 2 B. & C. 197; 3 Dow. & Ry. K.B. 414; 107 E.R. 356; 17 Digest (Repl.) 300, *1074*.

(5) *Stukeley* v. *Butler* (1614), Hob. 168; 80 E.R. 316; sub nom. *Stewkley* v. *Butler*, Moore, K.B. 880; 17 Digest (Repl.) 306, *1130*.

(6) *Barrington's Case* (1611), 8 Co. Rep. 136b; 77 E.R. 681; sub nom. *Cholke* (*Chalke*) v. *Peters* (1610), 2 Brownl. 289, 322; Godb. 167; affirmed in error, *Barrington* v. ——— (1615), 1 Roll. Rep. 137; 2 Digest (Repl.) 120, *883*.
(7) *Stanley* v. *White* (1811), 14 East. 332; 104 E.R. 630; 2 Digest (Repl.) 88, *531*.
(8) *Pomfret* v. *Ricroft* (1670), 1 Wms. Saund. 321; 2 Keb. 569; 1 Sid. 429; 1 Vent. 44; 85 E.R. 454, Ex. Ch.; 31 Digest (Repl.) 133, *2713*.
(9) *Mills* v. *Brooker*, [1919] 1 K.B. 555; 88 L.J.K.B. 950; 121 L.T. 254; 35 T.L.R. 261; 63 Sol. Jo. 431; 17 L.G.R. 238, D.C.; 2 Digest (Repl.) 88, *536*.

Appeal by plaintiff from an order of CLAUSON, J.

The facts appear in the headnote and more fully in the judgment of LORD HANWORTH, M.R.

Vaisey, K.C., and *W. M. Hunt* for plaintiff.
Grant, K.C., and *Potts* for defendants.

LORD HANWORTH, M.R.—This action was brought by Mr. George Ellis against Mr. Joseph Noakes and his sister, Mary Victoria Noakes, the defendants, and the claim is for a declaration that certain timber which has been sold by the defendants was and is the property of the plaintiff. There is further claim for an injunction to restrain the defendants from dealing or interfering with the timber, and for damages. The chief defence is:

> "The defendants submit that the plaintiff by reason of his not having removed the timber before Oct. 11, 1927, has forfeited all interest therein, and that the same now belongs to and is the property of the defendants."

CLAUSON, J., dismissed the plaintiff's claim, holding that the plaintiff had not established that he had any property in the timber which the defendants had dealt with and converted.

The case takes us back into old law and cases decided when the wealth of the country was largely in real property and its appurtenances and before the industrial revolution had begun. I will state the facts shortly. There was an estate near Hastings, called the Coghurst estate, of which a Mr. Lord was the owner. He was minded to sell this estate in lots. On July 28, 1925, the defendants purchased Lot 40 for a sum of £725 excluding the timber. It is a desirable smallholding, having an area of about ten acres, with a large garden, four-and-a-half acres of pasture, and five-and-a-half acres of valuable woodland. As I have said, the defendants purchased that excluding the timber, and on Sept. 28, 1925, the conveyance to them was executed. The question we have to deal with turns upon the proper construction of that deed, but before dealing with that I will complete the story in outline. Not all the lots were sold for which particulars were prepared, and the portions which were not sold, including some excepted timber lots, were assigned on Dec. 31, 1925, to Coghurst Estates, Ltd., a company which had then just been formed. On April 26, 1926, the plaintiff bought from Coghurst Estates, Ltd., the timber which was excepted from the conveyance of Sept. 29, 1925. The acceptance of his offer is dated April 1, 1926, and is in these terms:

> "We are instructed by the Coghurst Estates, Ltd., to accept your offer of £650 for the timber situated as follows, namely, Uckfield and Rodgers Wood and Brick Yard. . . . The timber to be cleared as stated in catalogue particulars and by date therein stated."

The timber that they bought on Lot 40, under that agreement, was about 141 trees, representing 2,706 cubic feet when sawn. The plaintiff thereupon entered upon the wood, and by June 10, 1927, all the trees he had bought on Lot 40 had been felled. Between Aug. 13 and Sept. 3, 1927, a quantity of sawing was done on the ground by contractors, some £170 being spent by the plaintiff in cutting up into planks the timber which had been felled. The planks so sawn were not removed by Oct. 11, the date fixed in the particulars, and when the plaintiff endeavoured to

remove the planks after that date the defendants refused him facilities and alleged A
that these planks had become their property and were no longer the property of the plaintiff. They have in fact sold the planks. The sale, we are told, took place after the writ had been issued, but by consent of the parties—a consent which was accepted by CLAUSON, J.—the sale was treated as having taken place before the writ was issued, so as to make it unnecessary, if the plaintiff had established his right, to impose an injunction; and CLAUSON, J., for the purposes of any judgment B
in the Court of Appeal, has held that the value of the planks which have been sold and thus converted by the defendants is a sum measured in damages at £250.

The writ was issued on June 28, 1928. The learned judge has held that the plaintiff has not established a property in the timber that was sold, so that, although he comes to a conclusion as to the measure of damages, he finds that the plaintiff has not established his case. He, therefore, dismissed the claim. On appeal we C
have had a number of interesting questions raised. It is unnecessary for us to deal with more than one or two points of those decided by CLAUSON, J., because the vital point depends on the proper construction of the conveyance to the defendants of Sept. 29, 1925.

I need hardly say that I should differ from a conclusion reached by CLAUSON, J., with diffidence; but in this case we have had the advantage of hearing arguments D
on both sides which have been of considerable assistance to the court, and have had some cases referred to which CLAUSON, J., had not, I think, the advantage of examining. I, therefore, find myself able to deal more freely with the matter. CLAUSON, J., has come to the conclusion that the exception which is contained in the conveyance must be read as a whole, and that, read as a whole, the timber which has passed into possession of the plaintiff was timber which could not become E
his unless the conditions which alone prevented its passing to the defendants had been complied with. Stated somewhat differently, he holds that the exception in the conveyance is to be read as a whole and not to be dissected into its parts. I turn, therefore, to the conveyance. Clause 2 of the conveyance says:

> "There are excepted out of the hereditaments hereinbefore described and there are reserved unto the mortgagee and the vendor respectively and their respective F
> heirs and assigns (a) all timber; (b) all manorial rights; and (c) a right in favour of the mortgagee and the vendor"

as to certain other matters. The important exception is the timber, and that is expressed in these terms:

> "All timber timberlike and other trees tellers saplings poles and underwood G
> either cut or growing on the property hereby conveyed (hereinafter referred to as 'the said timber') with full right and liberty for the mortgagee and the vendor respectively and their respective heirs and assigns or other the owner or owners for the time being of the said timber and his or their servants and licensees to enter upon the hereditaments hereby assured or any part thereof at all times up to the 11th day of October, 1927, with or without horses carts H
> waggons or other vehicles whether drawn or self-propelled and whether laden or unladen and to fell and remove in a proper and usual manner the said timber including all faggots and debris by such routes over the hereditaments hereby assured as may be agreed upon by the owner or owners of the said timber his or their heirs and assigns and the purchasers and in default of agreement as may be determined by an umpire to be appointed by them." I

CLAUSON, J., as I have said, held that that clause must be read as a whole, and that it affects only an exception of timber which is cut and taken away by Oct. 11—in other words, that it is a condition exception only from the parcels which are otherwise conveyed, and that unless that condition is completely fulfilled the exception fails, and the timber and the trees pass with the other parcels under the conveyance to the defendants.

Is that right? Close examination of the clause itself reveals that, first of all, it describes "all timber" and certain details attached to the timber such as "saplings poles and underwood either cut or growing on the property hereby conveyed (hereinafter referred to as 'the said timber')." Then follows an addition introduced by the conjunctive word "with"—"with full right and liberty. . . ." Is it right to take the clause as a whole, or to take separately the timber that is excepted and the rights attached to it, as something which is a concomitant right, but not an integral part of the exception? The difference is well exhibited by reference to the anonymous case (1) to which counsel for the defendants called our attention. The case is so short that it is worth quoting in whole. The case was:

> "A., seised of certain lands, bargained and sold by indenture all the trees there growing, habendum, succidendum, and exportandum, within twenty years after the date of the said indenture; the twenty years expire; the bargainee cuts down the trees. A. brought an action of trespass for cutting down the trees; and by Wray, J., the mere property of the trees vests in the bargainee, and the limitation of time which cometh after, is not to any purpose but to hasten the cutting of the trees within a certain time, within which, if the vendee doth not cut them, he should be punished as a trespasser as to the land, and not as to the trees, Gawdy, J., contrary; and that upon this contract, a conditional property vests in the vendee, which ought to be pursued according to the direction of the condition, and because the condition is broken, the property of the trees is vested in A."

Clauson, J., has agreed with the second view presented by Gawdy, J., but, after a full argument, we are in favour of the view which was adopted by Wray, J., and I cannot express it in better words. The property in the trees is in the person to whom they were reserved "and the limitation of time which cometh after, is not to any purpose but to hasten the cutting of the trees within a certain time." In other words, the exception is of all timber, as explained and expanded by the other terms used, all of which are defined in the exception as "the said timber," together with a right to take the said timber, which is to be exercised within a time limit. That time limit does not, however, import a condition into the exception or render the property in the timber one which, upon the failure to comply with the time limit, causes a reverter of the property in the timber to the purchaser of Lot 40.

It has been argued in opposition to that view, not only that the clause should be read as a whole, but that, unless the clause is read as a whole and given the meaning which Clauson, J., assigned to it, there is difficulty in giving effect to the words in which the right is expressed, because upon a sale of timber there would be, incidental to that sale, a licence to get the timber. Parker, J., expressed that view in *James Jones & Sons, Ltd.* v. *Earl of Tankerville* (2), where he says:

> "If A. sells to B. felled timber lying on A.'s land on the terms that B. may enter and carry it away, the licence conferred is an irrevocable licence, because it is coupled with and granted in aid of the legal property in the timber which the contract for sale confers on B.";

and he refers, as an authority for that proposition, to *Wood* v. *Manley* (3). The court there held that the sale of goods to a party carried with it the right to get them, and Lord Denman said:

> "If I sell goods to a party who is, by the terms of the sale, to be permitted to come and take them, and he pays me, I may afterwards refuse to let him take them. The law countenances nothing so absurd as this: a licence thus given and acted upon is irrevocable";

and Patteson, J., says:

> "A person does buy; part of his understanding is that he is to be allowed to enter and take. The licence is therefore so far executed as to be irrevocable . . . but here the licence is part of the very contract."

And so it is said in the present case the licence is part of the contract and to be treated as imposing upon the contract, or rather upon the exception, an integral term. A

In *Earl of Cardigan* v. *Armitage* (4) the correction for that view is, I think, to be found. It does not appear to us that it is right to say that this right and liberty for the mortgagee and the vendor and their assigns to enter and to take the wood up to Oct. 11 is one which is either co-extensive with or such as to exclude the right or licence which would be implied: it is to be looked at as a licence for its own purposes. BAYLEY, J., in giving the judgment of the court, a judgment, that is, of HOLROYD, J., as well as himself, says: B

> "The express liberty is introduced by the words 'together with,' as if the intention were to increase what had preceded, not to diminish; and I take it to be a general rule, that words tending to enlarge shall not (unless the intention is very plain) be taken to restrain. . . . The express liberty here is . . . to sink pits, to sough and get the coals. . . . It may be taken as clear, that an express liberty does not always control what would otherwise exist, especially if the express liberty goes beyond what would be implied." C

And later, after considering *Stukeley* v. *Butler* (5), he says: "To restrain what is primâ facie unlimited, the words should be plain and the intention clear." D

After consideration of those observations made by very learned authorities in the past, I do not think it is correct to say that no proper interpretation can be given to the right added to the exception of the timber, unless it is taken as part of the exception. Those authorities appear to indicate that on a sale of timber or an exception of timber, together with the right to get it, it is not necessary to treat the words conferring the right as a condition of the sale or exception. Those words may not be otiose, but may be intended either to amplify the licence that would be implied, or to have some other effect which does not take away the implied right which would be attached at law to the sale or exception. With those authorities before us, it appears to us that the right interpretation to be given to this exception is that there is absolutely excepted from the parcels in this conveyance all "the said timber," and that there is appended to that exception a right and liberty to go on the premises at any time before Oct. 11 for the purpose of getting the timber. If the person who is getting the trees goes after that date, he may be liable to damages for what he does, though he would not be liable for any damage if the same acts were committed before Oct. 11; but whether the acts of getting are done before or after Oct. 11., they do not affect any alteration in the property of the timber which is excepted from the conveyance. We thus differ from CLAUSON, J., in his interpretation of the conveyance. It is said, however, that the very words of the contract of sale to the plaintiff import the provision for clearance by Oct. 11 in the conditions of sale under the words to be found in the letter: "The timber to be clear as stated in catalogue particulars and by date therein stated." In other words, it is contended that unless the plaintiff complied with condition (c) in the particulars of sale, he cannot be held to have a right to remove the timber. It is very doubtful whether it is open to the defendants to rely upon this point. At best it would seem that in putting it before the court they are relying upon a jus tertii, for condition (c) provides: "Upon the failure to get the timber within two years from Oct. 11 then the timber trees are immediately on the expiration of the said period of two years to become the property of the vendor"—that is, of the Coghurst Estates, Ltd. We agree, however, with CLAUSON, J., in thinking that the words at the end of the letter of April 1: "The timber to be cleared as stated in catalogue particulars and by date therein stated," do not effect an introduction of the complete condition (c), and that the defendants cannot impute a failure to comply with that condition to the plaintiff so as to defeat his right. More than that, when condition (c) is examined carefully, it will be seen that the property which passes to the vendor upon the expiration of the period of two years is "the timber trees," that is, such timber trees as shall not be cleared within that time. The trees had, however, not only been felled and the cordwood taken, but the E F G H I trees had been sawn into planks at an expenditure of no small sum. These planks cannot be regarded as the timber trees which are to revert to or become the property of the vendor under condition (c). It is not possible, therefore, for the defendants to defeat the plaintiff's title by any reference to the terms on which he purchased, even if some complaint or claim might be made by the Coghurst Estates, Ltd. We agree, however, with Clauson, J., that condition (c) is not introduced into the contract by the letter of April 1.

That being so, I turn to Clauson, J.'s judgment to see what the effect of this determination of the Court of Appeal is. We have differed from him upon the construction, and we have adopted the possible construction which he referred to, and say that what was reserved by the conveyance was all the timber trees, to which the parties added a particular right to get them before a particular date. We have decided further that if condition (c) applies at all, it applies in favour of the vendor, and not in favour of the defendants; and we say that it is a case in which the defendants, by selling, have been guilty of conversion. We agree with Clauson, J., that it is not a case in which all the rights of the plaintiff are negligible, because he might have had to commit a trespass in order to get possession of the timber, and we accept Clauson, J.'s view that this alone would not deprive the plaintiff of a right to damages. Of course, we also accept the sum which Clauson, J., has decided upon as measuring the value of the timber—namely, £250. The result is that, for the reasons which I have given, the appeal must be allowed, and judgment must be entered for the plaintiff for £250 damages with costs here and below.

LAWRENCE, L.J.—I agree. The main question on this appeal depends upon the true meaning and effect of the exception of timber contained in the conveyance of Sept. 29, 1925. Clauson, J., has held that, according to the proper construction of that conveyance, the exception is limited to such timber as should have been felled and removed from the land comprised in the conveyance before Oct. 11, 1927, and that, consequently, the sawn planks in question in this action were excepted from the grant and belonged to the defendants, who were justified in selling them and in retaining the proceeds for their own use. However much such an interpretation may appeal to the practical mind as being a reasonable business-like arrangement for the parties to have entered into, I do not think that it can properly be spelt out from the language employed in the conveyance. The vendor, while granting to the defendants the soil of the entire piece of land, upon part of which the timber in question was growing, excepted the timber out of the grant and reserved it to himself, his heirs and assigns. The effect of this exception, in my opinion, is that no estate or interest in the timber passed to the defendants under or by virtue of the conveyance. It is true that to this exception there is appended a liberty to the vendor, his heirs and assigns to enter upon the property comprised in the conveyance at all times up to Oct. 11, 1927, and to fell and remove the timber, but the limited liberty so reserved does not, in my opinion, operate to qualify the absolute character of the exception and confine it to such timber only as had been felled and removed before Oct. 11, 1927. The exception is expressed in unambiguous terms, and, in my opinion, it would be contrary to the accepted canons of construction to imply a limitation to that exception merely because a liberty to enter upon the land and fell and remove the timber before a given date is superadded.

In view of the express liberty so conferred, the right of the vendor or his assigns to enter upon the land comprised in the conveyance after Oct. 11, 1927, may be open to doubt, but whatever right of entry the owner for the time being of the reserved timber may have, and whether that right be one held in respect of an estate in fee simple in the trees, or merely of a profit à prendre—see *Barrington's Case* (6) and *Stanley* v. *White* (7)—in my opinion, the conveyance does not operate to confer any estate or interest in the timber upon the purchaser of the land. The true view may well be that the power which by law is incident to an exception of timber, to enter upon the land of the grantee in order to fell and take it away—

see Williams' Notes to *Pomfret* v. *Ricroft* (8)—is not cut down by the express limited liberty: see *Earl of Cardigan* v. *Armitage* (4). In the circumstances of this case, however, it is not necessary to decide what right the vendor had to enter upon the defendants' land and fell and remove the reserved timber after Oct. 11, 1927, nor is it necessary to decide whether the reservation operated to leave or vest in the vendor an estate in fee simple in the trees, or merely a profit à prendre. The facts which render such a decision unnecessary are that the plaintiff as assignee of the vendor felled the timber and severed it from the inheritance within the time limited by the conveyance and then manufactured it into planks. As the estate and interest in the trees was admittedly vested in the vendor and his assigns at the time when the timber was felled, it follows, in my opinion, that the property in the planks was from the first and thereafter remained in the plaintiff. The plaintiff might have been placed in some difficulty if the defendants had merely persisted in their alleged right to prevent him from removing the planks from off their ground, but, in my judgment, they had no right to convert the planks to their own use. *Mills* v. *Brooker* (9) is an example of the well-established proposition of law that where an owner of land has upon it some property belonging to another he is not entitled to convert that property to his own use, although he may remove it. The conversion in the present case took the form of the defendants selling the planks and retaining the proceeds for their own use. This was clearly wrong, if I am right in my conclusion that the property in the planks was in the vendor or his assigns.

There remains one further point made by counsel, namely, that under the contract of sale of the timber by the Coghurst Estates, Ltd., to the plaintiff, the plaintiff's right to the timber was forfeited to his vendor or to the defendants as assigns of that vendor. That argument was based on the following words in the contract of sale of April 1, 1926: "the timber to be cleared as stated in catalogue particulars and by date therein stated." It was contended that those words were wide enough to include the stipulation as to forfeiture contained in the conditions of sale applicable to the timber lots offered for sale under these conditions. This stipulation provided that the purchaser should fell and remove the timber before a given date, and that he should forfeit all timber, whether growing or felled which should still remain upon the property on that date to the vendor, his heirs and assigns, the owner or owners for the time being of the land upon which the trees were or had been growing. CLAUSON, J., has held, and I entirely agree with him, that the stipulation as to forfeiture was not incorporated into the contract between the Estates company and the plaintiff, and therefore, in my judgment, neither the jus tertii set up by the defendants nor the claim to the trees made by the defendants as grantees of the land from the original vendor can prevail, with the result that the appeal should be allowed.

ROMER, L.J.—I agree, and do not find it necessary to add many words, because I find myself in complete agreement with CLAUSON, J., upon the points decided by him, except that relating to the construction of the exception contained in the conveyance of Sept. 29, 1925—a point that does not admit of elaborate treatment or discussion. It was held by CLAUSON, J., that all that was excepted in relation to the timber was so much of the timber upon the land conveyed to the defendants as the vendor or those claiming under him should remove by Oct. 11, 1927. If that had been the intention of the parties, nothing could have been easier than for them to have said so. But when I look at the words of the exception, so far from their having said so, I find that what is first reserved is: "all the timber on the property hereby conveyed" without any apparent qualification. Of course, the conveyance does not stop there, and I must not stop there for the purpose of considering the true construction of the exception, but when I come to the words which follow—words which CLAUSON, J., has held had the effect of cutting down the generality of the preceding words I find that they are words introduced by the word "with," a word which primâ facie points to something being added to what has gone before, and not to something being taken away from what has gone before. As was said by Bayley, J., in the passage in *Lord Cardigan's Case* (4), to which the Master of the Rolls has already referred: "I take it to be a general rule, that words tending to enlarge, shall not—unless the intention is very plain—be taken to restrain." With great respect to Clauson, J., I am unable to find in the words giving a liberty to enter and cut and take away, an intention to restrain the generality of the preceding words, whether I regard that liberty as one given in addition to the liberty of entering, cutting and taking away that are implied at common law, or as exclusive of that common law liberty. It follows that the whole of the timber on the defendants' land remained vested in the vendor without any qualification whatsoever. The property in that timber, accordingly, passed to the plaintiff, unless the words at the end of the contract by which the timber was sold to the plaintiff in some way qualified that property. Upon that point I have nothing at all to add to what was said by Clauson, J., and to what has been said by the other members of the court. In my opinion, the unqualified property in the timber which the vendor retained passed to the plaintiff. That being so, whether or not the plaintiff could, after Oct. 11, 1927, enter upon the defendants' land for the purposes of removing that timber—a point upon which I do not think it necessary to express any concluded opinion—the defendants had no right whatsoever to convert that timber to their own use. Having converted it by selling it for £250, it seems to me necessarily to follow that the plaintiff is entitled to judgment for that sum against them. I agree with the order which has been proposed by the Master of the Rolls.

Solicitors: *Kingsford, Dorman & Co.*, for *Dawes, Son & Prentice*, Rye; *Patersons, Snow & Co.*, for *Thorpe, Meadows & Pearson*, Hastings.

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

PRICE *v.* GOULD

[King's Bench Division (Wright, J.), May 7, 1930]

[Reported 143 L.T. 333; 94 J.P. 210; 46 T.L.R. 411; 74 Sol. Jo. 437; 28 L.G.R. 651]

Rent Restriction—Tenant—"Member of family"—Sister of deceased female statutory tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (1) (*g*).

The word "family" in s. 12 (1) (g) of the Rent and Mortgage Interest (Restrictions) Act, 1920, includes brothers and sisters, and, therefore, for the purposes of the Act the expression "tenant" includes the sister of a deceased female statutory tenant.

Notes. Considered: *Brock* v. *Wollams*, [1949] 1 All E.R. 715; *Jones* v. *Whitehill*, [1950] 1 All E.R. 71. Applied: *Standingford* v. *Probert*, [1949] 2 All E.R. 861. Referred to: *Thynne* v. *Salmon*, [1948] 1 All E.R. 49.

As to succession to a statutory tenancy, see 23 Halsbury's Laws (3rd Edn.) 811, 812; and for cases see 31 Digest (Repl.) 662 et seq. For Increase of Rent, &c., Act, 1920, see 13 Halsbury's Statutes 981.

Cases referred to:

(1) *John Lovibond & Sons, Ltd.* v. *Vincent*, [1929] 1 K.B. 687; 98 L.J.K.B. 402; 141 L.T. 116; 93 J.P. 161; 45 T.L.R. 383; 73 Sol. Jo. 252; 27 L.G.R. 471, C.A.; 31 Digest (Repl.) 695, *7866*.

(2) *Keeves* v. *Dean, Nunn* v. *Pellegrini*, [1924] 1 K.B. 685; 93 L.J.K.B. 203; 130 L.T. 593; 40 T.L.R. 211; 68 Sol. Jo. 321; 22 L.G.R. 127, C.A.; 31 Digest (Repl.) 694, *7865*.

(3) *Snow* v. *Teed* (1870), L.R. 9 Eq. 622; 39 L.J.Ch. 420; 18 W.R. 623; sub nom. *Sum* v. *Teed*, 23 L.T. 303; 44 Digest 888, 7455.

(4) *Pigg* v. *Clarke* (1876), 3 Ch.D. 672; 45 L.J.Ch. 849; 24 W.R. 1014; 44 Digest 887, *7435*.

(5) *Salter* v. *Lask, Lask* v. *Cohen*, [1925] 1 K.B. 584; 94 L.J.K.B. 522; 132 L.T. 830; 41 T.L.R. 201; 23 L.G.R. 327, D.C.; 31 Digest (Repl.) 663, *7635*.

Action tried by WRIGHT, J., without a jury.

The plaintiff was the tenant under a long lease of a house, which, in March, 1916, she sub-let to a Miss Aida Gould for a term of seven years at a rent of £45, subsequently raised to £60 15s. On the expiry of the lease in March, 1923, Miss Gould became a statutory tenant and lived in the premises till her death on Nov. 20, 1929. Thereafter her two sisters and brothers occupied the premises. The plaintiff sought possession. The sisters and brother of the deceased, the defendants, pleaded that they came within the term "family" in s. 12 (1) (g), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which provides:

> ". . . the expression 'tenant' includes . . . where a tenant . . . is a woman, such member of the tenant's family [residing with her at the time of her death] as may be decided in default of agreement by the county court."

The plaintiff further claimed that even if the defendants were protected by the above section, she was entitled to possession under s. 1 of the Prevention of Eviction Act, 1924 [repealed by Rent and Mortgage Interest Restrictions (Amendment) Act, 1933: see now Rent Act, 1957, Sched. 6, para. 21], because she reasonably required the premises for her own occupation and residence. It was agreed among the defendants that if the section applied Ethel Gould, a defendant, was entitled to possession.

A. E. Woodgate for the plaintiff.
Amiend Jackson for the defendants.

WRIGHT, J. (after stating the facts).—In my judgment, the defendant, Ethel Gould, is a statutory tenant under the Act, and the plaintiff is not entitled to succeed in the action for ejectment. The statute is an answer to her common law right. The position under the Act is somewhat peculiar. It is well established that the rights of a statutory tenant are purely personal and cannot be assigned. It has been held in *John Lovibond & Sons, Ltd.* v. *Vincent* (1) that the rights of a statutory tenant cannot be transmitted by will. There a statutory tenant had made a will in favour of the defendant, and the Court of Appeal held that the claimant under the will took no right as a statutory tenant and could not resist a claim for possession by the landlord. The Court of Appeal followed its previous decision in *Keeves* v. *Dean* (2), SCRUTTON, L.J., saying ([1929] 1 K.B. at p. 693):

> "We can only construe these Acts as we find them, and my view, as the result of the authorities, is that the right conferred upon the statutory tenant—in the absence of any express provision altering it in any particular case—is a purely personal right with which he cannot deal."

There is, however, in the Act of 1920 a special provision, s. 12 (1) (g), dealing with the case where a statutory tenant dies intestate. [His Lordship read the section and continued:] It may seem anomalous that, whereas a statutory tenant cannot dispose of his rights by will, those rights should pass in the case of an intestacy, but such is the provision of the Act. [The words "dying intestate" in s. 12 (1) (g) were repealed by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935.]

The only question I have to consider is whether, the statutory tenant, here being a woman who has died, one of the defendants—namely, Ethel Gould, who has been selected by the other defendants for that purpose—comes within the description of a "member of the tenant's family" residing with her at the date of her death. In other words, I have to decide whether the word "family" in the section includes brothers and sisters. I find as a fact that the brothers and sisters were residing with the deceased at the time of her death. It has been said in a number of equity cases, relating principally to wills or to settlements under powers of appointment, that the word "family" is a popular, loose, and flexible expression, and not a technical term. It has been laid down that the primary meaning of the word "family" is children, but that primary meaning is clearly susceptible of wider interpretation, because the cases decide that the exact scope of the word must depend on the context and the other provisions of the will or deed in view of the surrounding circumstances. Thus, in *Snow* v. *Teed* (3) it was held that the word "family" could be extended, not merely beyond children, but even beyond the statutory next-of-kin. The question there was the scope of a power of appointment to members of a family, and it was held that that involved a power of appointing to any person related to the donee of the power in the ordinary acceptation of the word "family," and the term was applied in that case to brothers and sisters. In *Pigg* v. *Clarke* (4), SIR GEORGE JESSEL, M.R., held that the word "family" was in that particular case limited to "children," the children of the testator, but he said:

> "Now every word which has more than one meaning has a primary meaning; and if it has a primary meaning you want a context to find another."

In the particular case he held that the children of the testator could alone take under the words "my said family."

I hold that in the section now under consideration the word "family" includes brothers and sisters of the deceased living with her at the time of her death. I think that that meaning is required by the ordinary acceptation of the word in this connection, and that the legislature has used the word "family" to introduce a flexible and wide term. Indeed, it has been laid down in *Salter* v. *Lask* (5) that under that section the word "family" includes the husband of a woman statutory tenant. Like the judges who decided that case, I do not think it necessary to specify precisely what may be the full extent of the word "family" used in s. 12 (1) (g) of the Act of 1920. It is enough to say that, in my judgment, it does include brothers and sisters. I hold, therefore, that Ethel Gould did become the statutory tenant by virtue of the provisions of the section.

That, however, does not dispose of the issues in the case. I have to consider whether, on the assumption that Ethel Gould was the statutory tenant, the case is one in which the court ought to make an order for ejectment on the ground that the plaintiff reasonably requires the dwelling-house for her own occupation as a residence. On the whole, it seems to me that the balance of hardship will rest with the plaintiff if I refuse to make an order. I, accordingly, give judgment for her on that ground, the order to take effect in six weeks.

Solicitors: *Evans, Rendall & Oakeshott*; *Cropley, Davies & Son.*

[*Reported by* R. A. YULE, ESQ., *Barrister-at-Law.*]

Re WALKER. WALKER *v.* WALKER

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), January 24, 1930]

[Reported [1930] 1 Ch. 469; 99 L.J.Ch. 225; 142 L.T. 472;
74 Sol. Jo. 106]

Will—Words of futurity—Gift to children of children in case any child "shall die in my lifetime leaving issue"—Child dead at date of will with testator's knowledge—No context to cut down primâ facie meaning of futurity.

On Sept. 27, 1920, the testator was aware of the death, on Sept. 5, 1920, of one of his sons, who left an only child, H. By his will, dated Sept. 27, 1920, the testator gave his residuary estate upon trust to pay the income to his wife for her life, and then for all his children in equal shares with the proviso that "in case any child of mine shall die in my lifetime leaving issue living at my death such issue shall stand in the place of such deceased child and shall take equally between them if more than one the share of my residuary estate which such deceased child of mine would have taken if he or she had survived me." The testator died on Nov. 13, 1920, leaving his widow and six children surviving him. His widow died in 1922. On an originating summons to determine whether H. was entitled to a share in the residuary estate,

Held: that the words "shall die in my lifetime" must be read according to the natural meaning of the words as words of futurity unless there were other words in the will negativing that plain meaning; in this will there were no such other words; and, therefore, H. was not entitled to share.

Notes. Referred to: *Re Booth's Will Trusts, Robbins* v. *King* (1940), 163 L.T. 77.

As to the construction of words of futurity in a will, see 34 Halsbury's Laws (2nd Edn.) 222; and for cases see 44 Digest 792 et seq.

Cases referred to:

(1) *Loring* v. *Thomas* (1861), 1 Drew. & Sm. 497; 30 L.J.Ch. 789; 5 L.T. 269; 7 Jur.N.S. 1116; 9 W.R. 919; 62 E.R. 469; 44 Digest 796, *6528*.

(2) *Barraclough* v. *Cooper* (1905), [1908] 2 Ch. 121, n.; 77 L.J.Ch. 555, n.; 98 L.T. 852, H.L.; 44 Digest 532, *3483*.

(3) *Re Lambert, Corns* v. *Harrison*, [1908] 2 Ch. 117; 77 L.J.Ch. 553; 98 L.T. 851; 44 Digest 798, *6537*.

(4) *Re Gorringe, Gorringe* v. *Gorringe*, [1906] 2 Ch. 341; 75 L.J.Ch. 687; 95 L.T. 574, C.A.; reversed sub nom. *Gorringe* v. *Mahlstedt*, [1907] A.C. 225; 76 L.J.Ch. 527; 97 L.T. 111; sub nom. *Re Gorringe, Gorringe* v. *Mahlstedt*, 51 Sol. Jo. 497, H.L.; 44 Digest 796, *6525*.

(5) *Re Metcalfe, Metcalfe* v. *Earle*, [1909] 1 Ch. 424; 78 L.J.Ch. 303; 100 L.T. 222; 44 Digest 798, *6538*.

(6) *Re Williams, Metcalfe* v. *Williams*, [1914] 2 Ch. 61; 83 L.J.Ch. 570; 110 L.T. 923; 58 Sol. Jo. 470, C.A.; 44 Digest 798, *6540*.

(7) *Re Cope, Cross* v. *Cross*, [1908] 2 Ch. 1; 77 L.J.Ch. 558; 99 L.T. 374, C.A.; 44 Digest 796, *6526*.

Appeal from an order of Eve, J.

The facts appear in the headnote and the judgment of the learned Master of the Rolls. Hilda Walker, the child of the deceased son, took out a summons to determine whether in the circumstances the daughter of the deceased son was entitled to share in the residuary estate. Eve, J., held that in clauses of this nature, whether they be substitutional or original, the word "shall" must be construed in its primary sense as a word of futurity, unless there was any context from which one could fairly come to the conclusion that the testator used the word "shall" as equivalent to "shall or shall have" done this or that; in the present case there was no such context, and, therefore, Hilda Walker was not entitled to any share in the residuary estate.

Hilda Walker appealed.

J. M. Gover, K.C., and *G. D. Johnston* for the appellant.
Baden Fuller for the respondents.

LORD HANWORTH, M.R.—Benjamin Walker made his will on Sept. 27, 1920, and he died on Nov. 13, 1920. He left a widow, who was tenant for life of the whole estate, and he also left six children surviving him. One son had predeceased him, having died on Sept. 5, 1920, that is, twenty-two days before the testator made his will. This son Benjamin Cullingworth Walker, left a daughter, Hilda, who was born on Sept. 4, 1907. The widow died on Jan. 6, 1922, and upon her death it became the duty of the trustees to distribute the corpus of the estate of the testator in accordance with the directions contained in the will. These were:

> "I direct that after the death of my wife my trustees shall stand possessed of my residuary estate for all my children in equal shares, provided nevertheless in case any child of mine shall die in my lifetime leaving issue living at my death, such issue shall stand in the place of such deceased child, and shall take equally between them if more than one the share of my residuary estate which such deceased child of mine would have taken if he or she had survived me."

It will be observed at once that the ultimate direction is to divide the estate among the children in equal shares, and the problem raised is whether the grandchild, Hilda Walker, is entitled to stand in place of her father. It is plain that the words "any child of mine shall die" have a plain meaning. In using the words "shall die," the testator is using a word of futurity. Is it possible to construe those words as equivalent to "shall have died" or "shall be dead?" If so, then Hilda is entitled to take her father's share; if not, the condition imposed by the proviso is not fulfilled.

We have had our attention called to a number of cases. The first is the well-known case of *Loring* v. *Thomas* (1). In that case the judgment of KINDERSLEY, V.-C., was on words akin to the words used in the present case, and in that case he felt able to give the words "shall die" a different meaning, so that they were really equivalent to "shall have died" or "shall be dead." One looks to see upon what grounds he decided that, and it is at once noticeable that in that case he had words which helped him to reach that decision. The clause to be construed there was:

> "In case any child or children of the said Dorothy Davies shall die in my lifetime leaving any children who shall be living at my decease, and who shall live to attain the age of twenty-one years, then and in such case the children of each such child so dying shall represent and stand in the place of their deceased parent."

Having cited that clause the Vice-Chancellor goes on (1 Drew. & Sm. at p. 517):

> "Now if the words 'shall die' must be construed to refer only to a future death, so as to exclude such children of Dorothy Davies as had died before the date of the will, then the words 'who shall live to attain the age of twenty-one years' must equally be construed to refer only to a future attainment of twenty-one years, so as to exclude such children of a deceased child of Dorothy Davies as had attained twenty-one before the date of the will."

The Vice-Chancellor rejects that, and comes to the conclusion that "shall live to attain the age of twenty-one years" was not to be attributed to the case of a future event only, and that those who had attained it before the date of the will were also to be included, and so the words "shall die" were upon the same footing. That case is really the root authority.

The next case is *Barraclough* v. *Cooper* (2), which, though decided by the House of Lords in 1905, did not find its way into the LAW REPORTS until 1908, as a footnote to *Re Lambert, Corns* v. *Harrison* (3). In that case the testator gave a A benefit to the issue of children who "shall have died in my lifetime, or shall die after my decease in the lifetime of my said wife," and the question was whether those words should fall within the scope of the decision in *Loring* v. *Thomas* (1) so as to include the daughter of a child who had died before the date of the will. The judgment of the Court of Appeal was given by ROMER, L.J., and it was to the effect that the case was governed by *Loring* v. *Thomas* (1), because the court found B that there were words sufficient to negative the view that the testator intended nothing but words of futurity. In the House of Lords LORD MACNAGHTEN, in his opinion, quotes a passage from KINDERSLEY, V.-C., in *Loring* v. *Thomas* (1):

> "When a testator directs that issue shall represent or stand in the place of or be substituted for a deceased child and take the share which their parent C would have taken if living, he may intend such representation or substitution to apply only to the case of a child dying subsequently to the date of his will and before the time of his own death; or he may mean it to extend also to the case of a child who was already dead at the date of the will. The solution of the question which of the two he intended must, of course, depend on the language he has used in directing such representation or substitution. He D may use language of such restricted import as to be inapplicable to any children but such as were living at the date of the will. But if he uses language so wide and general as to be no less applicable to a pre-deceased child than to a child living at the date of the will, then the direction as to such representation or substitution must be held to embrace both. That is exactly what the testator has done in this case." E

We have, therefore, exactly a case there in which the House of Lords, following the principle laid down in *Loring* v. *Thomas* (1), held that the words used were sufficient to prevent the necessity of adopting the narrow meaning of futurity.

In May, 1907, *Gorringe* v. *Mahlstedt* (4) was decided in the House of Lords. In *Gorringe's Case* (4) a testator gave legacies to children of a son whom he described as "my deceased son Alfred William Gorringe." He gave his residue F to his children who should be living at his death and attain twenty-one, and then came a proviso:

> "Provided that in case any one or more of my children . . . shall pre-decease me leaving any child or children living at my death, then such child or children of my deceased child . . . shall take, and if more than one in equal G shares, the share which his, her or their parent would have taken if such parent were living and over the age of twenty-one at my decease."

In that case the House of Lords reversed the decision of the Court of Appeal from whose decision ROMER, L.J., had dissented, and the children of the deceased son were held not entitled to share. But the terms of the will there indicated that the testator had had in mind that here was a deceased son, and there was a clear statement by the testator that he had not overlooked the fact that that son had died at H the date of his will. No doubt was thrown upon the decision in *Loring* v. *Thomas* (1); but ROMER, L.J., in the Court of Appeal, where the case was reported sub nom. *Re Gorringe, Gorringe* v. *Gorringe* (4), said that words in a will must be taken in their natural signification, and he continues:

I

> "That is, to my mind, the natural meaning of the words in the language used, and there is absolutely nothing, to my mind, in this will which enables the court to depart from the natural and first meaning of the words used."

LORD MACNAGHTEN, in the House of Lords, called attention to those words of ROMER, L.J., and approved them, and he adds:

> "In my opinion, the gift in the proviso was simply a substitutional gift, not an independent gift to all the grandchildren."

In my view, it is clear that the *Gorringe Case* (4) would have been decided as it was, even if the *Barraclough Case* (2) had been called to the attention of the House of Lords. I think that both cases really followed the lines of construction laid down by the Vice-Chancellor in *Loring* v. *Thomas* (1).

Since that time there have been a number of authorities, and I think that all the cases were decided upon the same principle. We have been referred to *Re Lambert, Corns* v. *Harrison* (3); *Re Metcalfe, Metcalfe* v. *Earle* (5); and *Re Williams, Metcalfe* v. *Williams* (6). In all those cases it has been decided that assistance was given to the court which enabled the court not to give to the words "will" or "shall" a meaning of futurity only, because, for instance, a proviso as to members of a class of persons taking a benefit on condition that they attain the age of twenty-one years applies also to those members of the class who may have attained twenty-one before the testator's death, and the existence, therefore, of such a clause enables the court to discard the narrow meaning of the word "shall." But if there are no words giving the court that assistance, the difficulty still remains, and in a case in the Court of Appeal—*Re Cope, Cross* v. *Cross* (7)—following the same line of reasoning, it was decided that the persons entitled to share in a residuary gift did not include children of a child who was dead at the date of the will, because there were no words which enabled the court to get away from the plain meaning of futurity implied by the words "shall die." In that case Cozens-Hardy, M.R., said:

> "I think the only safe course in construing a will of this nature is to adhere to the natural and grammatical meaning of the words used, and I doubt whether much advantage can be gained by referring to authorities dealing with other wills in which similar language is used. Our duty is to ascertain the testator's intention from the language of his will. . . . I feel great difficulty in understanding how this proviso can be tacked on to, or have any bearing upon, the first proviso. Yet I think it throws some light upon the rest of the will. It contemplates, and it only contemplates, the death of a child in the lifetime of the wife, and it is scarcely possible to suppose that the death so contemplated was not a death subsequent to the date at which the will was executed. I cannot hold that the testator, who must be presumed to know which of his grandchildren were living, intended by these words to include a child whom he knew to be dead."

That is a decision which is binding on this court, and it re-affirms the duty of the court to read and construe words according to their plain meaning, unless it can find that there are other words which negative the meaning of the narrow but plain words of futurity which have been used by the testator.

I think there is no confusion or doubt introduced by the two decisions of the House of Lords in the *Gorringe* (4) and *Barraclough* (2) cases and the fact that *Barraclough* v. *Cooper* (2) was not cited in *Gorringe* v. *Mahlstedt* (4) is immaterial as the decisions in those cases stand on the particular wills involved in each case the language of which necessarily caused different decisions. It seems to me that the word "shall" must be treated according to its natural meaning as a word of futurity, unless the court can find something to enable it to give the word a different meaning. I can find no such assistance given to the court here. I find it difficult to suppose that, at the date of this will, the testator was not cognisant of the state of his family, and the will contains no proviso as to children attaining twenty-one. It seems to me that neither the will, nor the proviso, nor any surrounding circumstances, give us any assistance to enable us to negative the meaning of the plain words which the testator has used. Therefore, the judgment of Eve, J., was right and the appeal must be dismissed.

LAWRENCE, L.J.—I agree. I think it is well settled by authority binding upon us that an expression such as "shall die" must be given its primary meaning of "shall hereafter die," unless there are words in the context by which a different meaning must be implied. It seems to me that there are no such words in the present case.

ROMER, L.J.—I agree.

Solicitors: *George A. Herbert*; *Gibson & Weldon* for *T. W. Weldon*, Leeds.

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law*.]

Re BUXTON. BUXTON *v.* BUXTON

[CHANCERY DIVISION (Bennett, J.), March 10, 1930]

[Reported [1930] 1 Ch. 648; 99 L.J.Ch. 334; 143 L.T. 37]

Will—Legacy—Contingent legacy—Gift of shares in company—Accretions to shares by consolidation after testator's death—Right to accretions before the happening of the contingency.

A testator bequeathed shares in a company belonging to him at his death to his son and grandson, the gift to take effect on the death of his wife. Between the testator's death and the death of his wife, his shares in the company, the nominal value of each of which was £35, became, as the result of capitalisation of a reserve fund, consolidated with new shares, each of the nominal value of £15, into shares each of the nominal value of £50. On the question whether the accretions to the testator's shares since his death should go to the son and grandson in the same proportion as the original shares, or whether such accretions should form part of the residuary estate,

Held: (i) the gifts were contingent: *Smell* v. *Dee* (1) (1707), 2 Salk. 415, followed; (ii) there being no reason why there should be a difference between the rule which applied to accretions of a capital nature to a contingent legacy and that which was applicable in the case of capital accretions to a vested legacy, the accretions which resulted from the capitalisation should go to the son and grandson and not fall into the residue: dicta of FRY, J., in *Guthrie* v. *Walrond* (2) (1883), 22 Ch.D. at p. 578, not followed.

Notes. As to accretions to specific legacies, see 16 HALSBURY'S LAWS (3rd Edn.) 329, para. 635; and for cases on the subject, see 23 DIGEST (Repl.) 422–423, *4933–4940*.

Cases referred to:

(1) *Smell* v. *Dee* (1707), 2 Salk. 415; 91 E.R. 360; 23 Digest (Repl.) 412, *4835*.

(2) *Guthrie* v. *Walrond* (1883), 22 Ch.D. 573; 52 L.J.Ch. 165; 47 L.T. 614; 31 W.R. 285; 23 Digest (Repl.) 416, *4868*.

Adjourned Summons.

The testator, Edward North Buxton, who died on Jan. 9, 1924, by cl. 9 of his will gave one-third of his total holding of ordinary shares in the company Truman, Hanbury and Buxton, Ltd., at his death to his son Anthony Buxton, and he gave the remaining two-thirds of those shares to his grandson Edward North Buxton, but he also directed that the two respective gifts were not to take effect until the death of his wife. At the date of the testator's death, his holding of ordinary shares in the company consisted of 460 fully paid ordinary shares of the nominal value of £35 each.

By resolutions made subsequently to the testator's death but in his wife's lifetime, a reserve fund was capitalised, and, as a result of the capitalisation, capital was appropriated to the holders of the ordinary shares by consolidating each of their shares with a new share of the nominal value of £15, making the consolidated share one of the nominal value of £50. The result was that, after such capitalisation, the trustees of the testator's will held 460 ordinary shares of the nominal value of £50 each. The testator's widow died on Oct. 26, 1929. The surviving executor and trustee took out a summons to determine the question whether the accretions to the testator's shares since his death should go to the son and grandson in the same proportion as the testator's shares, or whether such accretions should form part of the residuary estate.

Cecil Turner for the plaintiffs.

Stamp for one of the specific legatees.

Errington, for the residuary legatees, referred to *Guthrie* v. *Walrond* (2).

BENNETT, J.—This summons raises the question whether the accretions to the capital of certain shares in a company belong to certain specific legatees under the will of a testator or fall into his residuary estate. [His Lordship read the question as stated in the summons, considered the arguments with regard to the question whether the gifts were vested in the specific legatees on the death of the testator or were contingent on the death of the testator's widow, found, as a matter of construction, that the point was covered by *Smell* v. *Dee* (1), and that the gifts were contingent, and continued:] Then counsel for the residuary legatees argues that, the gifts being contingent, any accretion to the legacies before the happening of the contingency falls into the residue of the testator's estate, and he bases that argument on the observations of FRY, J., in *Guthrie* v. *Walrond* (2). In that case the learned judge said in his judgment (22 Ch.D. at p. 578):

> "I think the law is plain that when a specific legacy is given on the happening of a contingency the interest upon it, and any accretions to it before the happening of the contingency, fall into the residue of the testator's estate, or go to the next-of-kin, as the case may be."

It seems to me that the language used by the learned judge was wider than necessary for the purpose of deciding the point which arose before him. It appears that the only question was as to the destination of the income of the specific legacy during the period before the contingency happened. It seems that the learned judge had not to consider and, therefore, did not decide any question with reference to accretions to the capital of a contingent specific legacy, and, in my judgment, the judgment of FRY, J., is not a decision in favour of counsel for the residuary legatees' contention.

Then counsel for the specific legatee contends that, assuming the legacy to be contingent, when the contingency happens and the legatee becomes entitled to the shares, everything of a capital nature which has accrued to those shares goes to the legatee of those shares, there being no gift of capital accretions to anyone else; and that there is no reason why, when the contingency happens, the ordinary rule with regard to accretions to capital should not be applicable. It is difficult to see what answer there is to that contention.

There appears to be no reason why there should be a difference between the rule which applies to accretions of a capital nature to a contingent legacy and that which is applicable in the case of capital accretions to a vested legacy, and my answer to the question raised by the summons is that the accretions which resulted from the capitalisation go to the specific legatees under cl. 9 of the will in the proportions of one-third to two-thirds.

Solicitors: *Dawes & Sons*; *Collyer-Bristow & Co.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

ELDER *v.* NORTHCOTT

[CHANCERY DIVISION (Clauson, J.), April 14, 1930]

[Reported [1930] 2 Ch. 422; 99 L.J. 548; 143 L.T. 614]

Limitation of Action—Claim barred as to principal—Recovery of interest previously accrued also barred—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3.

Where a claim to a principal sum is barred by the Limitation Act, 1623, a claim for the interest thereon is also barred as being only accessory to the principal.

Hollis v. *Palmer* (1) (1836), 2 Bing N.C. 713, considered.

Notes. The Limitation Act, 1623, s. 3, was repealed by the Limitation Act, 1939, s. 34 (4) and Schedule, and replaced by s. 2 of that Act.

As to recovery of interest, see 23 HALSBURY'S LAWS (2nd Edn.) 178–179, paras. 258, 259; and for cases on the subject, see 32 DIGEST 324–325, *100–111*. For the Limitation Act, 1939, s. 2, see 13 HALSBURY'S STATUTES (2nd Edn.) 1160.

Cases referred to:

(1) *Hollis* v. *Palmer* (1836), 2 Bing.N.C. 713; 3 Scott, 265; 2 Hodg. 55; 5 L.J.C.P. 264; 132 E.R. 275; 32 Digest 542, *1948*.

(2) *Clark* v. *Alexander* (1844), 8 Scott. N.R. 147; 13 L.J.C.P. 133; 8 Jur. 496; 12 Digest (Repl.) 656, *5093*.

(3) *Collyer* v. *Willoch* (1827), 4 Bing. 313; 12 Moore, C.P. 557; 5 L.J.O.S.C.P. 181; 130 E.R. 788; 32 Digest 381, *643*.

(4) *Cameron* v. *Smith* (1819), 2 B. & Ald. 305; 106 E.R. 378; 35 Digest 178, *72*.

(5) *Parr's Banking Co.* v. *Yates*, [1898] 2 Q.B. 460; 67 L.J.Q.B. 851; 79 L.T. 321; 47 W.R. 42, C.A.; 32 Digest 333, *185*.

(6) *Reeves* v. *Butcher*, [1891] 2 Q.B. 509; 60 L.J.Q.B. 619; 65 L.T. 329; 39 W.R. 626; 32 Digest 337, *210*.

(7) *Henton* v. *Paddison* (1893), 68 L.T. 405; 9 T.L.R. 333; 3 R. 450; 32 Digest 333, *183*.

(8) *Skene* v. *Cook*, [1901] 2 K.B. 7; affirmed, [1902] 1 K.B. 682; 71 L.J.K.B. 446; 86 L.T. 319; 50 W.R. 506; 18 T.L.R. 431; 46 Sol. Jo. 356, C.A.; 30 Digest (Repl.) 351, *122*.

(9) *Cheang Thye Phin* v. *Lam Kin Sang*, [1929] A.C. 670; 142 L.T. 58, P.C.; Digest Supp.

(10) *Attwood* v. *Taylor* (1840), 1 Man. & G. 279; 1 Scott, N.R. 611; 133 E.R. 340; 35 Digest 200, *266*.

Witness Action.

The plaintiffs as executors of the testatrix, who died in 1921, claimed that the defendant owed the testatrix £1,500 together with 5 per cent. interest thereon. The claim for the principal sum of £1,500 had become barred by the Limitation Act, 1623, on June 30, 1926, but the plaintiffs also claimed the payment by the defendant of all the interest that had accrued due within the period of six years from the last payment of interest, the six years having expired on June 30, 1926. The question for determination, therefore, was whether the plaintiffs were entitled to so much of the interest as had accrued due before June 30, 1926, i.e., before the date when the principal sum became barred.

Pritt, K.C., and *N. A. Beechman*, for the plaintiffs, referred to *Clark* v. *Alexander* (2); *Hollis* v. *Palmer* (1); *Collyer* v. *Willoch* (3); *Cameron* v. *Smith* (4); BULLEN AND LEAKE'S PRECEDENTS OF PLEADINGS (8th Edn.), p. 216, note (e); Wms. Saund., vol. 1, pp. 204, 205, note (t); *Parr's Banking Co.* v. *Yates* (5); *Reeves* v. *Butcher* (6); *Henton* v. *Paddison* (7); *Skene* v. *Cook* (8).

Sir Boyd Merriman, K.C., and *Swords, K.C.*, for the defendant, referred to *Hollis* v. *Palmer* (1); *Cheang Thye Phin* v. *Lam Kin Sang* (9); *Parr's Banking Co.* v. *Yates* (5); *Attwood* v. *Taylor* (10).

CLAUSON, J., stated the facts and continued: After a short discussion, it was recognised that, so far as any claim to repayment of the principal was concerned, the action, on the facts as stated by the plaintiffs' counsel in opening, must necessarily fail by reason of the operation of the Limitation Act, 1623. But an ingenious point was then put forward to justify the action, at all events, in part; and it was said that, though the principal became irrecoverable on June 30, 1926, such instalments of interest could be recovered as accrued between Nov. 1, 1922 (six years before the issue of the writ), and June 30, 1926, when the principal became statute barred. The statement of claim was framed on the footing of a trust, but an amendment was asked for and, subject to any question as to costs, allowed in these terms:

> "In the alternative the plaintiffs will contend that on or about Nov. 4, 1907, the deceased lent to the defendant a sum of £1,500, the said loan to bear interest at 5 per cent. per annum. The plaintiffs will, in any event, claim all interest accrued due within a period of six years before the issue of the writ herein."

The plaintiffs argue that, as each half-yearly day for payment came, a cause of action accrued to the plaintiffs and, accordingly, that they are entitled to claim interest not going further back than Nov. 1, 1922, on the footing that every half-year a claim for interest arose, that claim arising within six years before the issue of the writ. It was, however, conceded by the plaintiffs that interest could not be claimed beyond June 30, 1926, being the end of the period of six years calculated from the past payment of interest; that is to say, interest could not be claimed after the date at which the principal money ceased to be recoverable by action. The claim struck me as novel. There must have been many cases in which, when it has been discovered that, owing to some error or oversight, the statute has been allowed to run, plaintiffs would grasp eagerly at the tabula in naufragio which would be provided by the consolation of recovering something for interest, although the principal had gone past recall. I, myself, could recall no case in which such a claim had been made, and I find on reference to a judgment, which I shall have to refer to again, of Tindal, C.J., in *Hollis* v. *Palmer* (1), that the experience of others seems to have been the same. In that case, a question arose on the form of the pleadings, and it is not easy to detach from the report the exact points that were decided; but one suggestion made was that the fact that the principal had been barred by the statute did not prevent recovery of interest on the debt, including interest which had accrued in respect of a period before the date at which the debt was barred. Tindal, C.J., says (5 L.J.C.P. at p. 266):

> "The first objection, without any reference to the mode of pleading, appears to be reducible to this, that the statute does not operate as a bar to the recovery of the interest, though it does to the recovery of the note, and that an action may be maintainable for the interest, though it would not for the principal. This supposition appears to proceed on the ground that the cause of action may be severed and divided. But there is but one contract, from which alone the principal and interest arise. The contract on which they are founded is one and the same; they constitute, and may be considered as the principal and accessory of the debt; and by the rule of law, if the principal be barred, the accessory falls with it to the ground; and, for myself, I must say that this is the first time, within my experience, that I have heard the question entertained."

Accordingly, I think that, supported by that observation of Tindal, C.J., I am justified in regarding the claim of the plaintiffs—that, notwithstanding the fact that the principal is barred, interest accruing before the time at which the principal became barred is recoverable—as a claim which, to the ordinary practitioner, would appear paradoxical, and requiring to be supported, if it can, by the clearest authority. Now when the authorities are investigated in order to see how the matter stands, what is found is this. I take as a typical statement of the law the statement to be found under the title "Money and Interest on Money" in 21 HALSBURY'S LAWS (1st Edn.), p. 41, para. 76: "If the principal is barred by a statute of limitation, the interest is, as a general rule, barred also"; and the decision in *Hollis* v. *Palmer* (1) is referred to as the leading authority for that proposition. In a very recent case, the matter came up incidentally for consideration before the Privy Council in *Cheang Thye Phin* v. *Lam Kin Sang* (9). I need not state the somewhat complicated facts of that case, but LORD WARRINGTON, in delivering the judgment of the board, treats the matter as settled law. He says ([1929] A.C. at pp. 676, 677):

> "The claim of the plaintiffs, except as regards sums advanced since March 30, 1908, has been held to be barred by the statute. It seems to their Lordships to follow that there being no independent contract to pay interest, the interest is a mere accessory of the principal, and if the principal is irrecoverable so is the interest on it: (see *Hollis* v. *Palmer* (1))."

Sitting as I am in a court of first instance, it might be enough for me, I conceive, to stop there, because I have in the statement of TINDAL, C.J., and the repetition of it by LORD WARRINGTON in the Privy Council, a statement which justifies me in treating the contention which is put forward by the plaintiffs, as one which is so contrary to the general understanding of practising lawyers, that, if the contention is to be established, it must be established in a higher court than a court of first instance. But, in deference to the interesting arguments which have been put before me by counsel for the plaintiffs and counsel for the defendant, I will add a few words.

On referring to the report of *Hollis* v. *Palmer* (1) in BINGHAM'S NEW CASES, one finds the judgment of TINDAL, C.J., reported in somewhat different terms from the language I have cited from the report in the LAW JOURNAL. His Lordship, according to the report in BINGHAM, said (2 Bing.N.C. at pp. 716, 717):

> "Perhaps in cases where there is an express contract to pay interest independently of the principal, there might be ground for such an argument; but in ordinary cases, interest has always been deemed a mere accessory of the loan, and when the demand for the principal is barred, the accessory falls along with it."

That sentence gives rise, of course, to this difficulty, that it would seem to suggest that in some cases, at all events, where there is an express contract to pay interest independently of the principal, the interest and the principal can be treated as being wholly different matters, and the barring of the principal might be treated as not barring the claim to the interest. It may be, I do not say that it is, that the Chief Justice had in mind such a case as that where there is a covenant to pay the principal and a separate covenant to pay interest. That is not the present case; for the present case, as appears from the way in which it has been pleaded by amendment after this point had been raised and after, of course, grave consideration, is a case where the agreement to pay the interest was contained in, and formed part of, the agreement to pay the principal. It is pleaded in the words that "the deceased lent the defendant the sum of £1,500, the said loan to bear interest at 5 per cent. per annum." I do not want it to be supposed that, in my opinion, the mere existence of two separate covenants, one as to principal and one as to interest, would make any difference; but it would appear that TINDAL, C.J., had some cases in his mind in which, for some reason or other, the interest was payable under such circumstances that it could not be treated as an accessory to the principal.

I was referred to *Parr's Banking Co.* v. *Yates* (5) as a case which throws some light on the matter. That was a case not between creditor and debtor, but between creditor and guarantor; and it was there held that the liability of the guarantor to pay a sum which, as between creditor and debtor, was interest, was a liability of such a character that the liability of the guarantor to pay that sum continued, irrespective of the question whether or not the principal on which that sum, as between creditor and debtor, was interest, had ceased to be recoverable. It may be that that is the kind of case that TINDAL, C.J., had in mind. On considering the judgments of the Court of Appeal in that case, I am disposed to agree with the argument put forward by counsel for the defendant that that case, so far from throwing any doubt on the doctrine which, as I have ventured to point out, the text-books and the profession generally have deduced from *Hollis* v. *Palmer* (1), indeed supports that doctrine, and I think that is the right view, because SMITH, L.J., in giving the leading judgment in *Parr's Banking Co.* v. *Yates* (5), said ([1898] 2 Q.B. at p. 465):

> "The doctrine that interest is an accessory which falls to the ground with the principal does not apply to a case like this, because the payment of interest, commission and other banking charges due from the guaranteed party is as much guaranteed as payment of the sums advanced themselves."

By that language I understand the Lord Justice to hold it as sound doctrine that interest is an accessory which falls to the ground with the principal; but that that doctrine did not apply to that case, because the sum which was interest as between the creditor and the debtor possessed another character as between the creditor and the guarantor; it was a sum which was guaranteed as a net sum and not as a mere interest accessory to the principal. If I have rightly interpreted the view of SMITH, L.J., it seems to me reasonably clear that the authority of that case, so far as it goes, supports the doctrine to which I have referred. I may add that, in *Skene* v. *Cook* (8), CHANNELL, J., said ([1901] 2 K.B. at p. 15):

> "When the mortgage debt has gone, the right to interest has gone also; no statute enables you to recover interest after the right to recover the principal has been lost. In the case of a mortgage the interest is dependent upon and accessory to the principal."

That statement is, no doubt, merely a dictum, but it is made by a very learned and experienced judge; it corroborates the view that, after the principal has become statute barred, the claim to interest accruing before the time of the barring of the principal is a claim which does not commend itself to the general understanding of the profession.

Accordingly, I hold that, since the claim to the principal is barred by lapse of time, the claim to the interest on it is barred also, and, accordingly, the plaintiffs cannot succeed in the claim so ingeniously put forward for interest between the dates that I have mentioned. The action will, accordingly, be dismissed.

Solicitors: *Mayo, Elder & Co.*; *Herbert Oppenheimer, Nathan & Vandyk.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

CHOWOOD, LTD. *v.* LYALL

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), May 6, 7, 8, 1930]

[Reported [1930] 2 Ch. 156; 99 L.J.Ch. 405; 143 L.T. 546]

Land Registration—Rectification of register—Land erroneously registered with absolute title under Land Transfer Acts, 1875 *and* 1897*—Claim for rectification under Land Registration Act,* 1925, *by rightful owner—Land Registration Act,* 1925 (15 *Geo.* 5, *c.* 21), *s.* 82 (1) (*g*), (*h*), (3), *s.* 147 (1) (*a*).

The plaintiffs purchased certain freehold land of which they were registered in 1925 with an absolute title under the Land Transfer Acts, 1875 and 1897. Included in the land were two strips of woodland, of which the defendant, who owned land adjoining that of the plaintiffs, claimed the ownership on the ground that she and her predecessors in title had been in undisputed possession for many years. The plaintiffs brought an action for trespass against the defendant and claimed an injunction restraining her from trespassing. The defendant counter-claimed, inter alia, for rectification of the register.

Held: (i) on the evidence, the defendant was the owner of the land in question, since she had shown that she had a good possessory title to it for many years previous to and at the time of the registration; (ii) the Land Registration Act, 1925, s. 147 (1) (a), did not limit the power of rectification of the register conferred by s. 82 (1) of the Act, which enabled the court to order rectification of entries made under the Land Transfer Acts, 1875 and 1897, and, further, s. 82 (3) did not apply since the defendant had been determined to be in possession of the land; accordingly, there would be an order for rectification of the register by excluding from the plaintiffs' registered title the land in question.

Notes. Applied: *Re 139, Deptford High Street, Ex parte British Transport Commission*, [1951] 1 All E.R. 950. Referred to: *Re Chowood, Ltd.*, [1933] All E.R.Rep. 946.

As to rectification of the register, see 23 HALSBURY'S LAWS (3rd Edn.) 203–206, paras. 425–431; and for cases on the subject, see 38 DIGEST 756–757, *909–911*. For the Land Registration Act, 1925, s. 82 and s. 147, see 20 HALSBURY'S STATUTES (2nd Edn.) 1013, 1058.

Case referred to:

(1) *A.-G.* v. *Odell*, [1906] 2 Ch. 47; 75 L.J.Ch. 425; 94 L.T. 659; 54 W.R. 566; 22 T.L.R. 466; 50 Sol. Jo. 404, C.A.; 38 Digest 756, *906*.

Appeal from a decision of LUXMOORE, J.

The plaintiffs, Chowood, Ltd., purchased certain freehold land at Walton-on-the-Hill and Ashtead, Surrey, from the executors of Pantia Ralli and were registered as proprietors with an absolute title under the Land Transfer Acts, 1875 and 1897, in 1925. The land as registered included within its eastern boundary, where it adjoined a sheepwalk, and within its north-eastern boundary, a belt of trees and underwood known as the Shaws, the eastern part being called the Sheepwalk Shaw and the northern part the Northern Shaw. The defendant, Mrs. V. M. Lyall, owned the sheepwalk, and she entered part of the Shaws to cut underwood. The plaintiffs commenced proceedings against the defendant for an injunction restraining her from cutting timber or underwood or otherwise trespassing on the Shaws. The defendant, by her defence, claimed that she and her predecessors in title had been in undisputed possession of the eastern part of the Sheepwalk Shaw since 1893, that that was bounded on the west by a ditch for its entire length, and that she and her predecessors in title had been for many years in undisputed possession of the Northern Shaw. She further claimed that, in 1911, the boundaries between her and the plaintiffs' land had been settled between Mr. Ralli and her late husband who was her predecessor in title. She relied on the Statutes of Limitation, and, in view of the fact that the plaintiffs were registered with an absolute title under the Acts of 1875 and 1897 as owners of the land in question, she counterclaimed for rectification of the register by excluding the eastern part of the Sheepwalk Shaw and the Northern Shaw. The plaintiffs denied that the defendant was the owner of these strips of land and contended that she was not entitled to rectification of the register. Luxmoore, J., held on the evidence (i) that the defendant was the owner of the land in question at the date of the plaintiffs' registration, having regard to what happened in 1911, and (ii) that the registration was effected without the defendant's consent. He held that there was jurisdiction to order rectification of the register, allowed the counter-claim and dismissed the action. The plaintiffs appealed.

J. F. Topham, *K.C.*, and *N. C. Armitage* for the plaintiff.
J. W. Manning, *K.C.*, and *C. L. Fawell* for the defendant.

LORD HANWORTH, M.R.—This is an interesting case, and it may be that, from some points of view, it is important on the question of land registration. It is an action which was brought by Chowood, Ltd. against Mrs. Lyall for an injunction to restrain her from cutting timber or underwood on or otherwise trespassing on the plaintiffs' land adjoining the west side of the sheepwalk leading northwards from Hurst Lane, in the parish of Walton-on-the-Hill, in the county of Surrey, and damages. The plaintiffs and the defendant are owners and occupiers of contiguous land in this parish of Walton-on-the-Hill, and the action is based on trespass said to have been committed by the defendant in cutting down certain timber and underwood on a disputed piece of land which lies between their two estates. The plaintiffs start their action by saying that they are the holders of an absolute title registered at the Land Registry, which thus gives them a right to maintain their rights and to prevent the defendant from interfering with what is their property, as shown on the map which is attached to the certificate of the registry. I must a little more carefully describe what is the piece of land in dispute. There is a field, which is numbered 24, and on its north side and on its east side and again on its south side it has a belt of trees and underwood surrounding it. The defendant's land abuts on this belt on what I may call the north-east side and on the east side of the belt. Luxmoore, J., has held that the defendant is entitled to succeed, that the disputed strip of land is her property, that the acts which she committed were exercised by her as acts of ownership on her own land, and that this certificate and the map attached to it must be amended and rectified by indicating on it the true limits of the land of the plaintiffs with regard to which at the present moment this map is incorrect, because it includes the land which he has held belongs to the defendant. [His Lordship considered the facts and the evidence and found that the defendant had acquired a good title by possession to the land in question at the time when the registration by the plaintiffs took place, since she and her predecessors in title had been in possession since at least 1911, and continued:] The defendant, therefore, asks that her counter-claim should be allowed. The plaintiffs claim to succeed on what I may call their statutory title. A plaintiff in ejectment must succeed on the strength of his own title. The defendant is entitled to plead that he is in possession and leave the plaintiff by proof of the strength of his title to oust him. All that the plaintiffs have proved primâ facie here is that they have a good statutory title—that they are entitled as the first proprietors with an absolute title which vests in them an estate in fee simple in possession in the land. They have not proved that they went into possession by exercising acts of ownership on that side of the shaw that belongs to the defendant. I do not think that any point can be made on the question of the onus of proof. The plaintiffs, we are told, brought their action of trespass, but it was to be treated as an action of ejectment; but, whether it is treated as an action of trespass, in which proof of possession would be absolutely necessary, or whether it is treated as an action of ejectment in which the plaintiffs have to succeed by the strength of their title, in both cases they have not proved facts which throw the onus on to the defendant. What they have left is that there is an issue to be decided between the parties as to which of them was in possession of the narrow strip. The defendant, on the other hand, has proved to the satisfaction of Luxmoore, J., and to the satisfaction of this court, that she is in possession and that she has been in possession, and that for more than twelve years, that there was an actual delimitation of the land in 1911, and that from and after that time there has been no act or no modification of the claim made at that time and acquiesced in by Mr. Ralli. It appears to us, therefore, that the defendant has proved that she was in possession as owner of this strip of the sheepwalk and also of the north side which was also delimited.

It is argued on behalf of the plaintiffs that, by reason of the Land Transfer Act, 1875, there can be no rectification. The Act of 1875 gave an absolute title to the person who was registered, and s. 95, which allowed for rectification in certain circumstances, begins with the words: "Subject to any estates or rights acquired by registration in pursuance of this Act." It is plain that the possibility of rectification, if it is only to be effective "subject to any estates or rights acquired by registration in pursuance of this Act" must be extremely small; indeed, it would appear that, as the statute of 1875 left it, there was practically no effective right or power of rectification. Then came the Land Transfer Act, 1897. Section 7 (1) provided that where any error or omission had been made in the register, or where an entry in the register was made or procured by fraud or mistake, and so on, there should be a right to indemnity. But there was also a proviso in sub-s. (2), which said:

> "Provided that where a registered disposition would if unregistered be absolutely void, or where the effect of such error, omission, or entry, would be to deprive a person of land of which he is in possession, or in receipt of the rents and profits, the register shall be rectified and the person suffering loss by the rectification shall be entitled to the indemnity."

We need not pause to consider the exact effect of that section. I do not want in this case to say anything which might create a difficulty in the matter of registration, but, as we are considering the effect of that section, I should like, in passing, to say that I respectfully agree with the view of that section which is presented by Vaughan Williams, L.J., in *A.-G.* v. *Odell* (1) ([1906] 2 Ch. at p. 73), where he says this:

> "This subsection seems to extend the area of rectification, for it provides for rectification in cases where the effect would be to destroy estates or rights acquired by registration under this Act."

Between 1897, and the consolidating Land Registration Act, 1925, the Law of Property Act, 1922, and the Law of Property (Amendment) Act, 1924, were passed; and they contained provisions which impinged on the Land Transfer Acts, 1875 and 1897. Thus when the Consolidation Act of 1925 came to be passed, it had to consolidate not merely the two Acts of 1875 and 1897, but the amendments and variations which had been incorporated in them by the two later Acts to which I have referred. It is quite true, as counsel for the plaintiffs has said, that s. 5 of the Act of 1925 states the effect of the first registration with absolute title in the same terms as the Act of 1875, and states the effect of a possessory title in s. 6, but it deals in Part VII with the rectification of the register and also with the right to indemnity. Section 82 (1): "The register may be rectified pursuant to an order of the court or by the registrar, subject to an appeal to the court, in any of the following cases"; and, as Luxmoore, J., has pointed out, it is cl. (a), cl. (g), and cl. (h) which may be of service in this case. Luxmoore, J., has said: "It appears to me that there is power under those clauses of that subsection to order rectification of the register." How far that may affect the absolute title granted under s. 5 it is not for us to consider, and it is a matter which had far better be left over until that express point arises. What we have to consider is whether or not it is right in a case in which we find that the defendant is in possession after there has been a settlement by agreement of a disputed boundary, a small strip of land, that there should be an amendment of this register so as to bring the actual delimitation on the maps more accurately to represent what was intended to pass, and did pass, under the conveyances under which both the plaintiffs and the defendant deduce their title. It appears to us that, under s. 82, there is power to make this rectification, and sub-s. (2) expressly provides that:

> "The register may be rectified under this section, notwithstanding that the rectification may affect any estates, rights, charges, or interests acquired or procured by registration, or by any entry on the register or otherwise."

Then it is said that sub-s. (3) has some application. The opening words of that subsection are:

> "The register shall not be rectified, except for the purpose of giving effect to an overriding interest, so as to affect the title of the proprietor who is in possession."

Once one person has been determined to be in possession then sub-s. (3) does not apply, and does not limit the power of registration.

Under these circumstances, having looked through the power of rectification now granted, it appears to us that this is a proper case for the exercise of that power, that LUXMOORE, J., was correct in allowing rectification in accordance with the counter-claim, and that the appeal, therefore, fails on both points—the defendant having established her title and that she is in possession, and that these acts complained of were done by her under the powers and rights belonging to an owner in possession.

The appeal, therefore, must be dismissed with costs.

LAWRENCE, L.J.—I agree. The dispute in this action concerns two strips of land; the first is a shaw known as the Northern Shaw, the second an eastern part of the shaw known as the Sheepwalk Shaw. As regards the first strip of land the appeal has not been seriously pressed, and I will say nothing more about it. As regards the second strip, however, the appeal has been vigorously urged. Having carefully considered the evidence adduced at the trial, I am clearly of opinion that LUXMOORE, J., was right in holding that, at the date of the plaintiffs' registration, that piece of land belonged to and was in the possession of the defendant, and that the registration was made in derogation of her rights.

On the question of rectification I will, for the purposes of my judgment, assume, without expressing any opinion on the point, that the learned judge was right in holding that s. 7 (2) of the Land Transfer Act, 1897, did not extend the power to rectify conferred by s. 95 of the Land Transfer Act, 1875, so as to enable the court to rectify the register in the circumstances of this case. Whether that be so or not, however, is, in my opinion, immaterial, for I agree with the learned judge that s. 82 of the Land Registration Act, 1925, confers ample power to rectify a first registration made before that Act came into force. I am further of opinion that the prohibition against rectification contained in s. 82 (3) does not apply in the circumstances, as the plaintiffs are not, and never have been, in possession of the land in question. Consequently, the rectification claimed by the defendant is not a rectification which will affect the title of a proprietor who is in possession of the land, and it is unnecessary to consider whether the present case comes within any of the exceptions mentioned in that subsection.

Two points were made by the plaintiffs why rectification could not be obtained in the present case. The first was based on s. 147 of the 1925 Act. I agree with the learned judge that this section does not operate in the manner contended for. The saving cl. (a) of s. 147 (1) was obviously enacted solely for the purpose of emphasising what had been already enacted by the Interpretation Act, 1889, namely, that the repeal of an Act shall not affect any transaction effected under the repealed Act whilst it was in operation; but it in no way purported to, nor did it in fact, limit the power of rectification contained in s. 82 of the Act of 1925. Section 82 confers a power in general words on the court to rectify the register, and the register includes entries made in it before and after the passing of the Act.

The other point was that the case has not been brought within s. 82 because the registration of the plaintiffs' title was not a mistake within the meaning of sub-s. (1) (h) of that section. I disagree with that contention. I see no reason to limit the word "mistake" in that section to any particular kind of mistake. The court must determine in every case whether there has been a mistake in the registration of the title, and, if so, whether justice requires that the register should be rectified. Here, I think, there has been an obvious mistake, brought about, no doubt, by erroneously including in the plan on the plaintiffs' conveyance this and other strips of land which did not belong to their vendors. The evidence is clear that the predecessors in title of the plaintiffs had no title to, and did not claim to have any title to, the strip in question, and, therefore, presumably never intended to convey it to the plaintiffs. I have no reason to doubt that the plaintiffs thought that they were purchasing what was delineated on the plan, but, in getting their title registered in the Land Registry, they were acting on the mistake which had been made in their conveyance, and that the entry made in the Registry in derogation of the right of the true owner who was in possession was an entry made by mistake within the meaning of the section. I further agree with the learned judge that, in the circumstances of the present case, the rectification might also be made under cl. (a) and cl. (g) of sub-s. (1). Moreover, I am not satisfied that the defendant's claim for rectification would not come under cl. (b) as being an application by a person who is aggrieved by an entry made in the register. Counsel for the plaintiffs has suggested that this clause applies only where the mistake is merely a slip made by the officials in the Registry, and not one where the mistake has been induced by one or more of the parties. I prefer not to express any concluded opinion on this point as it is unnecessary to decide it in the circumstances. In my judgment, for the reasons stated, the appeal fails and should be dismissed with costs.

ROMER, L.J.—The questions both of law and of fact arising on this appeal have been so fully dealt with both by the Master of the Rolls and by LAWRENCE, L.J., and I agree so wholeheartedly with the conclusions to which they have come, and the reasons they have given for their conclusions, that I do not think it is necessary for me to add a single other word.

Appeal dismissed.

Solicitors: *Corsellis & Berney*; *Routh, Stacey & Castle* for *Thring, Sheldon & Ingram*, Bath.

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re JACQUES SETTLED ESTATES

[Chancery Division (Eve, J.), July 24, 1930]

[Reported [1930] 2 Ch. 418; 99 L.J.Ch. 534; 144 L.T. 103]

Settled Land—Repairs—Expenditure by tenant for life—Installation in 1919 *of electric light in manor house and cottages—Right to recoupment out of capital.*

In 1919 the tenant for life of settled land installed electric light in the manor house and adjoining cottages which were previously lit by oil lamps. The cost was paid by him. He asked the court to authorise the trustees of the settlement to apply out of capital moneys the amount so expended, the cost to be repaid out of the income of the settled land in fifteen years from the date of the order in half-yearly instalments.

Held: the improvement having to be made sooner or later, the order asked for should be made, repayment to be by twenty half-yearly instalments, whereof the first must be taken to have fallen due on June 30, 1926.

Notes. Applied: *Re Borough Court Estate*, [1931] All E.R.Rep. 56.

As to the application of capital money under the Settled Land Act, 1925, see 23 Halsbury's Laws (3rd Edn.) 134–137, paras. 256–259; and for cases on the subject, see 30 Digest (Repl.) 317–320, *69–87*. For the Settled Land Act, 1925, s. 83, s. 84, s. 85, s. 87, s. 88 and Sched. III, Part III, see 23 Halsbury's Statutes (2nd Edn.), 186, 188, 190, 192, 193, 279.

Cases referred to:

(1) *Re Lord Leconfield's Settled Estates*, [1907] 2 Ch. 340; 76 L.J.Ch. 562; 97 L.T. 163; 23 T.L.R. 573; 30 Digest (Repl.) 320, *90*.

(2) *Re Lord Sherborne's Settled Estate*, [1929] 1 Ch. 345; 98 L.J.Ch. 273; 141 L.T. 87; 30 Digest (Repl.) 318, *82*.

(3) *Re Ormrod's Settled Estate*, [1892] 2 Ch. 318; 61 L.J.Ch. 651; 66 L.T. 845; sub nom. *Re Ormerod's Settled Estates*, 40 W.R. 490; 36 Sol. Jo. 427; 30 Digest (Repl.) 312, *14*.

Adjourned Summons.

The plaintiff was the tenant for life of settled land in Yorkshire. Prior to 1919 the manor house and adjoining cottages were lit by oil. The plaintiff then installed electric light at a total cost of £1,951 18s. 7d., which he paid; £223 13s. 7d. for the erection of a shed for the plant, £1,678 5s. for the installation of a turbine, generator, switchboard, battery, wiring, mains, timber, carboys, belting and other plant, and £50 to an engineer superintending the work. By this summons he asked the court to authorise the trustees of the settlement to apply out of capital moneys the sum of £1,951 18s. 7d. to be repaid to them out of the income of the settled land in fifteen years from the date of the order by half-yearly instalments.

Manning, K.C., and *A. Adams*, for the plaintiff, referred to *Re Leconfield's Settled Estates* (1) and *Re Lord Sherborne's Settled Estate* (2).

C. E. Harman, for the remaindermen, referred to *Re Lord Sherborne's Settled Estate* (2) and *Re Ormrod's Settled Estate* (3).

Winterbotham for the trustees of the settlement.

EVE, J.—The question I have to determine is whether, seeing that the expenditure was incurred at a time when it could not be paid for out of capital, that since Jan. 1, 1926, it is an expenditure which can be provided for primarily out of capital, and that it has now been decided that the provisions in the Settled Land Act, 1925, making the work done an improvement which can be provided for primarily out of capital operate retrospectively, I ought to make an order the effect of which will be to reimburse the tenant for life all or any, and, if any, what part, of an expenditure which he incurred at a time when he could have had no expectation of any relief being afforded him in respect thereof out of capital.

Speaking for myself, I think that the opinion expressed by North, J., in *Re Ormrod's Settled Estate* (3) is a very salutary one to bear in mind in connection with applications of this nature. There he had to deal with the question of recouping a tenant for life for certain expenditure he had incurred without having submitted antecedently a scheme of his proposals to the trustees, and the learned judge, who was prepared to assume that s. 15 of the Settled Land Act, 1890, authorising the recoupment of expenditure incurred without a scheme was retrospective, nevertheless refused to allow recoupment, on the ground that the tenant for life had deliberately done the work with the object, no doubt, of benefiting the estate, but with the full knowledge that the money expended could not be recovered from capital, and that, in these circumstances, he must be presumed to have intended to make the expenditure his own, and not to cast it on the corpus of the estate. I think that is a precedent to be borne in mind when applications are made under the present Act for the retrospective exercise by the court of its discretion in favour of tenants for life. I can imagine a large number of improvements, especially those which do not cost much individually, but which in the aggregate may amount to a large sum, with respect to which the court would not exercise its discretion by giving a retrospective effect to the legislation of 1925, but would leave the tenant for life who had incurred those expenses without any idea of getting them back in the position in which he must have known himself to be when the expenditure was incurred.

I confess that I am very much impressed in this case with the observations of North, J. The tenant for life installed this electric lighting system at a time when I must presume that he and his advisers knew that it was impossible for him to recover the cost from the capital moneys, and I am fairly certain that he remained under that impression not only until the Settled Land Act, 1925, came into force, but until he learnt, or his advisers learnt, from the decision of Tomlin, J., in *Re Lord Sherborne's Settled Estate* (2) that the provisions of that Act were of a retrospective nature. There are, however, features in this case which commend the expenditure as meritorious. Having regard to the antiquated system of lighting in vogue as late as 1919, I think that sooner or later, and sooner rather than later, there must have been an installation of electricity, and, had an application for the cost of such an installation been made subsequent to the Act of 1925, there cannot, I think, be any doubt but that it would have been sanctioned under sub-s. (2) (a) of s. 84. Moreover, the work appears to have been well done and the installation to have been satisfactorily maintained.

I do not, however, intend to go to the length which the summons asks, which is that although this expenditure was incurred in 1919, the instalments to be paid out of income for recouping capital should commence to be payable as from the date of the order, and should extend over the next fifteen years. I do not think that would be right. I think that I ought to regard this as though it were an application made immediately after the coming into force of the Act of 1925, and that the repayment of the £1,951 18s. 7d. which the trustees will be authorised to treat as payable out of capital must be made by twenty half-yearly instalments, whereof the first must be regarded as having fallen due on June 30, 1926.

Solicitors: *Rickards, Fox & Co.*; *Atkey, Turner & Co.*

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

H. S. WRIGHT AND WEBB *v.* ANNANDALE

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), May 1, 2, 5, 1930]

[Reported [1930] 2 K.B. 8; 99 L.J.K.B. 444; 143 L.T. 452;
46 T.L.R. 402; 74 Sol. Jo. 319]

Husband and Wife—"Necessaries"—Right of wife to pledge husband's credit—Costs of matrimonial proceedings—Act of adultery by wife before retainer of solicitor.

Solicitor—Costs—Wife's solicitor's costs—"Necessaries"—Adultery by wife before retainer—Isolated act of adultery—Liability of husband to solicitor.

A solicitor who has acted in matrimonial proceedings for a wife who is living apart from her husband cannot recover his costs by an action against the husband for them as necessaries if the wife had, albeit unknown to the solicitor, committed even a single act of adultery before she retained him. This rule applies to the costs of matrimonial proceedings whether the wife was the attacking or the defending party.

Durnford v. *Baker* (1), [1924] 2 K.B. 587, applied: observation of SCRUTTON, L.J. (ibid., at p. 600), retracted.

Notes. Divorce Rule 91 has now been replaced by the Matrimonial Causes Rules, 1957, r. 67.

As to the revocation by a wife's adultery of her right to pledge her husband's credit, and as to such pledging for costs, see 19 HALSBURY'S LAWS (3rd Edn.) 866–869, paras. 1425–1428; and for cases on the subject, see 27 DIGEST (Repl.) 193–200, *1513–1600*.

Cases referred to:

(1) *Durnford* v. *Baker*, [1924] 2 K.B. 587; 93 L.J.K.B. 866; 132 L.T. 35; 40 T.L.R. 757; 68 Sol. Jo. 790, C.A.; 27 Digest (Repl.) 199, *1579*.

(2) *Cragg* v. *Bowman* (1704), 6 Mod. Rep. 147; 87 E.R. 905, N.P.; 27 Digest (Repl.) 193, *1513*.

(3) *Arnold and Weaver* v. *Amari*, [1928] 1 K.B. 584; 97 L.J.K.B. 238; 138 L.T. 591; 44 T.L.R. 221; 72 Sol. Jo. 138; 27 Digest (Repl.) 199, *1580*.

(4) *Atkyns* v. *Pearce* (1857), 2 C.B.N.S. 763; 26 L.J.C.P. 252; 29 L.T.O.S. 212; 3 Jur.N.S. 1180; 140 E.R. 616; 27 Digest (Repl.) 193, *1522*.

(5) *Otway* v. *Otway*, *Otway* v. *Otway and Hoffer* (1888), 13 P.D. 141; 57 L.J.P. 81; 59 L.T. 153; 4 T.L.R. 523, 534, C.A.; 27 Digest (Repl.) 439, *3689*.

(6) *Robertson* v. *Robertson and Favagrossa* (1881), 6 P.D. 119; 51 L.J.P. 5; 45 L.T. 237; 29 W.R. 880, C.A.; 27 Digest (Repl.) 570, *5258*.

(7) *Holt* v. *Holt and Fleeming* (1858), 28 L.J.P. & M. 12; 27 Digest (Repl.) 509, *4513*.

(8) *Jinks* v. *Jinks*, [1911] P. 120; 80 L.J.P. 84; 104 L.T. 655; 27 T.L.R. 326; 55 Sol. Jo. 366; 27 Digest (Repl.) 538, *4864*.

Appeal against decision of HUMPHREYS, J., and a common jury, reported 143 L.T. 452.

The plaintiff solicitors claimed £130 odd as the balance of professional costs necessarily incurred by the defendant's wife, and as money expended on her behalf. The defendant husband admitted delivery of the bill of costs, and that he had paid £38 odd of the original amount claimed, and that the solicitors had rendered certain services to his wife; he did not admit that the services specified in the bill of costs had been rendered, or that the solicitors' charges were reasonable. He denied that the services were necessarily incurred by his wife, who was living apart from him, and alleged that she had committed adultery, of which he gave particulars.

On April 3, 1929, the wife had presented a petition for judicial separation on the ground of alleged cruelty, and had obtained an order for alimony pendente lite. On May 17, 1929, the husband had filed a cross-petition for divorce, naming two co-respondents. The wife then withdrew the solicitors' retainer. The cross-petition ultimately became undefended, and on Jan. 31, 1930, the husband obtained a decree nisi. When the wife withdrew her retainer of the plaintiffs as solicitors, the cross-petition had not reached the stage at which the solicitors could get an order from the Divorce Court for costs. They had, however, been paid part of their costs, and in this action they sued the husband for the balance. The jury found adultery by the wife, and, accordingly, returned a verdict for the defendant husband. The solicitors appealed.

Croom-Johnson, K.C., *J. W. Morris*, and *G. A. Thesiger* for the solicitors, the plaintiffs, referred to: *Cragg* v. *Bowman* (2); *Arnold and Weaver* v. *Amari* (3); *Atkyns* v. *Pearce* (4); *Durnford* v. *Baker* (1); *Otway* v. *Otway* (5); *Robertson* v. *Robertson and Favagrossa* (6); *Holt* v. *Holt and Fleeming* (7); *Jinks* v. *Jinks* (8).

Cartwright Sharp and *E. H. Blain*, for the husband, were not called on to argue.

SCRUTTON, L.J.—I have listened with great care to the very careful and exhaustive argument of counsel for the plaintiff solicitors, but I have come to the conclusion that we cannot interfere with the result of this case on any of the grounds that he has put forward.

The action is one brought by a firm of solicitors who had acted for a wife in divorce proceedings to recover their costs—the costs which they incurred by acting for the wife, and which they were entitled to receive because they acted for the wife—from the husband. The action is not brought on any divorce orders or divorce practice, but it is brought on the common law liability of the husband for necessaries supplied to the wife, and the case having been heard before Humphreys, J., and a jury, the solicitors have failed, and they now attack the result of the trial below on three grounds, as I understand: They say (i) that there was misdirection by the judge; (ii) that the verdict of the jury can be attacked on the ground that either there was no evidence to support it or that it was against the weight of the evidence; and, as I understand (iii) that, assuming the finding of the jury to stand, as a matter of law what they have found is no defence to his action.

His Lordship considered the summing up and the evidence in detail, rejected grounds (i) and (ii), and continued: That brings one, therefore, to the third point. We now have the jury's verdict of adultery, possibly on proof of only one act of unchastity, before the plaintiff solicitors began to act as solicitors for the wife—beginning to act as solicitors with an attack by the wife, and continuing to act as solicitors when the wife was on the defensive. What happened was that by some arrangement, the nature of which is not very clear, but which seems to me to have very little to do with the points in this case, the wife determined the retainer of the solicitors, and went and put her affairs into the hands of another solicitor who had previously acted for the husband, and she did not defend the case. Neither co-respondent defended the case, which was therefore an undefended case. By a late amendment of the pleadings the subsequent adultery when Daniels and the lady went and lived together before the case came on for hearing was alleged. As I say, I do not think it has anything to do with the legal questions involved, but the solicitors said: By the practice of the Divorce Court, our retainer having been determined before a certificate had been given as required by the rules, we were not able to make any application in the Divorce Court to get security for our costs up to that time. They were wrong in that, not that it matters very much whether they were right or wrong, but *Jinks* v. *Jinks* (8), to which I referred during the argument, shows that although their retainer had been determined they could have got an order for security from the husband for the costs incurred up to that time.

Putting that on one side, counsel for the solicitors argued before us two points. He said, first of all, that this common law rule that the solicitor cannot recover his costs against the husband if they were incurred when the wife had been guilty of a matrimonial offence (whether the solicitor knew of it or not) only applies where the wife is living in adultery and is continuously committing adultery; it does not apply where there is merely one isolated act of adultery, as there may have been here. He was unable to produce the slightest authority for that proposition, and it appears to me to be quite contrary to the principle on which the common law rule has been laid down. As I understand the rule, it is simply a particular instance of the general rule as to agency, which is that if the agent has been guilty of an act which is a breach of the contract of agency and going to the root and foundation of the whole contract of agency, that particular agent can no longer make any claim on his principal. An example of that, having nothing to do with matrimonial relations, is the case of a commercial agent who takes a bribe from the other party; that act is so inconsistent with the whole relation of agency that the agent forfeits all rights under the contract of agency and cannot recover his remuneration for that act or for any act connected with the contract of agency. The common law rule that if a wife has not been chaste she ceases to be an agent of necessity for her husband when she is not living with him, or whether she is living with him, appears to me to be simply an instance of the general rule as to misconduct by an agent of such a character as to go to the root of the whole contract of agency. In two places in Lush on Husband and Wife (3rd Edn.), pp. 394, 407, the law is stated in that way—if the wife is unchaste, not if the wife is continuously unchaste by living every day in adultery, but if the wife commits one act of unchastity her right to pledge her husband's credit is determined. For that reason it appears to me that the first point of law taken by counsel for the solicitors fails. There is no authority for saying that if the wife has only been unchaste once or twice she can bind her husband, but that she cannot bind him if she is, to use the phrase which is used in one or two of the cases on which counsel for the solicitors relied, living in adultery.

The other point taken was this. It is said that the law as suggested may be applicable if the solicitor is acting for an attacking wife, but it does not apply where the solicitor is acting for a wife who is defending herself, for a wife defending herself from the charge may very well be entitled to protection from her husband, even although the charge is true. Again I have been unable to find any authority for that distinction in common law. If you go to the Divorce Court and the Divorce Court practice it very often does happen that before the truth of the charge has been decided the husband is ordered to give security for his wife's costs, and sometimes actually to pay over his wife's costs to the solicitor acting for the wife who is defending herself, but it is also the fact that repeatedly it has been said in the common law courts that there may be the Divorce Court practice under the Divorce Court Rules, r. 91, but that does not affect the common law principles with regard to principal and agent, and if the solicitor does not use the opportunity which he has in the Divorce Court of securing his costs, he is not entitled to come in the common law court, suing on common law principles, to recover the costs that he has incurred in defending a wife who had at the time been unchaste so that she would not be entitled to succeed in her defence, and it is immaterial in that case whether the solicitor knows or does not know of the fact of unchastity.

One would deal with this question at greater length if it had not been that in *Durnford* v. *Baker* (1) the court had said practically the same thing, with the addition of one matter which I must mention afterwards. In *Durnford* v. *Baker* (1) the wife started the proceedings; the husband, discovering that his wife, as he thought, had been guilty of adultery, filed a cross-petition, whereupon the divorce proceedings were abandoned, and the solicitor for the wife, who had not got security in the Divorce Court, sued the husband at common law for the costs;

> "held by the Court of Appeal, affirming the decision of Rowlatt, J., that the solicitor was not entitled to recover, because, although he had reasonable grounds for believing that the charges of adultery and cruelty would be established against the husband, he had to take the risk of his own client, the wife, misinforming him as to her own conduct, and as she had committed adultery

> she was not entitled to pledge her husband's credit for the costs of her divorce petition."

It will be noticed that the facts there are practically identical with those in the present case: the wife attacked to begin with, the husband cross-petitioned, the solicitor acted for the wife in both proceedings in ignorance of the fact of the wife's adultery, and the only point which needs consideration is that I said (I have no doubt I said it) ([1924] 2 K.B. at p. 600):

> "There may be—and in the authorities there is some ground for thinking that there may be—an exception where the wife is defending herself against proceedings brought by the husband. But I can find no such exception where the wife is the attacking party, and I am not going to make it; I think it would be a great pity so to do."

I suppose, when I said that "in the authorities there is some ground for thinking that there may be," I had something before me which justified me in making that remark. All I can say is that counsel for the solicitors has not referred me to any authority which justifies my remark, and I am quite unable to discover why I said it, except that perhaps I was speaking about proceedings founded on the divorce practice in rule 91. At any rate, on further consideration I can see no ground in common law proceedings for making a distinction between the wife as an attacking party and the wife as a party defending herself, and, that being so, and as the jury found that the wife did commit adultery before the solicitors started to act for her, the appeal fails and must be dismissed with costs.

GREER, L.J.—I am of the same opinion. Counsel has argued this case for the solicitors with the lucidity, persistence and opulence of authority and illustration that clients, whether professional or lay, are entitled to expect from him and with regard to which their expectations are rarely disappointed, but he has failed to convince me that this appeal ought to succeed. I need add very little to what my Lord has said upon the questions involved, but I wish to add just a word or two on each of the points.

First of all, with regard to the question of principle, this is an action by solicitors at common law, and it is founded upon the law of agency. Unless the solicitors can make out that when they were retained, and throughout their retainer, the wife was her husband's agent to pledge his credit, then at common law the action necessarily fails. It is an undoubted principle of law that a wife, living away from her husband, whose husband is unwilling to maintain her, has the right at common law to pledge his credit for necessaries, and one of the matters that has always been regarded as included in the term "necessaries" is the power to instruct a solicitor to defend her from proceedings taken by her husband against her or to appear for her in proceedings which she takes against her husband, and it may well be to appear for her in proceedings which she takes independently of an action against her husband or which her husband takes to protect her interests when she is living apart from her husband. However that may be, there is a well-established exception to that rule, and that is that where the wife has committed adultery she is not entitled to pledge her husband's credit, nor is she entitled under the provisions which apply to applications for alimony to apply for alimony against her husband in the magistrate's court. It is argued by counsel for the wife that that exception only applies where she was continuously living in adultery at the time the necessaries were incurred. I can see no ground for supposing that that is the true way of stating the law. The question, surely, is whether the woman who has committed a fundamental breach of the marriage contract can insist on the rights of support which are given to her by the marriage contract. The fact that in olden times the question almost invariably arose with regard to a woman who was living in continuous adultery, and that therefore in giving judgment the judges so described the conduct of the wife in question, does not prove that the living in open adultery continuously was the ratio decidendi of those cases. The judgments refer to the wife as living in open adultery because she was in fact in those particular cases living in that way.

However, when the question came up for direct decision in the two cases that my Lord has mentioned, *Durnford* v. *Baker* (1) in the Court of Appeal and *Arnold and Weaver* v. *Amari* (3) before SANKEY, J., it was decided that it was unnecessary to prove more than that there were acts of adultery on the part of the wife before or during the time that the obligation to pay for the necessaries was incurred. That I think is sufficient to deal with the question of principle that has been argued. [His Lordship then considered, and rejected, the submission that there was no evidence of adultery, and that there had been misdirection by the judge, and continued:] For these reasons, without saying more, I agree with my Lord that this appeal must be dismissed with costs.

SLESSER, L.J.—I agree. I should have been content to make no observations, beyond saying that I accept the views expressed by my Lords in all particulars, were it not for one argument which was addressed to the court by counsel for the solicitors which, were it correct, would have such serious consequences that I feel it my duty to state how profoundly I dissent from it. The argument is this. Counsel for the solicitors does not dispute as a general proposition that the husband is under no obligation to support his wife and that she has no implied or presumed authority to pledge his credit after she has passed into a general state of adultery, but he says that that doctrine, which is based on the general law of agency, does not apply where the wife has only committed one or two isolated acts of adultery. My Lord has pointed out how the learned author of LUSH on HUSBAND AND WIFE has said that chastity is the condition which is essential to make the husband liable. He says that "the wife's right to assume her husband's assent to her contracts for necessaries exists only where she continues chaste." But apart from the very weighty observations of the learned author, in my opinion it must follow from the very nature of the matrimonial relation that an act of adultery brings the whole relation into an entirely different sphere. It is the obligation of the matrimonial relation that the spouses should continue chaste. The law with regard to matrimony is in part statutory and in part derived from the old ecclesiastical and canon law, and it is of the nature of the Sacrament and contract of marriage that the spouses should continue chaste. We are forbidden to commit adultery; we are not limited to a prohibition against committing a series of acts of adultery only, and the whole contract of marriage is based on the assumption that the spouses should continue chaste. Counsel for the solicitors has been unable to find a single case where in regard to a single act of adultery it has been held that a husband is responsible for his wife's necessaries. In the later cases that have been decided there is at least one recent case, *Arnold and Weaver* v. *Amari* (3) before SANKEY, J., where there is no reason to suppose but that the boy of sixteen, as he there was in that case, who committed adultery, had committed more than one or two acts of adultery. In my view the argument is ill-founded, and once it is shown that the wife has ceased to be chaste, she has so altered the foundation of the matrimonial contract and the Sacrament that no longer can it be said is the husband responsible for her necessaries.

Appeal dismissed.

Solicitors: *H. S. Wright & Webb*; *Rubinstein, Nash & Co.*

[*Reported by* T. W. MORGAN, ESQ., *Barrister-at-Law.*]

HERBERT CLAYTON AND JACK WALLER, LTD. *v.* OLIVER

[HOUSE OF LORDS (Lord Buckmaster, Viscount Dunedin, Lord Blanesburgh, Lord Warrington and Lord Tomlin), December 2, 3, 1929, February 10, 1930]

[Reported [1930] A.C. 209; 99 L.J.K.B. 165; 142 L.T. 585; 46 T.L.R. 230; 74 Sol. Jo. 187]

Contract—Breach—Damages—Measure—Theatrical engagement—Obligation to provide actor with part to play—Loss of publicity.

The respondent, an actor, was engaged by the appellants, who were theatrical producers, to play one of three leading comedy parts in a new musical production at the London Hippodrome for six weeks certain at a fixed salary for nine performances a week. The contract contained a condition prohibiting the respondent from acting elsewhere during his engagement without the appellants' consent. The respondent objected to the part for which the appellants cast him, refused to appear in the production, and sued the appellants for damages for breach of contract. The jury found for the respondent and awarded him damages for loss of publicity and for part of his salary.

Held: (i) on the true construction of the contract, the appellants were bound to give the respondent a part which satisfied the description in the contract; they had failed to do this, and, therefore, had broken the contract;

(ii) it was competent for the jury to award damages for loss of publicity to the respondent, and, though the damages were extravagant, they were not so extravagant as to vitiate the verdict.

Fechter v. *Montgomery* (1) (1863), 33 Beav. 22, and *Marbé* v. *George Edwardes* (*Daly's Theatre*), *Ltd.* (2), [1928] 1 K.B. 269, approved.

Turpin v. *Victoria Palace*, *Ltd.* (3), [1918] 2 K.B. 539, overruled.

Notes. Followed: *Withers* v. *General Theatre Corpn., Ltd.*, [1933] All E.R.Rep. 385. Referred to: *Moss* v. *Chesham U.D.C.* (1945), 172 L.T. 301; *Fielding* v. *Moiseiwitch* (1946), 174 L.T. 265.

As to the obligation of a manager to employ an actor, see 32 HALSBURY'S LAWS (2nd Edn.) 103–104, para. 146; and for cases on the subject, see 42 DIGEST 910–911, *68–72*. As to breach of contract affecting credit, reputation or convenience, see 11 HALSBURY'S LAWS (3rd Edn.) 285–286, para. 472; and for cases on the subject, see 17 DIGEST 103–104, *173–182*.

Cases referred to:

(1) *Fechter* v. *Montgomery* (1863), 33 Beav. 22; 55 E.R. 274; 42 Digest 910, *68*.

(2) *Marbé* v. *George Edwardes* (*Daly's Theatre*), *Ltd.*, [1928] 1 K.B. 269; 96 L.J.K.B. 980; 138 L.T. 51; 43 T.L.R. 809, C.A.; 17 Digest (Repl.) 129, *370*.

(3) *Turpin* v. *Victoria Palace, Ltd.*, [1918] 2 K.B. 539; 88 L.J.K.B. 569; 119 L.T. 405; 34 T.L.R. 548; 17 Digest (Repl.) 129, *369*.

(4) *Turner* v. *Sawdon & Co.*, [1901] 2 K.B. 653; 70 L.J.K.B. 897; 85 L.T. 222; 49 W.R. 712; 17 T.L.R. 45, C.A.; 12 Digest (Repl.) 700, *5352*.

(5) *Hadley* v. *Baxendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, *99*.

Appeal by Herbert Clayton and Jack Waller, Ltd., and Moss Empires from so much of an order of the Court of Appeal (SCRUTTON, SANKEY and GREER, L.JJ.), dated Oct. 22, 1928, as dismissed an appeal from the verdict given and judgment directed to be entered for the respondent, Barrie Oliver, against the appellants for £1,000 on the trial of the action before SWIFT, J., and a special jury.

By a contract made on June 22, 1927, by letters between the parties, the respondent was engaged by the appellants to play one of the three leading comedy parts in a new musical comedy for six weeks certain at a salary of £55 per week of nine performances with an option to the appellants to re-engage him for the run of the play in the West End of London. The contract was based on the forthcoming production of a new musical comedy, "Hit the Deck," at the London Hippodrome, and was not made conditional on its production. One of the conditions imported into the contract provided:

> "Exclusive Services. 4. The artist shall be deemed to be engaged exclusively by the manager and during the continuance of the engagement will not perform or otherwise exercise his or her talent for the benefit of any other company institution or person without the written consent of the manager first had and obtained. Provided that such consent shall not be unreasonably withheld in the case of any application for the making of a gramophone or similar record."

The appellants cast the respondent for a part which he complained was not one of the three leading comedy parts. He called on the appellants to carry out the contract but they refused to recast him and he declined to appear in the production, and issued the writ in this action for damages for breach of contract. By his statement of claim, the respondent further alleged that, by a collateral oral agreement made shortly before June 22, 1927, the appellants agreed with the respondent that, in consideration of his entering into the contract, the appellants would secure for the respondent the fullest possible publicity in the press and outside the theatre. The action came on for trial before SWIFT, J., and a special jury, when the jury found a verdict for the respondent and awarded him £1,000 damages for loss of publicity and £165 for loss of salary. On appeal, the Court of Appeal gave judgment reducing the verdict to £1,000, but, subject thereto, dismissed the appeal. They held that there was no sufficient reason for setting aside the verdict in a matter where there was evidence on each side, and as to the damages they held themselves bound by *Marbé* v. *George Edwardes* (*Daly's Theatre*), *Ltd.* (2), where a similar claim for loss of publicity and reputation was allowed.

Stuart Bevan, K.C., Gilbert Beyfus, St. John Field and *E. G. Robey* for the appellants.

Sir Patrick Hastings, K.C., and *P. B. Morle* for the respondent.

The House took time for consideration.

Feb. 10. The following opinions were read.

LORD BUCKMASTER.—There are two main questions on this appeal—the one the construction of a contract and the other the true measure of damages for its breach.

The contract was made in the following circumstances. The respondent Barrie Oliver is a young actor, who had been appearing on the stage since 1923, first in America and then here. The appellants, Herbert Clayton and Jack Waller, Ltd., and Moss Empires are theatrical producers.

On June 21, 1927, following on some conversations, the respondent wrote to the appellants a letter which began as follows:

> "23, Hertford Street, Mayfair, W., June 21, 1927.—Messrs. H. Clayton and J. Waller, Ltd., and Moss Empires, Ltd., 15, King Street, London, S.W.1.—Dear Sirs, In consideration of your paying me a salary of £55 (fifty-five pounds) per week of nine performances I hereby agree to play one of the three leading comedy parts in your new musical production at the London Hippodrome. The engagement to commence on or about the middle of September, 1927, and to be for six weeks certain, you to have the option of re-engaging me for the run of the play in the West End of London by giving me notice in writing during the first four weeks of the engagement."

To which they replied on June 22, in these words:

> "June 22, 1927.—We hereby agree to engage you to play one of the three leading comedy parts in our new musical production at the London Hippodrome at a

> salary of £55 (fifty-five) per week of nine performances. The engagement to commence on or about the middle of September, 1927, and to be for six weeks certain. . . . Otherwise this contract to be subject to the terms and conditions contained in the Standard Contract West End." A

It is on the construction of these documents that the first question depends. There was evidence of a collateral verbal agreement, but to this, in the circumstances, further reference need not be made. B

The respondent, who was the plaintiff in the action, alleged that the true meaning of the contract involved an obligation on the appellants to provide him with a part answering the description in the contract, that such contract was broken, and that he suffered damage (a) for loss of salary; (b) for loss of the advertisement and reputation he would have enjoyed had the contract been performed. The case was tried before a jury, who found in favour of the respondent and assessed the damages under (a) at £165 and under (b) at £1,000. On appeal to the Court of Appeal, it was pointed out that, the respondent having obtained service at an equivalent remuneration elsewhere, the verdict under (a) could not be sustained. The Court of Appeal accordingly modified the verdict by omitting this sum, but confirmed it in other respects, and from that judgment this appeal has been brought. The construction of the contract and the verdict for £1,000, therefore, are all that are now in dispute. C D

The construction of the contract is the first matter for consideration. If its true meaning is to be confined to a mere engagement of the respondent's services, the appellants must succeed, for, in such an action, the wages lost are the true measure of damage and the circumstances associated with the termination of the contract cannot be used to increase that sum. E

If, on the other hand, the contract be one binding the appellants to provide a part for the respondent to play, different considerations arise, and the measure of damages for breach of that bargain stands on a different footing. There is no evidence here of custom in the profession, but the character of the employment is an essential fact in determining its meaning.

The contract is based on the forthcoming production of the new musical comedy at the London Hippodrome. It is not made conditional on its production. That it is to be produced underlies the whole document, and it assumes the necessary arrangements having been made. An engagement, therefore, that the respondent is "to play one of the three leading comedy parts" is, to my mind, something more than a mere contract on the respondent's part to render service, opportunity for such service is contemplated and agreed to be furnished. This is still further enforced by the imported conditions, one of which provides: F G

> "Exclusive Services.—4. The artist shall be deemed to be engaged exclusively by the manager and during the continuance of the engagement will not perform or otherwise exercise his or her talent for the benefit of any other company institution or person without the written consent of the manager first had and obtained. Provided that such consent shall not be unreasonably withheld in the case of any application for the making of a gramophone or similar record." H

Now if the appellants were merely accepting the respondent's service for the period of the contract and were not bound to give him work, the service obviously not occupying all his time, this provision, which would, on that hypothesis, prevent him from profitably using time not owed to them, would have no purpose. On the hypothesis, however, that he was being provided with a part, it becomes sensible even if it be severe. To my mind, it helps to explain the provision as to engagement and shows that there was within the contemplation of the parties the dual obligation to which I have referred. This view of the bargain does not lack authority. *Fechter* v. *Montgomery* (1) is a similar case. I

The written bargain there was constituted by the acceptance of a written offer dated July 28, 1862, by the lessee of the Lyceum Theatre to a leading actor "to offer you an engagement at the Lyceum Theatre for two years, commencing Jan. 1, 1863." The lessee opened the theatre but gave no part to the actor, who thereupon accepted an engagement elsewhere. The lessee instituted proceedings claiming an injunction to restrain his performance. This injunction was refused on the ground that the plaintiff had himself broken the contract he sued to enforce. The condition alleged restraining the defendant from outside work was introduced into the contract by an alleged custom in the profession to that effect. This was accepted by the learned judge, and it was partly on this that he based his conclusion. It is true that, in the judgment, reference is also made to some antecedent verbal discussion where the actor said he came not to be idle but to act, but it is impossible to follow the reasoning without realising that this was not the real foundation of the judgment. SIR JOHN ROMILLY, M.R., there says (33 Beav. at p. 27):

> "That being the state of the case, the only questions are, whether that contract has been really broken between the parties, and who was the person that first broke it, so as to entitle the other to say it is no longer binding upon him. Upon that question, it is material to regard the facts that occurred; but before I advert to them, I may notice an observation that fell from Mr. Terrell, that the contract is like an agreement for engaging a clerk, or any other person whose service you require and wish to secure. I do not assent to that view of the case; you must regard the position and situation in which the person is placed who enters into the contract. Here the defendant carries on the profession of an actor, a profession peculiar in its character and results, for it is to be observed that his success entirely depends on pleasing the public, and upon being constantly before the public. It is scarcely possible to say that he could acquire such a reputation, by being associated with Mr. Fechter, as would supply the place, which I assume, for the purpose of the argument, he might have gained by delighting a large portion of a London audience with the ability with which he acted. It is obvious that you cannot put him in the position of a clerk or other person similarly situated and compare him with such a person. It is clear that the great object of any gentleman wishing to become a distinguished actor, when he has already established a reputation in the provinces, is to have an opportunity of appearing upon the London stage and before a London audience. That is the object for which a person enters into a contract of this description, and it would be defeated if the effect of the contract is this: that if the gentleman who engaged him is not bound to employ him, and does not in fact do so, so as to give him an opportunity to display his talent and abilities, yet he is not to be at liberty to act elsewhere, unless by the permission of the gentleman who engaged him. I entertain no doubt that it was a mutual contract between the parties, and also that Mr. Fechter so understood it."

It is true that the learned judge adds:

> "It is shown by Mr. Barnett's letter, and by the conversation itself, that this was part of the contract entered into between them,"

but this I regard as nothing but confirmation of the reasoning which is independent of the verbal negotiations.

I have dealt with this judgment at length since it formed the basis of the opinion of two learned Lord Justices in *Marbé* v. *George Edwardes* (*Daly's Theatre*), *Ltd.* (2), and it has, I think, been misunderstood in *Turpin* v. *Victoria Palace*, *Ltd.* (3). In my opinion, the judgments of the two Lords Justices in the Court of Appeal in *Marbé's Case* (2), who based their judgments on *Fechter's Case* (1), rightly interpreted the judgment in that case, and the passage from that case which I have already quoted, is, in my opinion, an accurate exposition of the principles applicable to the construction of the contract then under consideration. The contract in the present case is, in its essence, the same as that in *Fechter* v. *Montgomery* (1), but the condition there implied restraining the actor from performing elsewhere is here plainly expressed.

In *Turpin* v. *Victoria Palace, Ltd.* (3), the learned judge fell into the error of thinking that, because in *Fechter* v. *Montgomery* (1) the relief sought was by way of an injunction, it did not apply. But the construction of the contract is the same whether the remedy for its breach be by way of injunction or damages, and it is only on the distinction drawn between such a contract as the one then under consideration and the ordinary contract of service that the authority is of any value. In contrast with this decision *Turner* v. *Sawdon & Co.* (4) is instructive. There an agreement to "engage and employ" as a salesman was held to be merely a contract to serve, and that the word "employ" did not throw on the employer any obligation beyond that of master and servant, but that decision was due to the fact that, regard being had to the occupation, the word "employ," though capable of two meanings, meant in that case only to retain in the service of the employer. This is made clear in the judgment of STIRLING, L.J., who says ([1901] 2 K.B. at p. 659):

> "In the case of an actor who accepts an engagement, it may be an important consideration with him to have an opportunity of displaying his abilities before the public, and it may be there is an implied obligation on the part of the master to afford such opportunity,"

and he refers to and relies on *Fechter* v. *Montgomery* (1) as authority for the proposition. I agree with this view of STIRLING, L.J., and I think, entirely independently of the verbal conversation, *Fechter* v. *Montgomery* (1) was rightly decided.

The next question is whether the contract was broken by the appellants, and here I agree with SCRUTTON, L.J., that the matter was not placed before the jury as accurately as could be desired, due, no doubt, to some unfortunate confusion in the presentation of the case.

The true meaning of the contract is that the respondent was to have one of the three leading comedy parts in the play called "Hit the Deck." This was properly alleged in the pleadings, but the case was presented on the ground that such a part as that assigned to the respondent could not be called a leading comedy part in anything.

Counsel for the respondent said that this view was the only thing really discussed, but this is certainly an over-emphasis of what occurred. Both views were clearly presented by the evidence, but the more general view was the one urged on behalf of the respondent, and it nowhere appears that this was regarded as irrelevant. None the less, I think the summing-up should have been far more exact in its definition of the issue, and more limited in its scope. Unless, however, it is plain that injustice might reasonably be expected to have resulted from an irregularity in summing-up, a new trial ought not to be granted, for it is the substance and not the letter that should be regarded.

One of "the three leading comedy parts" assumes that there are three leading comedy parts in the play, and, though this must be regulated by looking at the play itself, yet, in my opinion, it is not satisfied by saying, "Here are the best three comedy parts—you shall have one of them." The part must be capable of satisfying the qualification of being a genuine leading comedy part even though judged in relation to the play, and, though I think this ought to have been so put to the jury, I regard their finding as a verdict that the condition was not satisfied on any view, and examination of the part itself is an ample justification of their opinion. Making all necessary allowances for the fact that the kind of humour of such a play seems melancholy in print, the part assigned to the respondent is so trivial that, even in relation to this play, the verdict is fully warranted. Attempts were made by the appellants to justify by suggesting that the written part was only a kind of seed from which a full-grown part might spring, and that the respondent was premature in writing as he did two days after the first meeting, that he had no alternative but to decline to appear, but, in my opinion, the part ought to have satisfied the conditions when given to the respondent at the rehearsal and this it failed to do.

No other part was offered, and the result is that the appellants broke their contract. The next question is: What was the measure of damage? It is true that, as a general rule, the measure of damage for breach of contract is unaffected by the motives or manner of its breach. What are known as vindictive or exemplary damages in tort find no place in contract nor, accordingly, can injury to feelings or vanity be regarded. The action of breach of promise of marriage is an exception to the general rule for, strictly assessed, the loss to a woman of a man as a husband who declines with insult to marry her might be assumed to be nil, but that is not the way such damages are determined.

In the present case, the old and well-established rule applies without qualification, the damages are those that may reasonably be supposed to have been in the contemplation of the parties at the time when the contract was made as the probable result of its breach, and, if any special circumstances were unknown to one of the parties, the damages associated with, and flowing from, such breach cannot be included. Here both parties knew that as flowing from the contract the respondent would be billed and advertised as appearing at the Hippodrome, and in the theatrical profession this is a valuable right.

In assessing the damages, therefore, it was competent for the jury to consider that the respondent was entitled to compensation because he did not appear at the Hippodrome, as by his contract he was entitled to do, and, in assessing those damages, they may consider the loss he suffered (i) because the Hippodrome is an important place of public entertainment, and (ii) that in the ordinary course he would have been "billed" and otherwise advertised as appearing at the Hippodrome. The learned judge put the matter as a loss of reputation, which I do not think is the exact expression, but he explained that as the equivalent of loss of publicity, and that summarises what I have stated as my view of the true situation.

As to the amount, that was for the jury; the damages appear to me extravagant just as they were in *Marbé's Case* (2), but they are not so extravagant as to vitiate the verdict.

I agree with the judgment of SCRUTTON, L.J.; this case might have been more carefully handled at the trial, but I cannot find sufficient ground of complaint to warrant this House deciding that it should be tried again.

VISCOUNT DUNEDIN.—I concur and have but little to add. It was explained to us at the Bar that this appeal was avowedly brought to test whether *Marbé* v. *George Edwardes* (*Daly's Theatre*), *Ltd.* (2), was rightly decided. I think it was rightly decided. I do not feel that any generalisation is possible, or that each and every contract would be found to fit a general rule. I think each contract as it arises must be considered by itself in order to see what are the prestations which each party is bound to perform. Considered from that point of view, I think that, in this case, the appellant contracted not only to pay the respondent a salary, but to give him the opportunity of appearing before the public in a part which answered to the stipulated description. I do not repeat all my noble friend has said as to the failure of the part offered to satisfy that description.

I may be allowed to say that the exact words which my noble friend expressed what it was competent for the jury to consider were agreed on after consultation between all the noble Lords who heard the case; but I agree with my noble friend in thinking that, after all, they are only the application to the present case of the well-known rule of *Hadley* v. *Baxendale* (5).

LORD BUCKMASTER, LORD BLANESBURGH and **LORD TOMLIN** have asked me to say that they concur.

LORD WARRINGTON OF CLYFFE.—I concur.

Appeal dismissed.

Solicitors: *Burton & Ramsden*; *W. D. Shearly Sanders.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

FLEXMAN *v.* CORBETT

[CHANCERY DIVISION (Maugham, J.), January 22, 23, 1930]

[Reported [1930] 1 Ch. 672; 99 L.J.Ch. 370; 143 L.T. 464]

Landlord and Tenant—Lease—Sale—Usual covenants—Onerous covenants.

By an agreement in writing in 1928 the defendant agreed to purchase and the plaintiff agreed to sell a leasehold house for the residue of a term of ninety-four years comprised in a lease of 1849. The defendant was aware that part of the house was let at £60 a year. The date for completion was March 25, 1929. The lease of 1849 contained a covenant, among others, not to do anything that might be to the annoyance, damage or inconvenience of the occupiers of neighbouring premises. There was a proviso for re-entry for non-performance of any of the covenants. The abstract of title was sent to the defendant's solicitors in January, 1929, the defendant meanwhile negotiating for the purchase of the freehold as the plaintiff knew. The defendant's solicitors wrote in March to the plaintiff's solicitors that their client would not buy unless the tenant of the part of the house, who was in arrears with her rent, was bought out, and said there was no binding contract, alleging, inter alia, that the lease of 1849 contained covenants which were of an unusual and onerous character of which the defendant had had no notice. The plaintiff sued for specific performance.

Held: (i) the question whether particular covenants in a lease were usual covenants was a question of fact which the court must decide on the evidence given in relation to them; (ii) while the covenant not to do anything that might be to the annoyance, damage or inconvenience of the occupiers of neighbouring premises might be usual in leases of houses on large estates, in a lease of one house, as in the present case, it was unusual and onerous; (iii) the proviso for re-entry for non-performance of any of the covenants contained in the lease was, on the evidence, unusual and onerous; (iv) in the circumstances of the case, the defendant had not waived her right to object to the lease as containing unusual and onerous covenants.

Hampshire v. *Wickens* (1) (1878), 7 Ch.D. 555, considered.

Allen v. *Smith* (2), [1924] 2 Ch. 208; *Re Anderton and Milner's Contract* (3) (1890), 45 Ch.D. 476; *Bennett* v. *Womack* (4) (1828), 7 B. & C. 627; *Brookes* v. *Drysdale* (5) (1877), 3 C.P.D. 52; *Hyde* v. *Warden* (6) (1877), 3 Ex.D. 72; *Re Lander and Bagley's Contract* (7), [1892] 3 Ch. 41; and *Reeve* v. *Berridge* (8) (1888), 20 Q.B.D. 523, followed.

Notes. As to what are usual and unusual covenants in a lease, see 22 HALSBURY'S LAWS (3rd Edn.) 442–443, paras. 1044, 1045; and for cases on the subject, see 31 DIGEST 115–119, *2495–2537*.

Cases referred to:

(1) *Hampshire* v. *Wickens* (1878), 7 Ch.D. 555; 47 L.J.Ch. 243; 38 L.T. 408; 26 W.R. 491; 31 Digest (Repl.) 122, *2602*.

(2) *Allen* v. *Smith*, [1924] 2 Ch. 308; 93 L.J.Ch. 538; 131 L.T. 667; 68 Sol. Jo. 718; 40 Digest (Repl.) 145, *1113*.

(3) *Re Anderton and Milner's Contract* (1890), 45 Ch.D. 476; 59 L.J.Ch. 765; 63 L.T. 332; 39 W.R. 44; 31 Digest (Repl.) 124, *2625*.

(4) *Bennett* v. *Womack* (1828), 7 B. & C. 627; 3 C. & P. 96; 1 Man. & Ry. K.B. 644; 6 L.J.O.S.K.B. 175; 108 E.R. 856; 31 Digest (Repl.) 121, *2594*.

(5) *Brookes* v. *Drysdale* (1877), 3 C.P.D. 52; 37 L.T. 467; 26 W.R. 331; 31 Digest (Repl.) 107, *2501*.

(6) *Hyde* v. *Warden* (1877), 3 Ex.D. 72; 47 L.J.Q.B. 121; 37 L.T. 567; 26 W.R. 201, C.A.; 31 Digest (Repl.) 124, *2630*.

(7) *Re Lander and Bagley's Contract*, [1892] 3 Ch. 41; 61 L.J.Ch. 707; 67 L.T. 521; 31 Digest (Repl.) 107, *2502*.

(8) *Reeve* v. *Berridge* (1888), 20 Q.B.D. 523; 57 L.J.Q.B. 265; 58 L.T. 836; 52 J.P. 549; 36 W.R. 517, C.A.; 40 Digest (Repl.) 144, *1102*.

(9) *De Soysa* v. *De Pless Pol*, [1912] A.C. 194; 81 L.J.P.C. 126; 105 L.T. 642, P.C.; 31 Digest (Repl.) 123, *2618*.

(10) *Re Haedicke and Lipski's Contract*, [1901] 2 Ch. 666; 70 L.J.Ch. 811; 85 L.T. 402; 50 W.R. 20; 17 T.L.R. 772; 45 Sol. Jo. 738; 40 Digest (Repl.) 145, *1111*.

(11) *Melzak* v. *Lilienfield*, [1926] 1 Ch. 480; 95 L.J.Ch. 305; 135 L.T. 145; 42 T.L.R. 364; 70 Sol. Jo. 487; 30 Digest (Repl.) 516, *1560*.

(12) *Molyneux* v. *Hawtrey*, [1903] 2 K.B. 487; 72 L.J.K.B. 873; 89 L.T. 350; 52 W.R. 23, C.A.; 40 Digest (Repl.) 145, *1112*.

(13) *Re White and Smith's Contract*, [1896] 1 Ch. 637; 65 L.J.Ch. 481; 74 L.T. 377; 44 W.R. 424; 40 Sol. Jo. 373; 40 Digest (Repl.) 144, *1103*.

(14) *Flint* v. *Woodin* (1852), 9 Hare 618; 22 L.J.Ch. 92; 19 L.T.O.S. 240; 16 Jur. 719; 68 E.R. 660; 40 Digest (Repl.) 143, *1097*.

(15) *Hart* v. *Hart* (1881), 18 Ch.D. 670; 50 L.J.Ch. 697; 45 L.T. 13; 30 W.R. 8; 27 Digest (Repl.) 239, *1923*.

(16) *Pegg* v. *Wisden* (1852), 16 Beav. 239; 20 L.T.O.S. 174; 16 Jur. 1105; 1 W.R. 43; 51 E.R. 770; 30 Digest (Repl.) 499, *1418*.

(17) *Strelley* v. *Pearson* (1880), 15 Ch.D. 113; 49 L.J.Ch. 406; 43 L.T. 155; 28 W.R. 752; 34 Digest 671, *679*.

(18) *Hodgkinson* v. *Crowe* (1875), 10 Ch. App. 622; 44 L.J.Ch. 680; 33 L.T. 388; 23 W.R. 885, L.JJ.; 31 Digest (Repl.) 124, *2624*.

Action.

The following statement of the facts is taken from the judgment. In 1928 Beard & Son, auctioneers and estate agents, were instructed by the plaintiff, Elizabeth Hannan Flexman, to sell premises at No. 23, Chepstow Place, Bayswater, a leasehold held by her, together with No. 25, under one lease for the residue of a term of ninety-four years from June 24, 1849, at a yearly ground rent of £18. In December of that year, Mr. Cooper, of the firm of Beard & Son, inspected the premises with the defendant, Lily Corbett, and she saw the ground floor and basement where the tenant, referred to in the agreement hereinafter mentioned, a Mrs. Hoffer, was living with her husband, but nothing material was said about Mrs. Hoffer on that occasion. On Dec. 11, there was a meeting at the house of the defendant and the plaintiff with others. The defendant did not at that time go over the house again, but there was considerable discussion on a number of subjects, the meeting lasting about half an hour. The defendant was then told that the rent paid by Mrs. Hoffer was £60 a year. Nothing was then said about the rent being in arrear. In fact, Mrs. Hoffer owed the plaintiff for the last quarter at that date, and had paid neither the Christmas rent nor the rent payable in the following March; and was still in arrear at the date of this action. On the following day, Dec. 12, the defendant entered into an agreement with the plaintiff in the form of a letter stating:

> "I agree to purchase at the price of £800, your leasehold house No. 23, Chepstow Place (which I understand is held together with No. 25, Chepstow Place, under one lease for the residue of a term of ninety-four years from June 24, 1849, at a yearly ground rent of £18, but that the rent and covenants have been apportioned by the freeholders, and that the ground rent payable in respect of No. 23, Chepstow Place, is £9 per annum) and subject to the covenants conditions and provisos contained in the lease. I understand that the ground floor and basement is let to a tenant who is holding over as a yearly tenant, and who is paying £60 per annum, the rent payable quarterly, the landlord paying rates and water rate, and that vacant possession of the remainder of the house will be given to me on completion of the purchase. I purchase the property in its present condition of repair, and should any notice or notices to carry out any repairs be served by the ground landlord or any public authority or official, such repairs are to be carried out by me at my cost. The purchase is to be completed on the twenty-fifth day of March next, up to which date you are to

> receive the rents and pay the outgoings, and from which date the same are to be received and paid by me, the usual apportionment account being taken on completion. If from any cause other than wilful default on your part the purchase shall not be completed on the twenty-fifth day of March next, I will pay interest on the balance of the purchase money at the rate of 7 per cent. per annum up to the actual date of completion. Should any objection or requisition as to title or otherwise be made which you shall be unable or on the ground of difficulty delay or expense unwilling to remove or comply with, you are to be at liberty on giving me not less than seven days' notice in writing to annul the sale, in which case, unless the objection or requisition shall have been in the meantime withdrawn, this agreement shall at the expiration of the notice be annulled, in which case I am to be entitled to the return of the deposit, but without interest, costs, or compensation. I have this day paid to your agents, Messrs. Beard & Son, 110, Westbourne Grove, W.2., as stakeholders, the sum of £80 as a deposit and in part payment of the purchase money, and I agree to complete the purchase in accordance with the terms of this agreement. Dated this 12th day of December, 1928."

A sixpenny stamp was affixed thereto and the letter was signed by the defendant and there followed an acknowledgment by the plaintiff, who appended her name to the statement, "I agree the terms of sale and purchase as above set out." Before this date the defendant had told the plaintiff that she wanted the premises as a lodging-house, and that it was of no use to her unless she was able to acquire the freehold, which she thought she could do for a sum of £800 or less. The lease had only comparatively few years to run. The lease of 1849 contained covenants by the lessee to do outside painting, to deliver up, to keep in repair, to insure, not to allow building without the lessor's consent, not to carry on offensive trades, and to produce assignments; and it contained also a proviso for re-entry on non-performance of the covenants. On Jan. 15, 1929, the plaintiff's solicitors sent the abstract of title to the defendant's solicitors. In the meantime the defendant, to the plaintiff's knowledge, continued negotiating for the purchase of the freehold, and was arranging with a building society for a mortgage. On Feb. 19, 1929, the defendant's solicitors acknowledged receipt of the abstract and at the same time replied in the following terms to letters which they had received from the plaintiff's solicitors:

> "Referring to your letter to us of the 14th inst. and to your previous letters, we duly received the abstract of title, and hope to see the deeds in the course of the next ten days. Will you kindly tell us in whose possession the various deeds mentioned in the abstract are?"

The plaintiff's solicitors immediately answered saying that they had all the abstracted deeds except the probate. On March 4 the defendant's solicitors wrote:

> "Re 23, Chepstow Place. Our client called upon us this morning and discussed with us the proposed purchase of the above. Of course your client is admittedly asking an excessive price for a very short lease, but our client would be prepared to pay this price except for the following very important points. It was distinctly represented to her during the negotiations that the tenant holding over [that is, Mrs. Hoffer] was a perfectly desirable one. It now appears that she owes three-quarters of a year's rent which will be due on March 25th instant, and our client declines to be saddled with an unsatisfactory tenant. If the tenant can be previously bought out, which we understand can be done for £100, our client will be pleased to go on with the matter. Otherwise she will withdraw from the transaction. There is, as you are aware, no binding contract."

The plaintiff's solicitors asked the defendant's solicitors by telephone what the last sentence of the letter meant; and they answered that the lease had not been produced to the defendant, who had no opportunity of inspecting it. The defendant did not complete on the date fixed for completion, and on March 27, 1929, the writ in this action was issued on the application of the plaintiff, who claimed specific performance of the agreement and damages. The defendant alleged that she was induced to sign the agreement by the plaintiff stating that Mrs. Hoffer was a satisfactory tenant, which was a misrepresentation entitling her to rescind. She alleged further that the covenants in the lease of 1849 were of an unusual and onerous nature, and that she was given no opportunity of acquainting herself with them or with the terms of the lease, and had no notice of the covenants before she signed the agreement. Accordingly, she claimed rescission of the agreement and repayment of the sum of £80 which she had paid as deposit with interest at the rate of 4 per cent. from Dec. 12, 1928. Evidence was given as to what covenants were usual in such leases.

Cleveland Stevens and *Hewins* for the plaintiff.

W. G. Hart, for the defendant, referred to *Re Anderton and Milner's Contract* (3); *De Soysa* v. *De Pless Pol* (9); *Re Haedicke and Lipski's Contract* (10); *Re Lander and Bagley's Contract* (7); *Melzak* v. *Lilienfield* (11); *Molyneux* v. *Hawtrey* (12); *Reeve* v. *Berridge* (8); *Re White and Smith's Contract* (13); and PRIDEAUX (22nd Edn.), vol. 3, 945.

Cleveland Stevens, in reply, referred to *Re Anderton and Milner's Contract* (3); *Bennett* v. *Womack* (4); *Flint* v. *Woodin* (14); *Hampshire* v. *Wickens* (1); *Hart* v. *Hart* (15); *Hyde* v. *Warden* (6); *Pegg* v. *Wisden* (16); *Strelley* v. *Pearson* (17); and FRY, SPECIFIC PERFORMANCE (6th Edn.), p. 317; WILLIAMS, VENDOR AND PURCHASER (3rd Edn.), p. 57.

MAUGHAM, J., stated the facts, found the charge of misrepresentation to be ill-founded, and continued: I now come to consider the wholly different point which arises with regard to the covenants and the proviso for re-entry contained in the lease. This point has long occasioned doubts among judges and lawyers, and it is one which has been the subject of a good deal of consideration in recent times; and I confess that I think that the view which has been expressed in some of the cases with regard to what are usual covenants in leases of houses for residential occupation in London, if not elsewhere, requires reconsideration at the present time in the light of the existing practice. It is suggested on behalf of the defendant that the court is bound to find that usual covenants in leases at the present time are those, and those only, which are specified in *Hampshire* v. *Wickens* (1). They, therefore, are only covenants: (i) to pay rent; (ii) to pay taxes; (iii) to keep and deliver up in repair; (iv) to allow the lessor to enter and view the state of repair; and, finally, the usual qualified covenant by the lessor for quiet enjoyment. It is true that that case has constantly been cited in the text-books and has been referred to from time to time as containing a statement of what are usual covenants in a lease of a house. I think it right to express my opinion, after having heard and considered all the numerous authorities which have been cited to me, that the question whether particular covenants are usual covenants is a question of fact, and that the decision of the court on that point must depend on the admissible evidence given before the court in relation to that question. I think that it is proper to take the evidence of conveyancers and others familiar with the practice in reference to leases, and that it is also permissible to examine books of precedents. It is permissible to obtain evidence with regard to the practice in the particular district in which the premises in question are situated. I would add that, in my view, it is a complete mistake to suppose that the usual covenants in regard to a lease, for instance, of a country house, are necessarily usual covenants in regard to the lease of a London residence, and I would add that it seems to me that it may very well be that what is usual in Mayfair or Bayswater is not usual at all in some other parts of London, such, for instance, as Whitechapel. Further, in my opinion, "usual" in this sense means no more than "occurring in ordinary use," and I think that it is an error to suppose that the court is entitled to hold that a particular covenant is not usual because it may be established that there are some few cases in which that covenant is not used. If it is established that—to put a strong case—in nine cases out of ten the covenant would be found in a lease of premises of that nature for that purpose and A in that district, I think that the court is bound to hold that the covenant is usual. The court must bear in mind here the ultimate question which is being decided, which is whether the form of the covenant is such as to constitute a defect in the subject-matter of the contract; and, if it were established that the lease is in the form in which it would be anticipated as being in the great majority of cases, having regard to the nature of the property and to the place where it is situated B and to the purposes for which the premises are to be used, it does not seem to me reasonable to say that there is a defect in the subject-matter of the contract. I do not think it necessary to go through and comment on all the authorities which have been cited to me on this subject, because I have come to the conclusion that the question for me must be, not whether such a covenant as the covenant to insure, which is mentioned as objectionable in this case, justifies the defendant C in refusing to complete—a thing which I may say I should be very loath to hold—but whether there are not in the lease covenants which the defendant is entitled to rely on as being unusual and onerous.

The covenant which I propose to consider from that point of view is the one which is shortly described as a covenant in regard to nuisance. It is in these terms: Not to carry on the trade of a D

> "soapboiler, tallow melter, tripe dresser or boiler, catgut spinner, hog spinner, boiler of horseflesh, slaughtersman or any other offensive or noisome trade or dealing, or be party to or suffer any act or thing which may be or grow to the annoyance, damage or inconvenience of the occupiers of the neighbouring premises."

It is material to bear in mind that it is not established that the premises form E part of a building estate in an ordinary sense, or that the premises form part of a property belonging to the original landlord and developed by him; in other words, there was nothing to lead the defendant to the conclusion that property which she was buying was subject to certain covenants for the benefit of adjoining owners, and that adjoining owners were in like manner subject to covenants for her benefit. It is quite reasonable and, I think, to be anticipated, that, where a great landlord F like the Duke of Westminster or Lord Portman, owning a large amount of property in London, grants leases to a number of people who would be adjoining tenants, there would be inserted in the leases provisions for the benefit of the property as a whole; and I think that the person taking a residential house on the Portman estate or the Westminster estate would find difficulty in persuading me that he did not expect to find in the lease a provision that he was not to do anything which might G be to the annoyance and damage of the occupiers of adjoining premises. That is a clause which is inserted for the benefit, not of any particular tenant, but of all. In this case, however, the defendant is not to be taken to be in that position at all; and it is inconceivable that, if she were going to let the premises as lodgings, as she intended, to the knowledge of the plaintiff, she might let to people who were going to indulge, for example, in the practice of the piano or some other occupation H of that kind, which might be to the annoyance, or, at any rate, to the inconvenience, of the occupiers of the adjoining premises. I cannot find, either on the authorities or by reason of the parol evidence in this case, that I am justified in saying that that particular covenant in the form in which it runs, including as it does "inconvenience" as well as "annoyance and damage," is one which is other than an unusual and an onerous covenant. The evidence on this point has, I have no I doubt, been given in good faith. It shows that the lease as a whole is not of an unduly onerous character, but there was no evidence directed to the point which I have mentioned with regard to that particular covenant, and I would add that the books of precedents which have been referred to show, as I think, quite clearly that the covenant not to commit nuisance, or do things which may be deemed to be to the inconvenience of occupiers, is a covenant not inserted in a lease granted by an owner of one house to a tenant, though it is inserted by an owner of a number of houses in the same neighbourhood, who is desirous of protecting his various tenants from each other for the benefit of his estate as a whole. I do not, therefore, think it necessary to go into and consider all the other covenants to which the arguments have been directed. I will add only that my view that the question is one of fact is supported by the authority of *Bennett* v. *Womack* (4) and *Hampshire* v. *Wickens* (1), and by the decision of my brother EVE in *Allen* v. *Smith* (2). I might also add *Brookes* v. *Drysdale* (5), in which it was held that a condition that assignments or underleases shall be registered by the lessor's solicitor and the fee paid to him, was not a usual covenant.

So far, I have been dealing with the covenants. The defendant was allowed to amend her defence by adding a similar objection with regard to the proviso for re-entry contained in the lease, which is in these terms:

> "Provided always and these presents are upon this express condition that if the said yearly rent hereinbefore reserved or any part thereof shall be in arrear and unpaid by the space of twenty-one days next after any of the days or times on which the same ought to be paid as aforesaid, or if the said G. Treadaway his executors administrators or assigns shall not well and truly perform and keep all and singular the covenants provisoes conditions and agreements hereinbefore contained on his and their part and behalf to be observed performed and kept according to the true intent and meaning of those presents then and in any or either of the said cases it shall be lawful for the said T. W. Budd his heirs or assigns at any time or times thereafter"

to re-enter.

With regard to the covenant for re-entry, there is, again, a good deal of authority. A covenant for re-entry in those terms was held by the Court of Appeal to be unusual in *Hodgkinson* v. *Crowe* (18). JAMES, L.J., says (10 Ch. App. at p. 626):

> "I not only do not consider it a proper and reasonable thing to introduce, but to my mind it is a most odious stipulation, it is offensive and it is oppressive beyond measure."

The clause included re-entry for breach of covenants generally, as well as for non-payment of rent. It may be added that, at the date at which the Lord Justice made this statement, the court was not in a position to give relief for trifling breaches, or comparatively trifling breaches, of covenants, and the language that he used was, accordingly, language which one can very well understand. The matter was, however, considered by CHITTY, J., in *Re Anderton and Milner's Contract* (3). The learned conveyancing counsel there suggested that, having regard to the alteration of the law made under the Conveyancing Act, 1881, s. 14, the insertion of the proviso in the form which involved re-entry not only for non-payment of rent, but also for the breach of any of the clauses and covenants of the lease, was a proper one, but CHITTY, J., refused to accept that view. He thought that the law still was, or, rather, that it was still true to say, that a covenant in that wide form was not a usual covenant; and that decision has been followed in other cases, including *Re Lander and Bagley's Contract* (7). I do not think that the evidence in this case is sufficient to enable me to express the opinion that the proviso for re-entry is in the usual form, although I think that, even with regard to the proviso for re-entry, the matter is one which might usefully and properly be reconsidered in the light of modern evidence at some future time.

It is well settled that a purchaser of a lease is not to be held to be affected with constructive notice of the covenants contained in the lease merely because the lease is mentioned in the agreement for the purchase; and it is equally well settled that a purchaser of such a lease is not bound to complete the contract if the lease is subject to onerous covenants or to an onerous provision of an unusual character unless, before the agreement was made, he had a fair opportunity of ascertaining for himself the terms of such covenants. The authorities are *Hyde* v. *Warden* (6) and *Reeve* v. *Berridge* (8), a decision of the Court of Appeal which has been constantly followed. Accordingly, unless there was a waiver of this objection, which lay with the defendant, she is entitled to refuse to complete, and the remaining question that I have to determine is whether there was such a waiver.

I have to remember with regard to waiver that the question is whether the facts establish an intention by the defendant to waive. In FRY ON SPECIFIC PERFORMANCE (6th Edn.), p. 621, is the following passage:

> "Leaving the abstract unobjected to for two years, altering the property, letting it, and apologising for not paying the purchase-money, which was, of course, only payable if the title was accepted, have been considered strong acts of waiver. And where the purchaser was in possession twenty years, and, after making frivolous objections and refusing any further explanation of them, still continued in possession, the right to investigate title was held to have been waived. The like was held in a case where a purchaser continued twenty-six years in possession after his requisitions of title were sent in, and had paid a considerable part of his purchase-money, and made alterations. In another case, LORD ROMILLY, M.R., expressed an opinion that the purchaser, having retained the abstract for five months and made no objections to the title, but simply got the vendor to verify the abstract with the title deeds, had thereby waived all objections as to title. And where the purchasers of a leasehold interest, after investigating and accepting the vendor's title, delayed completion on the ground that they had since discovered an ancient lease which they suggested—but did not attempt to prove—would override the vendor's interest, they were held to have lost the right to make any inquiry on the subject."

All those are cases—the authorities are cited, of course, in the book—of a much more serious delay than exists in the present case. The contract here was made on Dec. 12, 1928, the abstract was sent in on Jan. 15, 1929, and, presumably, was received by the solicitors for the purchaser on Jan. 16. In the meantime, it appears, the defendant was continuing negotiations for the purpose of acquiring the freehold interest, and, I may add, the vendor knew that she intended to acquire it. She was also making arrangements to obtain an advance on a mortgage from a well-known building society. Her solicitors—regrettably, I think—did not acknowledge the receipt of the abstract until as late as Feb. 19, 1929, and, in the meantime, the plaintiff's solicitors had complained and written several letters asking the defendant's solicitors to give attention to the matter. On Feb. 19 the defendant's solicitors wrote as follows: [His Lordship read the letter and continued:] There is a prompt reply from the plaintiff's solicitors that they have all the abstracted deeds in their possession with the exception of the probate, but I do not think the letter of Feb. 19 can be deemed to be a waiver of a right to object to the form of the lease. On March 4, thirteen days later, the defendant's solicitors wrote as follows to the plaintiff's solicitors: [His Lordship read the letter and continued:] On the evidence it appears that the plaintiff's solicitors rang up the defendant's solicitors and asked them what they meant by the final sentence; and the reply was that the lease had not been produced to the defendant, nor had she had an opportunity of inspecting it. I think that that is the evidence on that point, and I do not think that it can be said that, by this delay, and by writing this letter on March 4, without taking the point in definite language, which I agree should have been done as a matter of propriety between the vendor and purchaser, the defendant waived the right to object to the terms of the lease. The truth is this: The defendant put herself in the hands of her solicitors. Her solicitors took from the outset the view which they were repeating here on March 4, that the contract was not a binding contract. It follows from that, I think, that it would be wrong to draw the conclusion that they have waived a right to object to the contract, if, in truth, the contract is a binding one; in other words, I do not think that I can draw from the evidence before me the inference that the facts establish an intention on behalf of the purchaser or her solicitors to waive the objection to title. That the question is whether the purchaser intended to waive the particular objection is, I think, to be derived from the nature of an alleged waiver; and I may add that that is stated to be the test in WILLIAMS ON VENDOR AND PURCHASER (3rd

A Edn.), vol. 1, p. 177. It follows that the defendant is entitled to rely on this somewhat technical objection to the performance by her of the contract, and, in these circumstances, I think that she is entitled to the return of the deposit. She is entitled, therefore, to the costs of the action, except so far as they have been increased by the claim to rescind on the ground of misrepresentation, and, I would add, on the ground which has been given up, that the tenant was not a yearly tenant, but what B is known as a statutory tenant under the Increase of Rent and Mortgage (Restrictions) Acts. On the counter-claim, the defendant is entitled to her costs and will get repayment of the sum of £80 with interest at the rate of 4 per cent. from Dec. 12, 1928.

Solicitors: *W. A. L. Osborn*; *King & Jenkins*.

C [*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

D

SIMONS v. ASSOCIATED FURNISHERS, LTD.

[CHANCERY DIVISION (Clauson, J.), December 1, 2, 1930]

[Reported [1931] 1 Ch. 379; 100 L.J.Ch. 234; 144 L.T. 559;
E 47 T.L.R. 118; 75 Sol. Jo. 27]

Landlord and Tenant—Lease—Determination—Power to tenant to determine lease if covenants performed up to time of determination—Breach of covenant at date of notice to determine—Covenant performed at date of expiration of notice.

By a lease, dated Dec. 31, 1925, the plaintiff demised certain property to the F defendants for a term of years at a yearly rent. The lease contained covenants for repairs by the defendants, and also a proviso that, if the defendants should desire to determine the lease at the expiration of the first five or ten years of the term and should give the plaintiff six calendar months' notice in writing of such desire and should, up to the time of such determination, perform and observe the covenants on their part, then immediately on the expiration of G such five or ten years, as the case might be, the demise and everything therein contained should cease and be void, but without prejudice to the remedies of either party against the other in respect of any antecedent breach of covenant. The defendants gave the plaintiff six calendar months' notice in writing to determine the lease before its termination. At the date of the notice the defendants were in breach of certain of the repairing covenants, but these had H been remedied by the date of the expiration of the notice.

Held: the condition to perform the covenants in the lease was a condition precedent to the defendants' right to claim the determination of the lease, but, as the breaches had been remedied by the date when the notice expired, the condition was fulfilled and the lease had been effectively determined.

Grey v. *Friar* (1) (1854), H.L.Cas. 565, applied.

I **Notes.** As to an option to determine a lease, see 23 HALSBURY'S LAWS (3rd Edn.) 474–475, paras. 1096–1098; and for cases on the subject, see 31 DIGEST (Repl.) 594–599, *7125–7171*.

Cases referred to:

(1) *Grey* v. *Friar* (1854), 4 H.L.Cas. 565; 2 C.L.R. 434; 23 L.T.O.S. 334; 18 Jur. 1036; 10 E.R. 583, H.L.; 31 Digest (Repl.) 598, *7159*.

(2) *Stait* v. *Fenner*, [1912] 2 Ch. 504; 81 L.J.Ch. 710; 107 L.T. 120; 56 Sol. Jo. 669; 31 Digest (Repl.) 597, *7149*.

(3) *Burch* v. *Farrow's Bank, Ltd.*, [1917] 1 Ch. 606; 86 L.J.Ch. 400; 117 L.T. 8; 61 Sol. Jo. 383; 31 Digest (Repl.) 598, *7160*.

(4) *Finch* v. *Underwood* (1876), 2 Ch.D. 310; 45 L.J.Ch. 522; 34 L.T. 779; 24 W.R. 657, C.A.; 31 Digest (Repl.) 78, *2320*.

(5) *Bastin* v. *Bidwell* (1881), 18 Ch.D. 238; 44 L.T. 742; 31 Digest (Repl.) 74, *2289*.

Witness Action.

By a lease, dated Dec. 31, 1925, the plaintiff demised certain buildings to the defendants for a term of about seventeen and a half years, at a yearly rent. The lease contained several repairing covenants to be performed by the defendants. There was a proviso in the lease which read as follows:

> "If the company [the defendants] shall desire to determine the present demise at the expiration of the first five or ten years of the said term and shall give to the lessor [the plaintiff] six calendar months' previous notice in writing of such their desire and shall up to the time of such determination pay the rent and perform and observe the covenants and conditions on their part hereinbefore contained then immediately on the expiration of such five or ten years as the case may be the present demise and everything therein contained shall cease and be void, but without prejudice to the remedies of either party against the other in respect of any antecedent breach of covenant."

On Aug. 17, 1929, the defendants gave notice in writing to the plaintiff to determine the lease on Feb. 28, 1930. At the time of the giving of such notice certain covenants to repair had not been performed, but it was held by Clauson, J., on the evidence given at the trial that on Feb. 28, 1930, such covenants had been performed. This action was brought by the plaintiff claiming that the lease was still subsisting and binding on the defendants on the ground that the condition in the proviso with reference to the performance of the repairing covenants had not been fulfilled.

W. P. Spens, K.C., and *H. S. G. Buckmaster*, for the plaintiff, referred to *Stait* v. *Fenner* (2), *Grey* v. *Friar* (1), *Burch* v. *Farrow's Bank, Ltd.* (3), *Finch* v. *Underwood* (4), and *Bastin* v. *Bidwell* (5).

Vaisey, K.C., and *Wilfrid Hunt*, for the defendants, referred to *Grey* v. *Friar* (1), *Stait* v. *Fenner* (2), *Burch* v. *Farrow's Bank, Ltd.* (3), *Finch* v. *Underwood* (4), and *Bastin* v. *Bidwell* (5).

CLAUSON, J.—By a lease of Dec. 31, 1925, the plaintiff, in consideration of the rent and covenants mentioned therein, demised certain buildings to the defendants for a term of about seventeen and a half years, from March 1, 1925. That lease contained the usual repairing covenants, including, among others, the usual covenant to do certain outside painting in the third year of the term and in every subsequent third year. It also contained this clause: [His Lordship read the proviso in the lease and continued:] That clause is in an exceedingly familiar form. Such a form—or one so closely resembling it as to be practically indistinguishable—has been in common use for more than a century past. It has been before the court many times, and it would be dangerous to depart a hair's breadth from decisions on it in former cases.

The further facts which I must state are these. During the five years, from time to time, the tenants failed to observe or perform various covenants; in particular, they failed to perform the covenant to do outside painting in the third year, with the result that there was, without doubt, a breach of covenant. On Aug. 17, 1929, they served a notice on the plaintiff, pursuant to the clause which I have read, of their intention to determine the lease on Feb. 28, 1930; that was at the end of the fifth year of the term. There is no doubt that, at the date when that notice was served, not only was it true to say that between the commencement of the term and that date covenants had been broken, but it was also true to say that at the moment the notice was given there were existing causes of action in respect

A of breaches of covenant; in other words, there were breaches unremedied. Between the date when the notice was given and the end of the fifth year, as I have already found, all breaches of covenant had been remedied, and there did not exist at that day any cause of action in respect of arrears of rent or breaches of covenant.

The point which emerges for decision is this: Does the fact that at the moment the notice was given there were unremedied breaches of covenant available to the B plaintiff as causes of action prevent the notice being effective to determine the term, in spite of the fact that before the end of the fifth year all those breaches had been remedied? The question must turn on the true meaning of this clause. I am bound by the highest authority to hold that the words "if the company shall up to the time of such determination pay the rent and perform and observe the covenants and conditions on their part hereinbefore contained," express what is C in technical language known as a condition precedent. That condition has to be fulfilled, if the tenants are to have the right which this clause gives them to claim a determination of the term. Taking the words as they stand, there could be little doubt the clause is a condition precedent. The difficulty arises from the fact that, after the provision in the clause that in events stated the demise shall cease, there are added these words:

D

> "but without prejudice to the remedies of either party against the other in respect of any antecedent claim or breach of covenant,"

words which suggest that it may be that the clause ought not properly to be construed as a condition precedent and as essential to be observed before the right to determine the lease can be exercised. I need not go into the point, which was one E that occasioned great difficulty some seventy-six years ago, because it was decided in *Grey* v. *Friar* (1), that, notwithstanding the addition of the words which I have read, the clause must be considered as a condition precedent.

From that it follows that, whatever its proper meaning, it is essential for the defendants first to show that the condition has been fulfilled before they can establish their right to have the lease treated as having been determined by the F notice they served on the plaintiff.

The next question is: What does the clause mean? On a possible construction, it may make it essential that the tenant should comply with all the covenants throughout the whole period of the five years or, in other words, that the tenant must be able to say that in no single instance during that period has rent been in arrear or a covenant broken.

G On that question there has been from time to time a certain amount of difference of judicial opinion. If the condition imports that it is unfulfilled if there has been any breach of covenant, even if it has been remedied, the condition may be a very hard one and such as can scarcely be supposed that parties would enter into; but here I am bound by a very heavy weight of judicial opinion to hold that the true meaning of that clause is this, that it will have been complied with if, at the end H of the five years, "there should not exist any cause of action in respect of performance of covenants"; or, I may put it this way, the condition must be understood as

> "requiring that the account between the parties must, both as to rent and covenants, be clear; the rent need not have always been paid on the day; but all arrears, if any, must have been paid up; the covenants must have been I strictly kept, or, if broken, must have been satisfied."

In the language I have used, I have ventured to quote the language in the first case of Erle, J., and in the second case the language of Coleridge, J., in advising the House of Lords in the case to which I have already referred.

Counsel who argued the case for the plaintiff, as I understand, admits that the view which I am stating now in the words of those learned judges, is the correct view of the construction of the clause in that case, in which the existence of unremedied breaches at the expiration of the notice made it unnecessary to consider any question of breaches at the date of the notice. Whether or not he admits it, in my opinion, it is the right construction of the clause before me. That being the meaning of the clause, let me turn again to it and see what all the conditions are that have to be fulfilled. The first condition is: "If the company shall desire to determine the present demise at the expiration of the first five years." There is no doubt about that. The second condition is: "If they shall give the lessor six calendar months' previous notice in writing of such their desire." There is no doubt they have done that. The third condition is that they shall "up to the time of such determination pay the rent and perform and observe the covenants and conditions on their part hereinbefore contained." There is no doubt, if this construction of the clause which I have already adopted is correct, they have done that. Accordingly, in my view, all the conditions have been fulfilled and the term effectually determined. A B

The answer put forward on behalf of the plaintiff is that, at the moment the notice was given, there were unremedied breaches in existence; and, that being so, the notice was bad. Speaking for myself, I am unable to find in this clause anything which makes it a condition that the rent must have been paid and the covenants performed and observed at the date when the notice was given. I find nothing to make that a crucial date. Of course, if I had to construe the condition as providing that, throughout the five years, there must be no instance of an unremedied breach of covenant, then it seems to follow that the existence of an unremedied breach of covenant at the particular moment the notice was given would have been, just as the unremedied breach of covenant at any other moment of the five years would have been, an answer to the defendants' claim, because the condition would not have been fulfilled. But, assuming that the construction which I place on this clause is correct, I can find nothing on the construction of the clause to suggest the requirement that the condition must have been complied with at the moment the notice is given. C D E

The whole difficulty has arisen in this way. There are undoubtedly certain cases in which the question before the court was whether or not a tenant under similar or analogous circumstances was entitled to rely on a clause such as this, where there had been unremedied breaches at the date at which the period in question, corresponding to the five years' period in the present case, came to an end, and judges have used, there is no doubt, language suggesting that it is material to look and see what the condition of things was at the date of the notice, though, as it happens, in none of the cases did it matter, because the state of things at the expiration of the period and the state of things at the date of the notice were in every such case the same and no such difficulty as I am faced with in the present case arose; but it is true that, in some of those cases, judges have used language which may be construed as suggesting that the state of matters with regard to breach of covenant at the date of the notice may have to be considered. I do not propose to travel through those cases, because it is admitted that none of them decide anything which is binding on me. F G

My duty is to construe this clause, and construing the clause I can find no difficulty in the matter at all, and accordingly, whatever may be the explanation of the language used in the cases I have referred to, I find myself unable to hold that the fact that at the moment the notice was given there were unremedied breaches of contract has any bearing on the matter I have to decide. I am, therefore, of opinion that the defendants complied with all the conditions that were necessary to enable them to treat the term as determined, and, accordingly, the action, which claims a declaration that the lease is still subsisting, must necessarily fail. There is no counter-claim for a declaration that the lease has been determined, and I think the most convenient course will be simply to dismiss the action with costs. H I

Solicitors: *Ernest A. S. Howell*; *Sharpe, Pritchard & Co.* for *Harrison & Sons*, Leeds.

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

MINTER *v.* PRIEST

[House of Lords (Lord Buckmaster, Lord Dunedin, Lord Warrington, Lord Atkin and Lord Thankerton), February 6, 7, 10, March 20, 1930]

[Reported [1930] A.C. 558; 99 L.J.K.B. 391; 143 L.T. 57; 46 T.L.R. 301; 74 Sol. Jo. 200]

Slander—Privilege—Statement by solicitor to two clients—Question of privilege for judge, not jury—Waiver of privilege—Waiver by one of two clients.

The plaintiff, a dealer in property, appointed T. as his agent to find a purchaser for a particular property. T. found S., who was desirous of purchasing the property with a view to a re-sale, but S., being unable to find the necessary deposit of £475, went with T. to the defendant, a solicitor, asked him to advance the amount of the deposit, and agreed that, if the defendant did so, he might act as S. and T.'s solicitor to carry out the purchase. The defendant, who had previously acted for the plaintiff, but was no longer on friendly terms with him, refused to advance the £475 and then, in order to dissuade S. and T. from continuing with the proposed purchase so that he (the defendant) might himself purchase an interest in the property, uttered slanderous words with regard to the plaintiff. In this action for slander T., having told the plaintiff what the defendant had said, was subpœnaed by the plaintiff, but T. and the defendant claimed privilege on the ground that the words complained of had been spoken by the defendant when T. was seeing him in his professional capacity. The trial judge compelled T. to give evidence of his interview with the defendant to enable him (the trial judge) to rule whether it was privileged, and then left the following questions (among others) to the jury: At the time when the words complained of were uttered, did the relationship of solicitor and client actually exist between the defendant and S. and T. or one and which of them? Did the defendant reasonably believe that S. and T., or one, and which of them, would wish to retain him as solicitor? The jury answered each of those questions: "No, neither," and also found that the defendant was actuated by express malice. On the jury's answers judgment was given for the plaintiff for £1,500 damages. On appeal,

Held: (i) it was the duty of the trial judge to rule whether the conversation was privileged from disclosure, and questions as to this should not have been left to the jury; (ii) the plaintiff was entitled to his damages because the slanderous words, having been uttered when the defendant was no longer acting or contemplating acting as solicitor to S. and T., were not absolutely privileged from disclosure, and because the qualified privilege which the occasion attracted was defeated by the finding of express malice.

Quaere (i) whether a solicitor can claim absolute privilege in an action for defamation in respect of words spoken to a client who has waived the privilege from disclosure of those words.

More v. *Weaver* (1), [1928] 2 K.B. 520, doubted.

(ii) whether one of two clients can by himself waive the privilege from disclosure of words spoken by their solicitor to both clients jointly.

Notes. Considered: *Harris* v. *Harris*, [1931] P. 10.

As to privileges from disclosure and in defamation actions of communications between solicitor and client, see 12 Halsbury's Laws (3rd Edn.) 42, para. 59, ibid., Vol. 31 (2nd Edn.) p. 75, paras. 116, 117, and ibid., Vol. 20, pp. 465–466, para. 564; and for cases on the subject, see 18 Digest 123–128, *731–779*; and as to the duties of judge and jury in deciding privilege in defamation actions, see 20 Halsbury's Laws (3rd Edn.) 469, para. 571.

Cases referred to:

(1) *More* v. *Weaver*, [1928] 2 K.B. 520; 140 L.T. 15; 44 T.L.R. 710; 72 Sol. Jo. 556, C.A.; Digest Supp.

(2) *Cromack* v. *Heathcote* (1820), 2 Brod. & Bing. 4; 4 Moore C.P. 357; 129 E.R. 857; 22 Digest (Repl.) 403, *4329*.

(3) *Jones* v. *Pugh* (1842), 1 Ph. 96; 12 Sim. 470; 11 L.J.Ch. 323; 6 Jur. 613; 41 E.R. 567, L.C.; 18 Digest 124, *736*.

(4) *Carpmael* v. *Powis* (1846), 1 Ph. 687; 15 L.J.Ch. 275; 41 E.R. 794, L.C.; 22 Digest (Repl.) 404, *4336*.

(5) *Walker* v. *Wildman* (1821), 6 Madd. 47; 56 E.R. 1007; 18 Digest 126, *757*.

(6) *Hagart and Burn-Murdoch* v. *I.R. Comrs.*, [1929] A.C. 386; 98 L.J.P.C. 113; 141 L.T. 97; 45 T.L.R. 338; sub nom. *I.R. Comrs.* v. *Hagart and Burn-Murdoch*, 14 Tax Cas. 433, H.L.; Digest Supp.

(7) *Adam* v. *Ward*, [1917] A.C. 309; 86 L.J.K.B. 849; 117 L.T. 34; 33 T.L.R. 277, H.L.; 32 Digest 129, *1608*.

(8) *Hebditch* v. *MacIlwaine*, [1894] 2 Q.B. 54; 63 L.J.Q.B. 587; 70 L.T. 826; 58 J.P. 620; 42 W.R. 422; 10 T.L.R. 387; 9 R. 452, C.A.; 32 Digest 114, *1460*.

(9) *Browne* v. *Dunn* (1893), 6 R. 67, H.L.; 32 Digest 126, *1579*.

(10) *Nevill* v. *Fine Art and General Insurance Co., Ltd.*, [1895] 2 Q.B. 156; 64 L.J.Q.B. 681; 72 L.T. 525; 59 J.P. 371; 11 T.L.R. 332; 14 R. 587, C.A.; affirmed, [1897] A.C. 68; 66 L.J.Q.B. 195; 75 L.T. 606; 61 J.P. 500; 13 T.L.R. 97, H.L.; 32 Digest 154, *1868*.

(11) *O'Shea* v. *Wood*, [1891] P. 286; 60 L.J.P. 83; 65 L.T. 30; 7 T.L.R. 437, C.A.; 18 Digest 108, *588*.

(12) *Gardner* v. *Irvin* (1878), 4 Ex.D. 49; 48 L.J.Q.B. 223; 40 L.T. 357; 27 W.R. 442, C.A.; 18 Digest 83, *373*.

(13) *Lawrence* v. *Campbell* (1859), 4 Drew. 485; 28 L.J.Ch. 780; 5 Jur.N.S. 1071; 7 W.R. 336; 62 E.R. 186; sub nom. *Laurence* v. *Campbell*, 33 L.T.O.S. 355; 18 Digest 131, *821*.

(14) *Minet* v. *Morgan* (1873), 8 Ch. App. 361; 42 L.J.Ch. 627; 28 L.T. 573; 21 W.R. 467, L.C. & L.J.; 18 Digest 126, *754*.

(15) *O'Rourke* v. *Darbishire*, [1920] A.C. 581; 89 L.J.Ch. 162; 123 L.T. 68; 36 T.L.R. 350; 64 Sol. Jo. 322, H.L.; 18 Digest 84, *377*.

(16) *Bartlett* v. *Smith* (1843), 11 M. & W. 483; 12 L.J.Ex. 287; 1 L.T.O.S. 149; 7 Jur. 448; 152 E.R. 895; 22 Digest (Repl.) 29, *90*.

(17) *Bullivant* v. *A.-G. for Victoria*, [1901] A.C. 196; 70 L.J.K.B. 645; 84 L.T. 737; 50 W.R. 1; 17 T.L.R. 457; 45 Sol. Jo. 483, H.L.; 18 Digest 145, *941*.

Appeal from the decision of the Court of Appeal (Lord Hanworth, M.R., Lawrence and Greer, L.JJ.) (reported [1929] 1 K.B. 655), reversing the decision of Horridge, J., and a jury.

The facts, which are summarised in the headnote, are fully set out by Lord Buckmaster in his opinion.

The Court of Appeal held that on the only evidence given it appeared that the alleged slanders were spoken at a time when professional privilege had been established, and before it had been determined, and that questions (2) and (3) ought not to have been left to the jury; that Horridge, J., ought to have ruled on the evidence tendered, that the interview was protected by professional privileges, and that the evidence of what the defendant said could not be admitted. Horridge, J., was right in admitting the evidence as to the circumstances in which, and the purposes for which, S. and T. resorted to the defendant. What passed at an interview with a solicitor was protected by privilege if it was with a view to, and for the purpose of, retaining the solicitor, even if the retainer was in fact not accepted: (see *Cromack* v. *Heathcote* (2), 2 Brod. & Bing. at p. 6). The nature of the business upon which S. and T. saw and consulted the defendant was properly characterised as solicitor's business: *Jones* v. *Pugh* (3), *Carpmael* v. *Powis* (4), and the court disagreed with the dictum on that point in *Walker* v.

Wildman (5), which described a treaty for the purchase of an estate as a matter not professional to a solicitor. The appeal must, therefore, be allowed, the verdict and judgment set aside, and judgment in the action entered for the defendant with costs. The plaintiff appealed.

Harry Infield and C. G. Austin for the plaintiff.

Sir Henry Maddocks, K.C., and *A. E. Woodgate* for the defendant, the solicitor.

The House took time for consideration.

March 20. The following opinions were read.

LORD BUCKMASTER.—The appellant was the plaintiff in the action out of which this appeal has arisen—an action which was brought by him to recover damages for slander against the respondent. The plaintiff succeeded at the trial, and the jury awarded him £1,500 as damages. This verdict was set aside by the Court of Appeal on the ground that the slander was protected from disclosure because of privilege, and that and that only is the question on this appeal. The privilege claimed is that which covers communications between a solicitor and his client, a privilege the maintenance of which is essential in the best interests of society; the examination, therefore, of the circumstances in which it is said that discussion between a solicitor and a person consulting him is not privileged needs careful scrutiny.

The plaintiff is a man who deals in real estate and the defendant is a solicitor. Both carry on their work in London. In the course of his business the plaintiff in the year 1923 bought certain premises known as 19, Hertford Street, London, for £8,250; whether he purchased the freehold or the leasehold interest is not explained, nor is it material. The defendant had acted as solicitor for the plaintiff in this transaction, and apparently the whole purchase price was provided by various mortgages, the original first mortgagee, from whom the purchase was made, leaving £7,000 as a first charge on the property. The deposit on the purchase was provided by the defendant's wife who ultimately sued the plaintiff for the amount, and the plaintiff in turn sued both the defendant and his wife to set aside documents relating to the sale, the exact nature of which is not disclosed, and this litigation was compromised in June, 1925. These incidents are only material for the purpose of showing that the relationship of the parties was not of a friendly nature. In 1925 at the instance of one of the puisne mortgagees a receiver was appointed of the premises and the plaintiff subsequently took steps to secure their sale. For this purpose he approached a man named Taylor who is an accountant, and gave him a commission note for £100 agreeing to pay him £100 if he found a purchaser for the property at the price of £9,500. The commission note is not in evidence, and it seems uncertain whether it was conditional on finding a purchaser or on completion, but probably it was the latter. Taylor introduced a man named Simpson as a person prepared to purchase at this price, and made some arrangement with him to share the profit on a re-sale, an arrangement which, if Taylor were the agent of the plaintiff, was in fraud of his principal. Simpson placed the matter in the hands of Messrs. Parker and Thomas as his solicitors. This firm was also acting as solicitors for Taylor in connection with the purchase by him from the plaintiff of a house known as 57, Fairlop Road, an incident only deserving notice because of the disreputable arrangement said by Taylor to have been made between him and the plaintiff by which the real purchase price of £1,050 was to be inflated in the conveyance by £300 in order to raise more money on mortgage from certain named persons. It is only right to add that this alleged contemplated crime is denied by the plaintiff, and was not known to Messrs. Parker and Thomas.

The difficulty in effecting a contract with Simpson arose at an early stage over the proposed deposit. The draft contract had put the amount on the usual basis at £950. This had been altered on Simpson's behalf to £5 and Taylor, who was conducting the proceedings, had been instructed by the plaintiff to agree it at

£475. At this stage an interview took place, on Jan. 9, 1928, between Taylor and Simpson and Sir William Thomas, one of the partners of Messrs. Parker and Thomas, at their offices. According to Taylor's evidence at that interview the finding of the deposit only was discussed, and Sir W. Thomas said: "You may see Mr. Priest (the defendant) with Mr. Simpson; you may tell him that I stand down and he can act." This statement he subsequently modified by saying—the gist of the conversation was, "I cannot find the money. Mr. Priest might find the money; if he does, of course I have no objection to his acting for you." Taylor and Simpson then went to the defendant's office, explained the purpose of their visit and in response the defendant uttered the alleged slanders.

I have gone into this matter in some detail because it is contended that the relationship of solicitor and client never existed between the parties at this interview, since the employment of the defendant was conditional on his lending the deposit. Such a conclusion is, in my opinion, indefensible. I agree with the Court of Appeal upon this point. From one solicitor the parties were sent to another to see if he could do what the first would not, and the idea that it was possible to split the interview into two parts, treating the first as a proposal to lend money personally and the second, contingent on this, to act as a solicitor is, to my mind, outside the bounds of reasonable inference.

I am not prepared to assent to a rigid definition of what must be the subject of discussion between a solicitor and his client in order to secure the protection of professional privilege. That merely to lend money, apart from the existence or contemplation of professional help, is outside the ordinary scope of a solicitor's business is shown by *Hagart and Burn-Murdoch* v. *I.R. Comrs.* (6). But it does not follow that, where a personal loan is asked for, discussions concerning it may not be of a privileged nature. In this case the contemplated relationship was that of solicitor and client, and this was sufficient. There is much to be said in favour of the view that, so far as Taylor was concerned, this privilege was waived, but it does not follow that this enabled the conversation to be disclosed. Simpson was also present as a possible client and no authority has been quoted to establish that in these circumstances it was possible for Taylor to waive a privilege which was as much Simpson's as his own.

The relationship of solicitor and client being once established, it is not a necessary conclusion that whatever conversation ensued was protected from disclosure. The conversation to secure this privilege must be such as, within a very wide and generous ambit of interpretation, must be fairly referable to the relationship, but outside that boundary the mere fact that a person speaking is a solicitor, and the person to whom he speaks is his client affords no protection. According to the evidence in this case the defendant began by making statements as to the character of the plaintiff, which might in the circumstances have been properly privileged, but he concluded by a proposal that he could get the first mortgagee to sell for £7,000 and then they would re-sell and the three divide the profit. The jury found that this was done maliciously, and found also that at the time when the words complained of were uttered the relationship of solicitor and client did not actually exist between the defendant and either Taylor or Simpson; this, in my opinion, means that the defendant never really undertook the duty of solicitor, but that the conversation from first to last was nothing but the disclosure of a malicious scheme to deprive the plaintiff of any chance of effecting a contract with a view to the defendant making and sharing with the others a profit on another disposition of the property. Such a finding is in close agreement with the direction given by the learned judge who, after explaining what had taken place, adds:

> "It is said that that makes it quite clear that Priest [the defendant] was not using this occasion honestly for the purpose of considering whether the advance should be made or not by him or his clients, but that he (Priest) was using it to crab the deal, and get the property and make a profit out of it. If this statement is correct, it is clear that if somebody else bought he would pay the deposit because what he said was that if Simpson and Taylor liked to buy

> A through him (Priest) he would pay the deposit and buy for £7,000 and it is said that that shows that upon that occasion he was not really using the occasion for discussing whether he should advance the money or not, but he was using these words for the indirect purpose of crabbing the deal and getting the property himself, in order to make a profit out of it in another way. If he did that, then the occasion is not privileged, and he is responsible in the same B way as if the words had been uttered on any other occasion. Have I made that clear?"

The jury, "Yes, my Lord."

The learned judge then said that the answer to this could be found under the head of malice, and this the jury accordingly did find.

C On these findings, in my opinion, the cloak of privilege is stripped off the whole conversation and, as the learned judge said, the defendant "is responsible in the same way as if the words had been uttered on any other occasion." This view does not appear to have been present to the minds of the Court of Appeal, whose judgment rests on propositions of law which, subject to a reservation I will shortly mention, I think are accurate.

D There remain two matters which deserve comment. The case as presented was one of difficulty for the learned judge, but I think his duty was to have determined whether the privilege was well claimed or not, for the duty of saying what was evidence for the jury to consider was cast on him. The Court of Appeal seem to regard this as equivalent to the necessary exclusion of the evidence the relationship being once proved, but if that were so privilege could be claimed for matters wholly E outside its scope. Had the witness said that everything that took place was as between a solicitor and his client it would, in ordinary circumstances, have been difficult to displace his statement, but here the witness on his own showing was untrustworthy and the conversation had been put in writing so that it was possible to show that from its character it did not answer the description.

F Finally *More* v. *Weaver* (1) was quoted as showing that if privilege were once established, even if it were waived by the client, the occasion would still protect the solicitor even if acting maliciously. That the occasion would still be privileged so that the solicitor could avail himself of the fact in proceedings for libel is clear. I only desire to add, without decision, that it does not follow that when once the privilege due to the relationship is waived, the privilege of the occasion is absolute. For these reasons I think that the appeal should be allowed.

G **LORD DUNEDIN.**—The facts of this case have been set forth by the noble Lord on the Woolsack and I do not repeat them. The first observation I wish to make is that it is essential to distinguish between the privilege which allows a witness to decline to answer questions and the privilege which attaches in respect of statements made. The first is essentially a personal privilege and it exists in respect of various relationships or positions. I do not attempt to give an exhaustive H category. The one in point in this case is the relationship of solicitor and client. Therefore, in this case, if nothing else had previously happened and Taylor had been put in the box to say what passed between him and the defendant once it was shown that Taylor went to see the defendant as a solicitor, I think he would have claimed privilege effectually.

I The first argument of the defendant here is that, that being the case, the learned judge ought to have taken pro non dicto all that was said by Taylor in the box, and withdrawn the case from the jury and found for the defendant because there was no evidence of the publication of the slander. But here something had previously happened. Taylor had told, and had allowed to be committed to writing, all that he afterwards said in the box. Now as I say, this privilege is personal. I do not think that there is a right in the defendant to insist on a privilege which Taylor himself had made non-effectual. This disposes of the first part of the case.

But now comes the question of privilege in respect of statements made and in so far as the slander consisted in statements made by the defendant, it is clear, though Taylor could waive any privilege belonging to himself, he could not waive A any privilege enjoyed by the defendant. The question that, therefore, first arises is, had the defendant in the circumstances any privilege. I had occasion in *Adam* v. *Ward* (7) to make observations in this House on the question of privilege. I have carefully re-considered these observations, which may be found in [1917] A.C. at p. 332, and I have re-read many of the numerous cases which are to be found on this branch of the law, and I adhere to what I then said. I do not weary B your Lordships by repetition, but the gist of the matter was that really it is the occasion which is privileged, though it is natural enough to speak of the privilege as belonging to the defendant who wishes to avail himself of the doctrine. Now, whether an occasion is privileged or not, is for the judge to decide, and not for the jury, and the question of express malice, as it has been called, which destroys the privilege, if it is qualified privilege, ought only to be put to the jury after the judge C has ruled whether the occasion is privileged or not. This is no new doctrine of mine. The dictum, which has been cited again and again, is that of LORD ESHER, M.R., in *Hebditch* v. *MacIlwaine* (8) ([1894] 2 Q.B. at p. 58).

> "The question whether the occasion is privileged, if the facts are not in dispute, is a question of law only, for the judge, not for the jury. If there are questions of fact upon which this question depends, they must be left to D the jury, but when the jury have found the facts, it is for the judge to say whether they constitute a privileged occasion."

It is here, in my opinion, that this trial was erroneously conducted. There were really no facts in dispute, for the only evidence as to what happened was the evidence of Taylor, and the defendant did not go into the box. The questions put E by the learned judge to the jury were really not questions as to disputed facts, but were questions calculated to get from the jury the inference they drew from the facts, in other words, I think he practically asked the jury to determine whether the occasion was privileged or not. I think he himself ought to have ruled whether the occasion was privileged or not. If he had taken the view which I understand your Lordships take, he would have held that the occasion was not privileged, and F he would have had no reason to put any question to the jury except as to damages, for that the words spoken were calumnious could not be contested. I think that so far the learned judges of the Court of Appeal were perfectly right. They disregarded the verdict of the jury and came to the conclusion for themselves that the occasion on which the words were spoken was at a meeting between a person seeking advice from a solicitor and that solicitor. Now that conclusion is a wrong G conclusion in the view of your Lordships, but what I mean is that they were right in disregarding the verdict of the jury and coming to a conclusion for themselves. Having come to the conclusion they did they were bound by *More* v. *Weaver* (1), or at least they thought they were.

It seems to me that the way in which the learned judge tried the case was to obliterate the distinction between two perfectly different ways open to the plaintiff H of meeting the defence of privilege—(i) to contend that the occasion was not privileged, and (ii) that, on the assumption it was privileged, he could prove express malice which would destroy the privilege. Further the questions which he did put, taken as indicative of what he would have asked himself before coming to a decision, were inadequate. The questions as to the situation were: Q. "At the time the words complained of were uttered, did the relationship of solicitor and I client actually exist between the defendant on the one part, or Simpson and Taylor, or one, and which, of them on the other part?" A.: "No, neither." Q. "Did the defendant reasonably believe that Simpson and Taylor, or one, and which, of them would wish to retain him as solicitor?" A.: "No, neither."

Now, if a man goes to a solicitor, as a solicitor, to consult and does consult him, though the end of the interview may lead to the conclusion that he does not engage him as his solicitor or expect that he should act as his solicitor, nevertheless the interview is held as a privileged occasion. This follows I consider from the judgment of this House in *Browne* v. *Dunn* (9), only reported in a not very well-

A known set of reports, 6 R. 67—but I have read the judgments in the journals of the House. The real question was, therefore, not as put, but was, Were the statements made when the defendant was no longer giving advice as a solicitor, but was introducing a proposal of his own as a speculator? It is said that the jury really answered this by finding malice, and, in the light of a certain part of the charge, that is possible. But I cannot think that "malice" is what changes a privileged
B occasion into a non-privileged occasion. "Malice," says LORD ESHER, M.R., in *Nevill* v. *Fine Art and General Insurance Co., Ltd.* (10) ([1895] 2 Q.B. at 169), "is a state of mind," and that cannot alter an occasion. What it can do is to destroy the privilege, if it is a qualified privilege, which arises from the occasion. Now, it might seem that this is a distinction without a difference; that is not so, and for this reason. If the finding of the judge is that the occasion is not privileged,
C the plaintiff need not prove malice, for malice will be inferred from the slanderous words used, but if the judge finds the occasion privileged, it must be either absolute privilege or qualified privilege. If it is absolute privilege, then malice cannot be proved to take it away, secus if it is qualified privilege. The most recent authority on privilege as between solicitor and client is that it is absolute, *More* v. *Weaver* (1), and that case bound both HORRIDGE, J., and the Court of Appeal. But it must
D be admitted that the older authorities point rather the other way, and that the privilege of solicitor and client has been generally dealt with in the books as qualified privilege.

In the view that your Lordships are taking of the occasion being no longer privileged, it is not necessary to decide the question whether *More* v. *Weaver* (1) was right or not, but if the decision of HORRIDGE, J., when, after the jury had
E answered his questions, he ruled no privilege, meant that although the occasion was privileged the privilege was destroyed by malice, it would be necessary to decide whether *More* v. *Weaver* (1) was right or not. I have several times used the expression "whether the occasion was no longer privileged." I have done so on purpose because I understand that all your Lordships agree with me in thinking, whatever the view of HORRIDGE, J., was—I am uncertain what it was—that at the
F outset it was a privileged occasion because Simpson and Taylor had been sent by one solicitor to another, so that Taylor approached the defendant as a solicitor.

I have been forced to be more discursive than I would wish, and I should, therefore, like to lay down clearly how I think the trial ought to have been conducted. When Taylor, on being put in the box, pleaded privilege to the effect that he did not wish to say anything, I think the learned judge ought to have ruled
G that there was no such privilege in respect that Taylor had already communicated and so published the result of the interview between Simpson and him on the one hand and the defendant on the other. After that ruling Taylor should have been examined and cross-examined, and then if that had been done I do not doubt that his counsel would have put the defendant in the box. He did not do so because the learned judge having refused at this stage to dispose of privilege, he was afraid
H of losing his claim to absolute privilege if he put his client in the box. If after the defendant had given his evidence, there was a conflict of testimony between him and Taylor, then the judge might and ought to have put questions to the jury calculated to bring out which version of the facts they believed, but having done that, he should have ruled that the occasion was either privileged or not before he put any question as to malice. If he ruled that the occasion was not privileged,
I then the only question left was damages. If he ruled that it was, then in the state of the authorities which bound him, he ought to have found for the defendant.

Holding these views I think that there should be a new trial because the judge's conduct of the case prevented the defendant's counsel from putting his client in the box. If, however, the evidence as given is to be taken as the whole evidence in the case, then on that evidence I should come to the conclusion that the occasion on which the words were spoken was not privileged.

LORD WARRINGTON.—The question arising on this appeal is whether the defendant in this action for slander is entitled to be absolutely protected against an action founded on the defamatory words in question on the ground that, as he alleges, they formed part of confidential professional communications between him and certain alleged clients. The Court of Appeal have held that he is so entitled. The learned judge before whom the case was tried held that the words were spoken on a privileged occasion in the ordinary sense, but as the jury found that there was express malice this qualified privilege afforded no defence, and judgment was entered for the plaintiff for damages and costs. This judgment was set aside by the Court of Appeal and judgment entered for the defendant with costs.

The only question, therefore, is whether the Court of Appeal were right in holding the defendant to be entitled to the absolute privilege claimed by him. I think this question may be decided on a short issue of fact, namely, did the relation of solicitor and client exist either actually or in intention at the time the words were uttered.

The facts may be shortly stated. In November, 1927, the plaintiff was the owner, subject to two mortgages, of 19, Hertford Street, which he had recently purchased with a view to a re-sale thereof at a profit. He employed one Taylor to find him a purchaser at £9,500 and agreed, if he did so, to pay him £100 on completion of the purchase. Taylor introduced one Simpson as the purchaser and terms of an agreement for sale and purchase at £9,500 were settled. The amount of the deposit was to be £475. At the material date the draft agreement had been prepared but the agreement itself had not then, and never has, been signed. In the negotiations and the settlement of the draft agreement Sir William Thomas acted as solicitor for Simpson. Simpson had no money wherewith to pay the deposit and applied to Sir William Thomas to lend him the amount. This Sir William refused to do and advised Simpson and Taylor, who was with him at the time, to apply to the defendant, saying that if he, the defendant, found the money he, Sir William, would stand down and the defendant might act as solicitor in carrying out the deal. Taylor's position demands some explanation. He was the vendor's agent and yet was employing himself in helping the purchaser to find the funds for going on. The fact is that Simpson was buying only for re-sale at a profit in which Taylor was to share—a not very creditable arrangement. Taylor and Simpson then approached the defendant with the object of obtaining from or through him money for the deposit with the intention if, and only if, he found the money then to employ him as their solicitor in carrying out the transaction. The conclusion I draw from Taylor's evidence is that as soon as he knew what was required of him the defendant refused to find the money, and, accordingly from that moment any professional relation even in intention ceased, and words spoken thereafter would not be entitled to the privilege accorded to professional communications.

The words complained of were uttered subsequently to the determination of such relation, actual or intentional, as previously existed, and related to a matter entirely irrelevant to that about which Taylor and Simpson had approached him, namely, the provision of the deposit and the subsequent carrying out of the deal. The fact is, as appears from Taylor's account of the interview, that the defendant had conceived the idea of inducing the first mortgagee to sell to him or his nominee for £7,000 only, the amount due to him, thus ousting both the second mortgagee and the plaintiff. Accordingly, he set to work to abuse the plaintiff and throw aspersions on his honesty with a view to inducing Simpson and Taylor to throw up the proposed deal and to enter into the scheme of obtaining the property at a lower price. The ultimate goal was, I need hardly say, the division of any profits amongst the three.

I desire it to be understood that I do not differ from the view of the Court of Appeal that the original approach was by a client to a solicitor or intended solicitor. It cannot be denied that it is part of a solicitor's business to carry out contracts for sale and purchase of land and incidentally thereto to advance or procure the advance of money necessary for those purposes. But if the meaning of the remarks of the members of the court is that it is part of a solicitor's business to lend money independently of any professional employment, I must say with all respect that I

A do not agree. Any such view is inconsistent with the decision of this House in *Hagart and Burn-Murdoch* v. *I.R. Comrs.* (6). I do not base the conclusion at which I arrive on the findings of the jury as to the non-existence of the relation of solicitor and client; this issue was a collateral issue and therefore one on which the judge ought to have ruled after hearing such evidence on the point as seemed to him to be necessary. This House is entitled now to rule as it may think the judge B ought to have ruled at the trial, and that is, in my opinion, that when the statements complained of were made there was no relation of solicitor and client actual or in intention between the defendant and Taylor and Simpson or either of them, and that the defendant is not entitled to any privilege other than that usually attaching to words spoken on a privileged occasion and without malice. On this ground I think that the appeal should be allowed, the judgment of the Court of C Appeal set aside and that of HORRIDGE, J., restored.

In the view I take of the facts it is unnecessary to discuss the true nature and extent of the professional privilege claimed. How far, if at all, can a solicitor, in reliance on that privilege, defend himself against an action founded on defamation, against which on the facts of the case, the ordinary qualified defence of privileged occasion would not be a protection owing to the existence of express malice? It D must not be assumed, however, that in abstaining from answering this question I accept all the statements on this head to be found in the judgment in this case, and in *More* v. *Weaver* (1). So far as I am concerned, the question whether the absolute privilege of the client extends to protect the solicitor must be treated as open. I agree to the order proposed by my noble and learned friend on the Woolsack.

E **LORD ATKIN.**—This slander action was tried before HORRIDGE, J., and a special Middlesex jury. It raised important questions arising out of confidential relations between solicitor and client. The very experienced judge found the case difficult, as it indubitably was. It is not surprising that even with such competent hands at the wheel in the shallows of a tortuous passage the ship once or twice grounded. I do not propose to recapitulate the facts. The publication alleged F was at an interview between the defendant, a solicitor, and two gentlemen, Taylor and Simpson, who had gone to interview him with a view to procuring a loan of a sum of £450 for the purpose of a deposit on a purchase by Simpson from the plaintiff of a house in Hertford Street. Taylor was the plaintiff's agent in the transaction and was to receive a commission of £100 if the deal went through.

Confidential communications passing between solicitor and client are doubly G guarded in the law. It is important to emphasise the twofold nature of the protection given; for they are commonly said to be privileged and the word unfortunately tends to confuse two entirely distinct rights. In the first place, they are protected from disclosure whether by production of documents or in oral evidence. This protection is part of the law of evidence. It has no direct relation to the question whether the communication itself constitutes a cause of action. H Neither the solicitor nor the client need be party to the action in which the question of evidence arises. Also it matters not whether the action be for defamation, fraud (subject to limitations to be discussed), breach of trust, breach of contract or otherwise; if the communication comes within the prescribed rule it is inadmissible in evidence. The object is no doubt to enable the persons concerned to communicate freely without fear of exposing themselves or others to actions. But I the right to have such communications so protected is the right of the client only. In this sense it is a "privilege," the privilege of the client. If the client chooses to withdraw the veil, the law interposes no further difficulty. The communications are then available as evidence. Once the communications have been admitted in evidence the second protection comes into force. This affects the question how far the communications can form part of a cause of action. They have become evidential; are they actionable? The protection here is limited. As far as I know it is confined to actions of defamation. I am not aware of any authority which would prevent a client from revealing communications made to him by his solicitor for the purpose of bringing an action of fraud, breach of trust, or A negligence against him; just as the communications may, if disclosed by the client, be used as evidence in any actions by or against a third party. In actions of defamation, however, the communications are "privileged."

To what extent this protection goes is in dispute in this case. The defendant's contention, relying on the recent decision of the Court of Appeal in *More* v. *Weaver* (1), is that the communications are absolutely privileged, so that no action B of defamation can be brought upon them. The plaintiff's contention is that the privilege is only a qualified privilege, i.e., that they receive only the ordinary protection of other confidential communications, namely, that the occasion on which they are made is a privileged occasion, and the plaintiff to succeed must prove express malice. The main question in this case is whether the words complained of were confidential communications between solicitor and client so as to be en- C titled to the twofold protection I have mentioned. The test for such protection has been defined in different words in a number of cases. I think that it is best expressed in two phrases used in the Court of Appeal in the leading case of *O'Shea* v. *Wood* (11). LINDLEY, L.J. ([1891] P. at p. 289), adopts the language of COTTON, L.J., in *Gardner* v. *Irvin* (12), "professional communications of a confidential character for the purpose of getting legal advice." KAY, L.J., at the same D page refers to the language of KINDERSLEY, V.-C., in *Lawrence* v. *Campbell* (13) (4 Drew. at p. 490), and adopted by SELBORNE, L.C., in *Minet* v. *Morgan* (14) (L.R. 8 Ch. at p. 368), communications passing as "professional communications in a professional capacity." The lord justice prefers the former phrase, and emphasises the importance of the confidential character. As to this it is necessary to avoid misapprehension lest the protection be too limited. It is apparent E that if the communication passes for the purpose of getting legal advice it must be deemed confidential. The protection of course attaches to the communications made by the solicitor as well as by the client. If, therefore, the phrase is expanded to professional communications passing for the purpose of getting or giving professional advice, and it is understood that the profession is the legal profession, the nature of the protection is, I think, correctly defined. One exception to this F protection is established. If communications which otherwise would be protected pass for the purpose of enabling either party to commit a crime or a fraud the protection will be withheld. It is further desirable to point out, not by way of exception but as a result of the rule, that communications between solicitor and client which do not pass for the purpose of giving or receiving professional advice are not protected. It follows that client and solicitor may meet for the purpose of legal G advice and exchange protected communications, and may yet in the course of the same interview make statements to each other not for the purpose of giving or receiving professional advice but for some other purpose. Such statements are not within the rule: See per LORD WRENBURY *O'Rourke* v. *Darbishire* (15) ([1920] A.C. at p. 629). Not all communications, therefore, passing between solicitor and client are protected. How is the question of protection from disclosure to be de- H termined, when there is a dispute. If the judge admits the evidence of what was said or written he destroys the protection; if he does not hear the evidence he cannot determine the dispute.

It is necessary also to remember that this dilemma is presented for solution to the judge alone. The question is one of admissibility of evidence; and on all such I questions it is for the judge to decide after hearing if necessary evidence on both sides bearing on any contested question of fact relevant to the question. Thus the question whether a confession is voluntary or a deposition admissible as a dying deposition are questions to be determined by the judge and not the jury. Cf. *Bartlett* v. *Smith* (16) (11 M. & W. at p. 486). Fortunately the procedure is settled by opinions expressed in this House which appear to me to be authoritative. The question has arisen in two cases where it was suggested that the protection did not apply because the communications passed for the purpose of enabling the client or the solicitor as the case might be to commit a fraud or fraudulent breach of trust.

In *Bullivant* v. *A.-G. for Victoria* (17) a question had arisen in litigation in Victoria as to whether a testator had made certain conveyances before his death "with intent to evade the payment of duty" under a colonial statute. A commission had been ordered in Victoria to examine witnesses in this country and witnesses were duly summoned under the English statute, the Evidence by Commission Act, 1859. One of the witnesses claimed professional protection. The suggestion for the plaintiffs was that the communications were for the purpose of enabling the client to commit a fraud or illegality, namely, to evade payment of duty. This House held that there was no fraud alleged or proved. Lord Halsbury, L.C., referring to the dilemma, says ([1901] A.C. at p. 201):

> "The line which the courts have hitherto taken, and I hope will preserve, is this—that in order to displace the primâ facie right of silence by a witness who has been put in the relation of professional confidence with his client, before that confidence can be broken you must have some definite charge either by way of allegation or affidavit or what not. I do not at present go into the modes by which that can be made out."

He expands this ([1901] A.C. at p. 203) by saying that at the trial the judge would have to satisfy himself that the issue to be tried was whether there was a fraud or not, and that this was a piece of evidence relevant to establish the fraud.

In *O'Rourke* v. *Darbishire* (15) the plaintiff suggested that communications which, primâ facie, were entitled to protection, passed for the purpose of carrying out a fraud. Most of the learned Lords who decided the case expressed their opinion upon this point. Lord Finlay, L.C., says ([1920] A.C. at p. 604):

> "The statement (i.e. of fraud) must be made in clear and definite terms, and there must further be some primâ facie evidence that it has some foundation in fact."

Lord Sumner says ([1920] A.C. at p. 614):

> "The right of the one party to have discovery and inspection and the right of the other, within certain areas, to be protected from inspection are parallel rights; in itself neither is paramount over the other. It is therefore the business of the party claiming production to meet a properly framed claim of professional privilege by showing that the privilege does not attach because it is being asserted for documents which were brought into existence in furtherance of a fraud, and he can only do this by establishing a primâ facie case of fraud in fact. Evidence, admission, inference from circumstances which are common ground or 'what not,' as Lord Halsbury says, may serve for this purpose."

See also per Lord Parmoor ([1920] A.C. at p. 622) and Lord Wrenbury ([1920] A.C. at p. 633).

The above cases referred to evidence taken on commission and to discovery of documents and related to the exemption from protection based on fraud; but it seems obvious that the same principles apply when the question arises on the trial; and where the protection is attacked not on the ground of fraud, but on the ground that the communications did not pass for the purpose of giving or receiving professional advice at all. In the present case the contention of the plaintiff was that the words complained of were not in fact professional communications, but were uttered for the independent purpose of securing to the solicitor an interest in a different transaction in the same property. The learned judge ought to have himself decided whether the evidence of publication was admissible. He allowed it to be given, apparently intending the final decision to be made by the jury. In leaving any question of evidence to the jury he was I think wrong; though the position was made difficult by the decision in *More* v. *Weaver* (1) that the professional communications even if proved are not actionable. It would appear on

A principle that any contested question of fact relating to the actionable as opposed to the evidential character of the words would rightly be for the jury. The judge is clearly put in a difficulty. Nevertheless, I think it clear that on the question whether the words shall be admitted in evidence, i.e., whether there shall be any material for the jury to come to a decision, the judge himself must rule. In the present case I think that there was ample primâ facie evidence from the nature of B the words alleged to be used that some other purpose than professional advice was intended by the defendant, and that the evidence was rightly admitted. I am inclined to think that when once the judge has rightly come to the conclusion that the evidence is admissible the contest as to protection from disclosure is over. The seal is broken: the statements cannot be re-sealed. The only question that would remain is whether the words so disclosed are relevant to establish a cause C of action. In the present case, however, as in my view it was finally established by the verdict of the jury that the words never were protected, the precise effect of a judge's ruling need not be determined. To determine the question whether the words were entitled to professional protection the judge left certain questions to the jury with directions on the law. I agree with the judgments in the Court of Appeal in thinking that on this matter the learned judge took too restricted a D view of the relations which bring into existence the protection. It is not necessary that the relations should have reached the definite status of solicitor and client. The solicitor may not be willing to be employed as a solicitor by the person with whom he may be communicating. If a person goes to a professional legal adviser for the purpose of seeing whether the professional person will give him professional advice, communications made for the purpose of indicating the advice required will E be protected. And included in such communications will be those made on occasions such as the present where the parties go to a solicitor for the purpose of seeing whether he will either himself advance or procure some third person to advance a sum of money to carry out the purchase of real property. Such business is professional business, and communications made for its purpose appear to me to be covered by the protection, whether the solicitor eventually accedes to the request or not. F

If the matter rested here we should have to consider whether the proper remedy was not a new trial. But there is a finding of the jury which is not affected by the direction complained of, and which appears to me to dispose of the matter. In the event of the jury finding as they did that the relation of solicitor and client did not exist, the judge rightly in his view of the law ruled that the occasion would G be a privileged occasion, and left to the jury the question of express malice. I have carefully perused the passages of the judge's summing-up on this point, and it seems to me clear that the only suggested evidence of malice which was left to the jury was evidence from which they might infer that the words were not spoken for the purpose of giving professional advice on the transaction of the purchase of the property from the plaintiff, but for the purpose of destroying the proposed H clients' confidence in that transaction in order to induce them to enter into a different transaction by which a different purchaser as a nominee would buy from the first mortgagee at a reduced price and the three persons, the two alleged clients and the solicitor, would share in the profits of a re-sale. The finding of the jury that there was express malice must be taken to affirm this view of the facts, for no other case was made before them or left to them. There appears to me to be I ample evidence to support the finding. Construed as above I think that the jury have found on admissible evidence that the words complained of were not spoken "for the purpose of giving or receiving professional advice," but were spoken for a purpose independent of professional advice, namely, to carry out a speculation in real property and to enable the solicitor to secure a participation in its profits. Communications made in such circumstances are not entitled to protection from disclosure. They could not, therefore, be entitled to the absolute protection from being actionable laid down in *More* v. *Weaver* (1); they are not protected by qualified privilege, and the verdict for the plaintiff must stand. It is true that the damages given are large, but the words spoken were seriously defamatory, and nothing appears to indicate that the jury must have taken into their consideration matters not properly relevant to the assessment of damages for the words spoken in the circumstances of this case. In this view of the case it becomes unnecessary to consider whether evidence of the publication was admissible on the ground that the witness Taylor had waived the protection given by law. While I have little doubt that the witness himself had waived the protection, I am left in doubt whether such waiver would of itself have made the evidence admissible in the absence of proof of waiver by the other proposed client Simpson. As the admissibility does not turn upon waiver I desire to leave this matter open.

It also becomes unnecessary to consider the important question whether the law really is as decided in *More* v. *Weaver* (1) that communications protected from disclosure are where disclosed absolutely privileged. In that case the female plaintiff appeared in person, and the contrary construction was therefore not argued by counsel: the decision considerably extends the protection which up to its date had been confined to communications made by judge, counsel and witnesses in the course of judicial proceedings, and is based upon a view of public policy which appears to be somewhat widely stated and is certainly not the view accepted in Scotland. I prefer to leave the correctness of the decision entirely open for consideration hereafter in this House. In my opinion the appeal should be allowed, and the verdict and judgment for the plaintiff restored with costs in Court of Appeal.

LORD THANKERTON.—I am in entire agreement with the opinion of my noble and learned friend on the Woolsack, and I also desire to reserve my opinion as to the contention based on *More* v. *Weaver* (1), that, if the privilege be established, the solicitor, despite subsequent waiver by the client, would still be protected by such privilege.

Appeal allowed.

Solicitors: *Clarke & Co.*; *Freeman, Haynes & Co.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re A DEBTOR (No. 247 of 1930). Ex parte DEBTOR *v.* PETITIONING CREDITOR

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), May 30, 1930]

[Reported [1930] 2 Ch. 239; 99 L.J.Ch. 356; 143 L.T. 292; [1929] B. & C.R. 184]

Bankruptcy—Moneylender's petition—Judgment for debt with interest at rate exceeding 5 per cent.—Non-compliance by debtor with bankruptcy notice—Right of moneylender to receiving order—Moneylenders Act, 1927 (11 *&* 18 *Geo.* 5, *c.* 21), *s.* 9 (1).

The debtor borrowed £50 from the petitioning creditors, a firm of moneylenders, and signed a promissory note promising to pay £30 interest, which was at the rate of 270 per cent. per annum. He also entered into an agreement on the same terms, as required by the Moneylenders Act, 1927, s. 6. Default having been made in payment, the moneylenders obtained judgment under R.S.C., Ord. 14, r. 1, for the amount endorsed on the writ they had issued, which included interest at the rate of 270 per cent. per annum. They then issued a bankruptcy notice against the debtor for the amount of the judgment debt. Default being made in payment, a petition for a receiving order was presented by the moneylenders, and an order was made. At the hearing before the registrar the debtor offered to pay a sum less than that of the judgment debt, contending that under s. 9 (1) of the Act of 1927 the moneylenders were only entitled to the principal and 5 per cent. per annum interest. The moneylenders refused to accept this offer, and this refusal was upheld by the registrar. On appeal by the debtor, the registrar having stayed the advertisement of the receiving order,

Held: section 9 of the Moneylenders Act, 1927, did not prevent the moneylenders, having obtained judgment for a debt including interest at a rate which exceeded 5 per cent. per annum, from obtaining a receiving order for non-payment of the judgment debt.

Notes. As to the issue of a bankruptcy notice for a judgment debt, see 2 HALSBURY'S LAWS (3rd Edn.) 278, para. 519; and for cases on the subject, see 4 DIGEST 93–94, *840-851*. For the Moneylenders Act, 1927, s. 9, see 16 HALSBURY'S STATUTES (2nd Edn.) 390.

Appeal by the debtor from a receiving order.

On Oct. 1, 1929, the debtor signed a promissory note in favour of the petitioning creditors, who were registered moneylenders, or their order given in respect of the principal sum of £50 advanced to the debtor, whereby the debtor promised to pay the petitioning creditors the sum of £80 for principal and interest on Dec. 20, 1929, with a proviso that, should default be made in payment of this sum of any part thereof, then so much of the balance of £50 as represented the balance of principal remaining unpaid, together with the proportionate part of the sum of £30 charged for interest to the date of such default, should immediately become due and payable together with interest on the amount then remaining due as aforesaid whether in respect of principal or interest on that sum at the rate of 48 per cent. per annum from the date of such default until payment. An agreement in which the promissory note was set out was entered into on the same date as the promissory note to comply with the requirements of s. 6 of the Moneylenders Act, 1927. On Jan. 2, 1930, the petitioning creditors issued a writ, no payment having been made under the promissory note, for the amount of the note due Dec. 23, 1929, £80, and for 19s., the interest thereon at 48 per cent., as provided by the note from Dec. 23, 1929, to Jan. 2, 1930. On Feb. 11, 1930, the petitioning creditors obtained judgment under Ord. 14, r. 1, for the amount endorsed on the writ with interest, if any, and £10 11s. 6d. costs, the total sum including interest from Jan. 2 to Feb. 11, 1930, £5 1s. 2d., amounting to £85 1s. 2d. plus £10 11s. 6d. costs or £95 12s. 8d. On Feb. 12, 1930, a bankruptcy notice was issued against the debtor for £95 12s. 8d. Default being made in payment, a petition for a receiving order was presented on March 11, 1930, by the petitioning creditors, and on May 1, 1930, a receiving order was made by Mr. Registrar MELLOR on the ground that the following act of bankruptcy had been committed, namely, that the debtor failed to comply before Feb. 25, 1930, with the requirements of a bankruptcy notice issued at the instance of the petitioning creditors against him on Feb. 12, and duly served on him before the hour of six in the afternoon of Feb. 17, 1930. The registrar ordered that the advertisement of that order be stayed until the hearing of an appeal. At the hearing before the registrar, the debtor's solicitor offered to pay £61 10s. 6d. down in cash and interest at 5 per cent. up to the day of hearing, May 1, and to give a solicitor's undertaking that taxed costs of the petition would be paid. He submitted that, under s. 9 (1) of the Moneylenders Act, 1927, the petitioning creditors were only entitled to the principal and 5 per cent. interest. The petitioning creditors' solicitor refused this offer. The registrar upheld the refusal of the petitioning creditors' solicitor to accept this offer, and the debtor appealed from the receiving order made against him.

R. A. Willes for the appellant debtor.
W. N. Stable for the respondent petitioning creditors.

LORD HANWORTH, M.R.—This appeal raises an interesting point under the Moneylenders Act, 1927. [His Lordship stated the facts and continued:] By the Moneylenders Act, 1927, s. 9 (1):

> "Where a debt due to a moneylender in respect of a loan made by him after the commencement of this Act includes interest, that interest shall, for the purposes of the provisions of the Bankruptcy Act, 1914, relating to the presentation of a bankruptcy petition, voting at meetings, compositions and schemes of arrangement, and dividend, be calculated at a rate not exceeding 5 per cent. per annum, but nothing in the foregoing provision shall prejudice the right of the creditor to receive out of the estate, after all the debts proved in the estate have been paid in full, any higher rate of interest to which he may be entitled."

It is to be observed that, under the last words of that section, the right of the moneylender to receive a higher rate of interest is preserved if all the debts have been paid in full, otherwise the right of the moneylender to excess interest is postponed.

But counsel for the debtor says that these provisions take one back to the Bankruptcy Act, 1914, and to the jurisdiction to make a receiving order under s. 3 of that Act which, it should be observed, makes the jurisdiction to make a receiving order:

> "Subject to the conditions hereinafter specified, if a debtor commits an act of bankruptcy the court may, on a bankruptcy petition being presented either by a creditor or by the debtor, make an order, in this Act called a receiving order, for the protection of the estate."

Counsel says that the provisions which relate to the presentation of a bankruptcy petition include the provisions as to the service of a bankruptcy notice, noncompliance with which is an act of bankruptcy. The conditions for the making of a receiving order include the obtaining of a judgment and the like, hence it is said that there is an implied prohibition in s. 9 of the Act of 1927 against the inclusion of a claim for interest at a higher rate than 5 per cent. in a bankruptcy notice founded on a judgment for the recovery of a debt due to a moneylender, such judgment and the notice founded on it being steps leading up to the presentation of a bankruptcy petition. Here it is said that the writ asked for interest at the rate of 270 per cent. and, therefore, that there has been a disobedience of s. 9 which only allows interest at the rate of 5 per cent. and no more to be claimed by a moneylender if the resultant judgment is to be followed by a bankruptcy notice leading to the presentation of a bankruptcy petition. Attention is also drawn to s. 7 of the Act of 1927 which, it is said, prohibits the charge of compound interest and, as interest is being charged on the interest unpaid when the bill was not met in due course, there is thus a contract to pay compound interest. But the proviso to s. 7 enables the moneylenders to do precisely what they did, therefore I do not think s. 7 avails the debtor. It comes, therefore, back to s. 9. In that section, there is a reference to the provisions of the Bankruptcy Act, 1914, but the section does not introduce or refer to all the provisions of that Act. It particularises certain provisions relating to the presentation of a bankruptcy petition, voting at meetings, compositions and schemes of arrangement and dividend. But not all the steps in a bankruptcy under the Act of 1914 are included in s. 9 of the Act of 1927, and we have to see whether the provisions of the Bankruptcy Act are restricted by the words of particularity in the section. The words of s. 9 are too plain, specifying as they do certain steps in a bankruptcy, and it is impossible to read the section as if all the provisions for a bankruptcy were introduced. Therefore, the technical point argued for the debtor fails. Equally so has the appeal failed on the decision of the question of fact by the registrar.

Then counsel for the debtor said that, as the debtor is now ready before the advertisement of the receiving order to show that he is able to pay all his debts in full, the receiving order is unnecessary and ought not to have been made. We think it would be wrong to set aside the receiving order, but that it would be fair, however, to allow the debtor to proceed under s. 108 of the Bankruptcy Act, 1914, to ask for rescission of the receiving order. This can be safely done by sending the case back to the registrar to enable the debtor to make an application under s. 108 and staying the advertisements for a sufficient time to give him that opportunity. Subject to that opportunity being given to the debtor, the appeal will be dismissed.

LAWRENCE, L.J.—I agree.

ROMER, L.J.—I agree.

Appeal dismissed.

Solicitors: *F. Wilson Foley*; *M. A. Jacobs*.

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law*.]

Re COLLIER

[Chancery Division (Clauson, J.), March 31, April 1, 1930]

[Reported [1930] 2 Ch. 37; 143 L.T. 329; 99 L.J.Ch. 241;
[1929] B. & C.R. 173]

Bankruptcy—Property available for distribution—Husband and wife—Policy of assurance by husband for benefit of wife—Bankruptcy of husband—Death of wife before husband—Husband's interest in policy—Married Women's Property Act, 1870 (33 *&* 34 *Vict.*, *c.* 93), *s.* 10.

In 1876 a husband, who had married in 1875 and whose wife was still living, took out, under the Married Women's Property Act, 1870, s. 10, a policy of assurance for the benefit of the wife, by which £500 became payable on his death to his executors, administrators and assigns. In 1891 the husband was adjudged bankrupt, and in 1899 he obtained his discharge. The wife died in 1918 and the husband died in 1929 without having married again. On the question whether the trustee in bankruptcy was entitled to the policy moneys or whether they formed part of the deceased wife's estate,

Held: the interest in the policy moneys vested in the husband subject to the trust in favour of his wife which only enured for her benefit if she survived him, and, therefore, the wife having died before her husband, the policy moneys were payable to the trustee in bankruptcy.

Re Browne's Policy (1), [1903] 1 Ch. 188, applied.

Robb v. *Watson* (2), [1910] 1 I.R. 243, approved.

Notes. The Married Women's Property Act, 1870, was repealed by the Married Women's Property Act, 1882, s. 22. See now s. 11 of the 1882 Act.

As to the effect of assurance for the benefit of a wife, husband or children, see 19 Halsbury's Laws (3rd Edn.) 846–847, para. 1383; and for cases on the subject, see 27 Digest (Repl.) 134–138, *971–996*. For the Married Women's Property Act, 1882, s. 11, see 11 Halsbury's Statutes (2nd Edn.) 801.

Cases referred to:

(1) *Re Browne's Policy*, *Browne* v. *Browne*, [1903] 1 Ch. 188; 72 L.J.Ch. 85; 87 L.T. 588; 51 W.R. 364; 19 T.L.R. 98; 27 Digest (Repl.) 137, *993*.

(2) *Robb* v. *Watson*, [1910] 1 I.R. 243; 44 I.L.T. 151; 5 Digest 699, *j*.

(3) *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147; 61 L.J.Q.B. 128; 66 L.T. 220; 56 J.P. 180; 40 W.R. 230; 8 T.L.R. 139; 36 Sol. Jo. 106, C.A.; 27 Digest (Repl.) 136, *989*.

(4) *Prescott* v. *Prescott*, [1906] 1 I.R. 155; 27 Digest (Repl.) 138, **499*.

Motion in bankruptcy.

In 1876, Walter Collier, who had married in 1875 and whose wife was then living, took out a policy of assurance whereby £500 became payable on his death to his executors, administrators and assigns. The policy contained a recital that the assured had proposed to effect an assurance on his own life "for the benefit of his wife" in pursuance of the Married Women's Property Act, 1870. In July, 1891, he was adjudicated bankrupt, and on April 14, 1899, he obtained his discharge. The bankrupt's wife died in November, 1918, and the bankrupt died in August, 1929, without having remarried. The question raised on this motion was whether the trustee in bankruptcy was entitled to the policy moneys or whether they formed part of the deceased wife's estate.

The relevant part of s. 10 of the Married Women's Property Act, 1870, is as follows:

> ". . . a policy of insurance effected by any married man on his own life and expressed upon the face of it to be for the benefit of his wife or of his wife and children or any of them shall enure and be deemed a trust for the benefit of his wife for her separate use and of his children or any of them according

> to the interest so expressed and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate."

W. N. Stable for the trustee in bankruptcy.

G. H. Beyfus for the respondents, the representatives of the bankrupt, and of his deceased wife.

CLAUSON, J., stated the facts and continued: Apart from the Married Women's Property Act, 1870, which was the Act in operation when the policy was effected, the legal effect of the policy was simply to bind the insurance company to pay £500 to the personal representatives or the assigns of the assured; no interest was conferred by the policy on the then existing or any future wife of the assured: *Cleaver* v. *Mutual Reserve Fund Life Association* (3). But the policy was expressed to be made in pursuance of the Act of 1870, which is still in force in the case of policies effected under that Act. Section 10 is the important section and is as follows: [His Lordship then read s. 10 of the Act, and continued:] The corresponding section, s. 11, of the Married Women's Property Act, 1882, was considered in the case I have already cited; and, having regard to the view expressed by the Court of Appeal in that case, I must hold that the effect of s. 10 of the older Act was that the right to payment of the policy moneys formed part of the estate of the husband subject only to the trust in favour of the wife declared by the policy made in pursuance of the statute; but the operation of the policy in her favour continued only so long as the object of the trust remained.

The first question to be decided is: Who is the person for whose benefit the policy was taken out? In the present case, it is expressed to be for the benefit of the wife of the assured. On the proper construction of the words "for the benefit of his wife" and having regard to the object which the assured must have had in view, that person was the wife of the assured who was in existence at the time when the moneys fell to be paid under the terms of the policy, that is to say, on the death of the assured. I am guided to this conclusion by the decision of KEKEWICH, J., in *Re Browne's Policy* (1). The headnote to that case reads as follows:

> "A man who had a wife and children, effected a policy of assurance on his life under the Married Women's Property Act, 1882, s. 11. The policy was expressed to be 'for the benefit of his wife and children.' The wife died, and the man married again and had a child by his second wife. On his death: Held, that the widow and her child were entitled to participate jointly with the children of the first marriage."

The learned judge had to decide whether the second wife was within the description of the wife mentioned in the policy. KEKEWICH, J., said ([1903] 1 Ch. at p. 190):

> "Regarding the case apart from the language of the Married Women's Property Act, 1882, one is met by the presumption, which is rather one of common parlance and common sense than of law, though it has been recognised by legal authority, that a married man speaking of his wife intends his wife at that time, and does not contemplate one whom he may marry after her death, and the observation holds good respecting allusions by another to a given man's wife. But, in construing an instrument intended to make provision for a wife after the husband's death, this seems to lose weight, and is countervailed by the consideration that he in all probability intended to provide for her who survived him, and for that reason stood in need of the provision."

The object of the Act of 1870 being to enable a husband to provide for his widow on his death, I am of opinion that the words "for the benefit of his wife" mean for the benefit of his wife who should survive the assured and become his widow; and I so hold.

The facts are that Mr. Collier was in 1891 adjudicated bankrupt, that in 1918 Mrs. Collier died, and that her husband survived her and died in 1929 without having married again, whereupon, in view of my construction of the policy, the moneys which were payable thereunder to the husband's executors, administrators or assigns belonged to the person in whom the rights under the policy were then vested, subject to the interest of the husband's widow, if any.

In view of the arguments placed before me I ought to express my opinion on a further point. Assuming I am wrong in the construction I have put on this policy, and that, on its proper construction, the words "his wife" mean the person who at the date when the policy was taken out was the wife of the assured, the question then arises, does the Act of 1870 enable a husband to create a trust for the benefit of a person who does not live to become his widow? In my opinion, the Act is aimed at enabling provision to be made for a widow and is so framed as not to give a husband power to confer the benefit of the policy on any wife, unless she, by surviving her husband, becomes his widow. That view is involved in the decision in *Robb* v. *Watson* (2). But it was suggested that my view and the decision in that case are inconsistent with the decision in another Irish case, namely, *Prescott* v. *Prescott* (4), where a wife, in pursuance of the Married Women's Property Act, 1882, effected a policy on her own life in favour of William Prescott, who was the husband of the assured at the date of the policy, and the insurers contracted to pay on her death to William Prescott or his executors' administrators or assigns the policy moneys; and it was held that, as soon as the policy was effected, the interest in the moneys assured vested absolutely in William Prescott and was not contingent on his surviving his wife. I confess that I find a difficulty in following the grounds on which that case was decided; and if the decision in that case is inconsistent with that in *Robb* v. *Watson* (2), and I have to make a choice between the two, I prefer the decision in *Robb* v. *Watson* (2).

In my view, therefore, when the assured became bankrupt in 1891, his interest in the moneys to become payable under the policy on his death was an absolute interest subject only to a trust of those moneys in favour of any wife who should, by surviving him, become his widow. In the events which happened, the assured died leaving no widow, with the result that the policy moneys are payable to the trustee in bankruptcy of the assured.

Solicitors: *Tarry, Sherlock & King*; *Morgan, Price, Marley & Rugg*.

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law*.]

Re DRABBLE BROS.

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), May 16, 1930]

[Reported [1930] 2 Ch. 211; 99 L.J.Ch. 345; 143 L.T. 337;
74 Sol. Jo. 464; [1931] B. & C.R. 200]

Bankruptcy—Fraudulent preference—Preferential payment made by agent—Principal ignorant of preference—Bankruptcy of principal—Acts of agent imputed to principal—Bankruptcy Act, 1914 (*4 & 5 Geo. 5, c. 59*), *s.* 44 (1).

Every payment made by an agent of any person who is unable to pay his debts as they become due, acting within the scope of his authority, in favour of any creditor of the principal with a view to giving such creditor a preference over other creditors, should, if the principal is adjudged bankrupt on a petition presented within three [now six: see Companies Act, 1947, s. 115 (3)] months after the date of the payment, be deemed fraudulent and void as against the trustee in bankruptcy within s. 44 (1) of the Bankruptcy Act, 1914. It does not matter whether the act which constituted the fraudulent preference is performed by one agent or many, so long as each agent engaged in the transaction acts within the scope of his authority.

Partners employed a manager of the financial side of their business, and one of the partners signed cheques put before him by the manager without exercising any determination as to or acquainting himself regarding which of the creditors of the firm should be paid or what amount should be paid to any creditor. To obtain personal advantage the manager caused the partner to sign cheques which he (the agent) had made out to creditors of the firm which he had chosen and for amounts which were larger than those payable in the ordinary course of business. When those payments were made the partners were unable to pay their debts, and within three months thereafter they were adjudicated bankrupt.

Held: to prove a fraudulent preference within s. 44 (1) of the Bankruptcy Act, 1914, it was not necessary that the act of preferring a creditor and the motive in doing so should be directed by or contained in one mind; the partners had so delegated their authority with regard to the finances of the firm as to make the acts and intentions of the manager their own; and, therefore, the payments in question were void as against the trustee in their bankruptcy.

Notes. Referred to: *Armstrong* v. *Stràin*, [1951] 1 T.L.R. 856.

As to the avoidance of a fraudulent preference in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 553 et seq.; and for cases see 5 DIGEST 852 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Case referred to:

(1) *Blackburn, Low & Co.* v. *Vigors* (1887), 12 App. Cas. 531; 57 L.J.Q.B. 114; 57 L.T. 730; 36 W.R. 449; 3 T.L.R. 837; 6 Asp.M.L.C. 216, H.L.; 29 Digest 174, *1308*.

Appeal by the trustee in bankruptcy from an order of a Divisional Court of the Chancery Division sitting in bankruptcy.

The facts appear in the judgment of LORD HANWORTH, M.R.

Sir Gerald Hurst, K.C., and *R. A. Willes* for the trustee.

G. W. Cave, K.C., and *G. C. Allsebrook* for John J. Swan & Co., Ltd. (recipients of the disputed payments).

LORD HANWORTH, M.R.—This case raises an interesting point and an important point, which I am told may have a wide application. We have had the great advantage in this case of the very carefully considered judgment of His Honour Judge PROCTER, delivered after he had had two days' evidence before him and had taken time to consider his judgment. It is complete in its statement of the facts and in the application of the law to those facts. The learned county court judge held that there had been a fraudulent preference and that the creditors who had been preferred were bound to hand over to the trustee in bankruptcy, two sums which they had received, one being a sum of £100 and the other being a sum of £647 13s. 3d. or £647 12s. 2d.—it is variously stated and I do not know which are the right shillings and pence. I have found both in the papers. The Divisional Court in bankruptcy have set aside that judgment and held that there was no fraudulent preference. The ground on which the Divisional Court held that was, not that they differed from the facts as found, but that, in their opinion, there was no view or object or motive to prefer the two creditors which could be imputed to the debtors. From that decision the trustee in bankruptcy appeals to this court.

I will shortly summarise the facts which are ably stated by the county court judge in his judgment. A firm, consisting of two brothers, George Drabble and Frederick Drabble, carried on business in partnership, and in the year 1927 they took into their employ, on terms which are not very clear, a man named Tiley. Tiley was a man who bought goods from builders' merchants; he was in touch with a number of builders' merchants, and was able to provide from those merchants the materials which were required by the Messrs. Drabble in the course of their building operations. I do not know whether in fact he received any commission from Messrs. Drabble, but he was allowed to receive some commission from the builders' merchants whose goods he supplied or got supplied for Messrs. Drabbles' undertakings. Although the fact that he was taking these commissions was known to Messrs. Drabble, I cannot help at once stating that his position affords an illustration of how unfortunate it is that a man should be placed in a double position, a position in which his duty was to serve his employers, Messrs. Drabble, and whose interest was concerned in the sums which would be paid by his employers to builders' merchants, for the builders' merchants paid him a commission on the sums which they received from Messrs. Drabble. On reading the correspondence which passed, it is plain from the outset and in every letter, that Tiley was occupying a dual position and was engaged in considering the interests of the merchants, which in a sense were his own interests, for the amount of money paid to the merchants enhanced his own commission; at the same time, he owed a duty to Messrs. Drabble, who employed him, and a large part of whose business he had to conduct. It appears that Tiley had an opportunity to get a contract for Messrs. Drabble for them to build 198 houses, which were to be built for a sum to be paid to Messrs. Drabble, of £78,000. In a letter which we have had placed before us, dated April 6, 1928, Tiley writes to Swan & Co. and says this:

> "Stoke-on-Trent. Reference enclosed inquiry. Please go into the matter carefully and let me have your keenest prices for decent building red. Bear in mind that I have the handling of this order and could no doubt help you out of any very difficult lines. I should particularly like you to handle some of this business. First delivery will be required in about three weeks, and regular monthly deliveries will be taken of remainder. Please deal with this matter urgently as I want to get it settled. The lengths in the main are quite reasonable. If you like, I will quote myself for the mouldings. Whilst prices have to be competitive, this order will not be unduly cut in price."

Consider what the position of Tiley was. His employers had secured this contract for £78,000 to build those houses, and he writes to Swan & Co., who are able to supply materials, that he hopes that they may have a part of the handling of the order, and he says to them that he "could no doubt help you out of any very difficult lines," and also: "Whilst prices have to be competitive this order will not be unduly cut in price." It appears quite clear from that letter that he was acting the part of Mr. Facing-both-ways and finding the difficulties which belong to that situation. In consequence of the position that Tiley held, Swan & Co. did supply a certain amount of material required for building these houses at Stoke-on-Trent.

At the outset of my judgment I desire to repeat what we have said in the course of the argument that no charge of any sort is made against John Swan & Co. They

A have acted perfectly honourably, and, although under the bankruptcy law and our decision, they will be compelled to hand over the sum which they have received, no blame attaches to them, and, indeed, no criticism need be offered against their conduct in having received money in the ordinary course of business.

The letter to which I have referred was the first which passed between the parties. On May 4 there is another letter, in which Tiley writes to them:

> B "No advices or invoices for this Stoke contract must be sent to Mosborough, but advices must be sent to the job at Stoke and all invoices to W. H. Tiley, 16, Tithby Drive, Sherwood, Nottingham."

Another letter written by Tiley to Swan & Co. said:

> "Drabble Bros. Concerning the order for three crowns E 1 × 5 Red PTG for Sheffield, which was marked 'very urgent,' I regret that I have had no advice of C despatch and shall be glad if you will get order off at once. These delays greatly inconvenience customers. With regard to Stoke you will be pleased to learn that I have now arranged with the architect that full payment will be made once monthly for all goods on the site, on production of invoices. This is in addition to payment for work, and should please you, as you will be absolutely certain of your money, and that it will be received promptly. I would also mention D that I am personally dealing with all accounts on behalf of these friends and will see that regular cheques are obtained for you."

The answer by Swan & Co. is dated May 7, and contains the phrase: "We trust you will see that we get our cheque." After that we have the evidence given by F. Drabble himself, telling us that in June he discussed the finance of the Stoke contract with Tiley. E

Putting those facts together as they stand, for a moment, I think it is plain that to the knowledge of Tiley the Messrs. Drabble had some difficulty in financing this contract. We are told that it was a much larger contract than they usually dealt in, and building of this sort, involving the payment to them of £78,000, obviously required a considerable margin at the bank in order that they might carry on the business satisfactorily both to themselves and to their merchants who F were sending them the materials with which to build. After that conversation with Mr. Drabble about financing, we find Tiley writing on July 10, to Swan & Co.:

> "As mentioned on the 'phone there will be a cheque to-night or to-morrow. You will have it by Thursday at latest. Glad to hear that Sheffield, etc., a/c is settled up to end of April."

G It will be noted that in that letter once more Mr. Tiley says that the receipt is to be sent to him, Tiley, and he writes on the 12th, with reference to a cheque which had been sent for £607 8s. 6d: "I shall be glad if you will let me have my commission as above statement per return and oblige." On Aug. 15, there is this letter:

> "Drabble Bros. Copies of statements of accounts to hand. With regard to Stoke the Sutton trustees meet on the first Wednesday in each month and H Drabble's cheque is sent the following day. As soon as this is received I will immediately make out cheques and forward same. I will see that cheque for the full amount is made out for you, and you will receive same on Sept. 8, next. You can rely that I will look after your interests in respect to this. With reference to Sheffield a/c I am not personally dealing with these accounts, as I am not working these contracts for them, but I will mention the matter to Mr. I Drabble at Stoke this week and ask him to do something forthwith. The difficulty is that he has over £3,000 tied up in retention moneys on Sheffield district contracts and in addition has to finance Stoke. I am not willing that moneys from Stoke should be utilised in the payment of Sheffield accounts, and am keeping same quite separate. I will write you immediately I have chatted over the matter with Mr. Drabble."

After that two cheques were sent. A cheque was sent for £100 on account of the Sheffield matter, on Sept. 6.

I pause there to consider what was the position of Tiley in reference to this business. Quite apart from any question that arises in bankruptcy and of fraudulent preference, the evidence is all one way, that Messrs. Drabble were in some difficulty over the finance of this undertaking; that, so far as Stoke went, Tiley was in command of the financial side of it; that he had an opportunity of taking orders; and that he had committed himself to the statement that he would endeavour to get the money paid in due course to Swan & Co., and further, from the chat he had had with Fred Drabble, he knew the difficulties of the firm, the difficulties arising from money tied up, and the like, and also that with regard to the Sheffield account, although he was keeping these accounts quite separately, he would have the opportunity of a chat with Fred Drabble which might enable him to send on to Swan & Co. a sum of £100 in respect of the contract independently of what has been called the Stoke-on-Trent contract. That is a fair picture of the business as it stood in September. The cheque is sent for £100. After that there pass one or two more letters. On Sept. 8, Tiley writes to Swan & Co.:

> "I did my best for you regarding a goodly cheque which I personally posted to you on Friday. You will observe that I included invoices up to Aug. 8, totalling £1,372, and did what I could for you for Sheffield accounts by allowing £100, making the total of cheque £1,472. . . . Will you please see that both receipts for Sheffield account and Stoke account are always sent to me?"

On Oct. 4, some accounts appear to be paid and cheques were drawn. At that time Messrs. Drabble were entitled to a credit, which is called "thirty days net," from their merchants, and the meaning of it is that, taking the date of the delivery of the goods, from which the credit starts, Messrs. Drabble were not required to make the payment until the 1st of the month after an intervening month had elapsed between that date and the date of delivery. Goods delivered in May would not have to be paid for until July 1, and goods delivered in June would not have to be paid for until Aug. 1, for there is a clear intervening month between the date of delivery and the date of payment. More than that, it appears that an arrangement had been made as between the building owner of Stoke, that is, the Sutton trustees, and Messrs. Drabble, whereby they allowed, for the purpose of convenience and finance, a certain sum in each month, or, in each certificate given by the architect each month, for builders' materials delivered. It is not an unusual provision and it enables the builder to pay his accounts more readily. Those payments so allowed in the certificate of the architect did not in any way alter the terms of payment between Messrs. Drabble and their customers. They were still entitled to the full thirty days net, and the customer had still got to allow Messrs. Drabble the intervening month between the delivery and the date of payment. On Oct. 4 there were twenty-four cheques to be drawn, and eighteen of these were drawn in respect of payments which allowed the full credit of thirty days net, but in the case of six of the merchants to whom cheques were to be drawn, there was a further payment in the cheque, for they were not required to give the full thirty days net credit, so that payments were brought up to a much later date than Messrs. Drabble and the merchants required. To take two illustrations, a cheque suggested for Messrs. Swan is one which brings the account up to or covers the period from Aug. 9, right up to Sept. 22, that is, up to a date only twelve days before the date of the cheque. A cheque to the Doncaster Joinery Co., Ltd., covers the period from Aug. 31, to Sept. 25, only nine days before the cheque is to be drawn. In these six cases this system of cancelling the credit to which Messrs. Drabble are entitled is applied, and it so happens that those six merchants were the merchants who, under their terms of contract, were allowed to and did in fact pay commission to Tiley. The inference is irresistible that with Tiley's knowledge of the peril of Messrs. Drabble's business, he made good the payments to those six merchants, not taking advantage of the full credit to which Messrs. Drabble were entitled, but making the payments up to a few days before the cheques were drawn, so as to enhance the value of the cheques paid to those six merchants, with the corresponding advantage to himself that they would have received larger sums out of which the commission payable to himself was to be calculated. That is what was done, and I find it impossible to accept any other explanation than that he was minded to pay those persons who would render him a commission, in priority and preference to other persons. If he had paid the creditors properly and obtained for Messrs. Drabble the full credit to which they were entitled, the sum out of which his commission would have been paid would have been considerably less. A cheque was sent to Swan & Co., and their reply on Oct. 6, is: "We are very much obliged to you for getting through such a decent cheque from Drabble Bros. for this month." Unless those statements contained in the letters of Tiley were mere statements by an egotist who had some idea of pretending that he had power, if they are to be taken, as it seems they are, at their face value, they clearly indicate that Tiley was a man who was in charge of the keeping of the accounts and the payment of the accounts, and that Tiley saw to the payments.

On Nov. 2, Drabble Bros. committed an act of bankruptcy, and a receiving order was made on the same day. The trustee was entitled to go back to a date anterior to the date on which the £100 was paid in respect of the Sheffield account, and he made his motion asking that this sum of £100 paid on Sept. 6, and a sum of £647 12s. 9d. paid on Oct. 4, to Swan & Co., should be repaid by them on the ground that they were fraudulent preferences within the meaning of s. 44. As I have said, it was held that they were, and the learned county court judge found this:

> "Tiley was the servant and agent of the bankrupts and the person in control of the financial side of the bankrupts' business in connection with the Stoke contract. The payment of accounts was within the scope of his employment. I have found that he knew that the bankrupts were insolvent in September and October, 1928, and that the payments of £100 and £647 12s. 5d. were made by him with knowledge of the insolvency and with the view of giving the respondents a preference over the other creditors."

I do not think it is possible to differ from or even to challenge this finding of the learned county court judge; but the learned judges in the Divisional Court have taken a somewhat different view. They have said that the money was paid by Fred Drabble, but that his evidence showed that his mind was really a blank and that any separate idea on the part of Tiley cannot be imputed to Messrs. Drabble. What was said by Fred Drabble on this point was this: "Oct. 4. I signed cheque for £1,497 13s. 3d." Of that I may say that £850 was in ordinary course a matter in respect of which the full thirty days net credit is allowed, leaving only £647. "Tiley made it out and brought to me to sign. He never said anything particular, except that it was for the ordinary routine. It was not ordinary routine to pay in October for goods supplied previous month. I thought it was for goods supplied in July. Nothing said to bring to my mind that it was for goods delivered in July. I never knew at any time when I signed cheques on what dates the goods had been delivered. My idea was that Tiley was paying the current accounts."

With reference to the passage where the learned county court judge has held that the payments were made by Tiley with knowledge of insolvency and with a view to giving to the respondents preference over the other creditors, CLAUSON, J., says this:

> "With regard to that passage which I have read I feel bound to hold that there is no evidence to support it. That finding is this: 'The payment of accounts was within the scope of his employment.' If that means that Tiley was employed to hand out according to his views of what was right and proper the cash of the firm to the persons to whom money was owing under the Stoke-on-Trent contract I can only say that the evidence does not support that finding."

It appears to me that when CLAUSON, J., said that, he must have forgotten the evidence which I have referred to and the statement that Drabble made, that although he signed cheques he, Frederick Drabble, never knew at any time on what date the goods had been delivered. Then the learned judges held that the payments that were made were made in each case by Fred. Drabble, and by him alone, A and that, as the banking account could not be drawn upon by Tiley, the payment was a payment as to which Tiley had no part, and was the act of Fred. Drabble alone.

I find it impossible to share that view. I think the evidence before the learned county court judge amounts to this, that Fred. Drabble retained his control over the banking account, but he himself exercised no determination as to the creditors B to be paid or the amounts to be paid to them. All such details he delegated to this man Tiley who was engaged in Drabble's business on terms which made him, Tiley, the servant and agent of Drabble in respect of that side of the business which had been placed by Messrs. Drabble within his sphere. It is not an unnatural severance of business; it is common enough in the business of large firms that the conduct of the work is parcelled out into different departments. Fred. Drabble, we are told, C was a competent and practical builder, but it is plain that he was not a man who also combined with his qualification as a builder any clerical ability or any expert accountancy. All such matters he delegated to Tiley, and I think he did this, not only in respect of the Stoke account, as is plain from the letters, but of all other matters on which Tiley had a chat with Mr. Drabble, including the Sheffield matter, either as a whole or at any rate as to a part which covered the payment of the D £100.

It has been stated by LORD HALSBURY, in words which are quite plain, how far you can impute the knowledge of an agent to the principal. He says in *Blackburn Low & Co.* v. *Vigors* (1) (12 App. Cas. at p. 537):

> "Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions and E knowledge of the principal," and again lower down, that "Where the employment of the agent is such that in respect of the particular matter in question he really does represent the principal, the formula that the knowledge of the agent is his knowledge is I think correct."

Let me apply that principle to the present case. It is plain beyond all question that on all matters of finance, Fred. Drabble was not in control at all. How much F and to whom the payments were to be made had been delegated entirely to Tiley. It has been said that even so, it cannot be a fraudulent preference within s. 44. That section requires that three things shall be involved, first, the payment that is made must be by a person who is unable to pay his debts, as they become due, from his own money; that clearly is the fact in the present case. Messrs. Drabble were unable to pay their debts as they became due. Secondly, that in fact G the payment preferred one creditor over the others. It is plain that the payment of those two cheques and those other cheques on Oct. 4 did give a larger sum to those six merchants than was allowed to the other eighteen. Thirdly, that the dominant motive, or you may call it, object or view with which the payment was made, was a desire to prefer that creditor to whom the payment was made. It is unnecessary to repeat what I have said was the purpose and aim and object of the payments H made on Oct. 4, to those six merchants, or why they were allowed larger payments than were made to the other eighteen. There was then this intention or object or view of preferring.

But it is said that you cannot have a fraudulent preference unless both the act of preferring and the motive are contained in and governed by one brain—that you cannot impute the intention and knowledge of the agent to the principal. That I appears to me to be an unsound view. In the complexity of business it must be that in a number of undertakings the duties are severed into departments, and when Mr. Drabble undertook to sign any cheque that was put before him for any amount and to any person which should be chosen and determined by Tiley, he so far delegated his authority as to make the act and intention and the knowledge of Tiley his own, because Tiley, on those details of the finance, represented his principal, and thus made his, Tiley's intentions, the intentions of his principal. On the facts of this case it appears to me quite clear that the actions of Tiley and the intentions of Tiley can be and ought to be imputed to the principal, for Tiley was delegated by the principal to represent him, Fred. Drabble, in carrying out all this very necessary part of the business. That being so, it appears to me that the point of law which was taken in the Divisional Court is not sound, that it cannot be held that there is a divergence between the responsibility of Tiley and the responsibility of his principal, but that the principal, Fred. Drabble, is to be held bound by the intentions of Tiley, and that in fact there has been a payment made by a person unable to pay his debts and with a view to giving six creditors, which include Swan & Co., a preference over the other creditors, and that payment is to be deemed, within s. 44, to be "fraudulent and void as against the trustee in the bankruptcy." For these reasons the appeal must be allowed and the order of the learned county court judge must be restored, with costs here and below.

LAWRENCE, L.J.—I entirely agree. The point raised on this appeal is a short one, and no authority has been cited to us in which the facts were on all fours with the facts in the present case. The question may be stated in this way. Where a bankrupt has employed a person to manage and control the financial side of his business and has not concerned himself in any way with the manner in which that employee has performed his duty, can the creditor escape the consequences of s. 44 if it should turn out that the employee has made a payment to him with a view to giving him a preference over the other creditors of the bankrupt, who at the time when the payment was made, was unable to pay his debts as they became due? The learned judges in the Divisional Court, differing from the learned county court judge, have held that as the view to prefer was the view of the employee and not the view of the bankrupt, s. 44 has no application. The result of that decision, if it be right, would have far-reaching consequences. There must be many concerns in which the principal leaves the financial side of the business to a cashier or other employee and does not trouble himself about the details of that part of the business or with the items comprised in the cheques which are brought to him for signature. It seems to me that it would lead to a strange result if it were held that a preferred creditor could successfully plead as a defence to a claim made against him under s. 44, that the bankrupt when no longer able to pay his debts as they became due, had allowed his employee to remain in control of his finances without inquiring how his moneys were being employed, and that, therefore, the view to prefer admittedly entertained by the employee who was aware of the insolvency of his employer was not the view of the bankrupt but was the view of the employee, and consequently outside the section. Counsel for Messrs. Swan & Co. rightly contended that the view to prefer must be the view of the person making the payment, but in the special circumstances of the present case the knowledge and intention of the employee must, in my opinion, be imputed to the bankrupt and be deemed to be the knowledge and intention of the latter: see *Blackburn, Low & Co.* v. *Vigors* (1). To hold otherwise in the case of a principal who has not taken the trouble to inform himself or who has deliberately not informed himself of what is being done on his behalf by his own employee, would, in my judgment, be opening a wide door to fraudulent preferences by traders minded not to concern themselves with what their employees were doing on their behalf. For these reasons, I agree the appeal ought to be allowed.

ROMER, L.J.—I agree. Notwithstanding the interesting argument we have heard, I am not satisfied that there is any reason why the principle qui facit per alium facit per se should not apply to a fraudulent preference under s. 44 of the Bankruptcy Act. In my opinion (and I do not understand the Divisional Court to have come to any different conclusion), every payment made by an agent of any person unable to pay his debts as they become due, acting within the scope of his authority, in favour of any creditor of the principal with a view to giving such creditor a preference over the other creditors, should, if the principal is adjudged bankrupt on a petition presented within three months after the date of the payment, be deemed "fraudulent and void as against the trustee in the bankruptcy." Indeed, any other view would lead to rather strange results, as indicated by my

Lord. In particular, it seems to me that it would be impossible in many cases to say that any payment made was a fraudulent preference unless every single one of the partners had made the payment with the intention to prefer, and the trustee in bankruptcy would not be able to take advantage of s. 44. If I am right so far, obviously it cannot matter whether the composite act which constituted the fraudulent preference is performed by one agent or by many, as long as each agent engaged in the transaction acts within the scope of his authority. Supposing one agent has the power of selecting a particular creditor for preference and fixes the amount to be paid to him and the date of the payment, but another agent is entrusted by the principal with the performance of the mere ministerial act of drawing the cheque and making such payment directed by the first person, it would be impossible to say that that composite act was not a fraudulent act of preference. What are the facts of the present case? The authority of Tiley did not, indeed, extend to enable him to make the actual payments, that is to say, to draw the cheques, but most assuredly he was the person who arranged when and in what order the creditors were to be paid, and how much should be paid to them from time to time. He was, therefore, the agent to whose discretion was entrusted the selection of the creditors and he was the agent to judge of whether and why a particular creditor should be paid. The mere fact that all that was reserved was the power of actually signing cheques, does not seem to me to make any difference. In determining whether there was an intention to prefer a particular creditor, the fact that the ministerial act of signing the cheque was performed by Fred. Drabble is, in my opinion, not sufficient to prevent the composite act of the two from being a fraudulent preference. For these reasons, I agree that the appeal should be allowed, with the consequences that have been mentioned by the Master of the Rolls.

Appeal allowed.

Solicitors: *Peacock & Goddard*, for *R. W. Beswick*, Hanley; *Geare & Son*, for *Cooke & Co.*, Nottingham.

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

SPYER *v.* PHILLIPSON

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), January 26, 27, 1930]

[Reported [1931] 2 Ch. 183; 100 L.J.Ch. 245; 144 L.T. 626; 74 Sol. Jo. 787]

Landlord and Tenant—Fixtures—Removal—Matters to be considered—Quantum of fixture—Purpose of annexation—Extent of damage to premises or to article affixed by removal.

The general rule that fixtures become part of the property demised and cannot be removed by the tenant has been relaxed from the earliest times and these relaxations have been wider with the advance of time and changes of fashion and custom. In considering whether or not a case comes within the rule it is material to consider not only the quantum of the fixture, but also the object and purpose of the annexation—whether it was to benefit the premises and the landlord rather than to contribute to the tenant's own temporary enjoyment. So long as the article attached to the premises can be removed without doing irreparable damage to those premises neither the method of annexation, nor the degree of annexation, nor the quantum of damage that would be done to the article itself or to the demised premises by its removal, have any bearing on the question of the tenant's right to remove it except in so far as they throw light on the question of the intention with which the chattel was affixed by the tenant to the premises.

Notes. Referred to: *Webb* v. *Frank Bervis, Ltd.*, [1940] 1 All E.R. 247.

As to fixtures and their removal, see 23 HALSBURY'S LAWS (3rd Edn.) 489 et seq.; and for cases see 31 DIGEST (Repl.) 199 et seq.

Cases referred to:

(1) *Buckland* v. *Butterfield* (1820), 2 Brod. & Bing. 54; 4 Moore, C.P. 440; 129 E.R. 878; 31 Digest (Repl.) 216, *3484*.

(2) *Elliott* v. *Bishop* (1854), 10 Exch. 496; 3 C.L.R. 272; 24 L.J.Ex. 33; 24 L.T.O.S. 217; 19 J.P. 71; 3 W.R. 160; 156 E.R. 534; on appeal sub nom. *Bishop* v. *Elliott* (1855), 11 Exch. 113; 3 C.L.R. 1337; 24 L.J.Ex. 229; 19 J.P. 501; 1 Jur.N.S. 962; 3 W.R. 454; 156 E.R. 766; sub nom. *Elliott* v. *Bishop*, 25 L.T.O.S. 150, Ex.Ch.; 31 Digest (Repl.) 229, *3651*.

(3) *Re De Falbe, Ward* v. *Taylor*, [1901] 1 Ch. 523; 70 L.J.Ch. 286; 84 L.T. 273; 49 W.R. 455; 17 T.L.R. 246; 45 Sol. Jo. 294, C.A.; affirmed sub nom. *Leigh* v. *Taylor*, [1902] A.C. 157; 71 L.J.Ch. 272; 86 L.T. 239; 50 W.R. 623; 18 T.L.R. 293; 46 Sol. Jo. 264, H.L.; 31 Digest (Repl.) 199, *3313*.

(4) *Minshall* v. *Lloyd* (1837), 2 M. & W. 450; Murp. & H. 125; 6 L.J.Ex. 115; 1 Jur. 336; 150 E.R. 834; 31 Digest (Repl.) 220, *3575*.

(5) *Hallen* v. *Runder* (1834), 1 Cr. M. & R. 266; 3 Tyr. 959; 3 L.J.Ex. 260; 149 E.R. 1080; 31 Digest (Repl.) 199, *3311*.

(6) *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328; 41 L.J.C.P. 146; 26 L.T. 709; 20 W.R. 990, Ex.Ch.; 31 Digest (Repl.) 206, *3376*.

(7) *Hellawell* v. *Eastwood* (1851), 6 Exch. 295; Cox, M. & H. 452; 20 L.J.Ex. 154; 15 J.P. 724; 155 E.R. 554; sub nom. *Halliwell* v. *Eastwood*, 17 L.T.O.S. 96; 31 Digest (Repl.) 205, *3361*.

Appeal from an order of LUXMOORE, J., in an action for an injunction restraining the defendants from removing certain panelling from premises of which the plaintiff was landlord, and for other relief.

The plaintiff was the owner of a block of flats, No. 74, Portland Place. The defendants were the executors of the late Ralph Hilton Phillipson, who was the lessee of one of the flats. On July 5, 1912, Mr. Phillipson took a lease of the flat from one George Paxton, the predecessor of the plaintiff, the term of the lease being for twenty-one years from June 24, 1912. The rent was £900 a year plus something which varied with the amount payable by the landlord in respect of rates, taxes and assessments, including water rate. The lease, which was in a usual form, contained a covenant that the tenant would throughout the term substantially maintain and keep the interior of the demised premises and also the doors, windows, skylights, stoves, hot water system, bath water, closets, cisterns, pipes, taps, drains, locks, keys, bolts, bars, and all other fixtures and fittings therein belonging to the landlord in substantial repair. It provided for the painting and general decoration of the demised premises, and that the tenant would keep the chimneys and windows clean, and replace fixtures, fittings, or appliances broken, damaged, or destroyed with others of a similar character and of equal value. The lease continued:

> "And the demised premises so repaired, maintained, painted, enamelled, papered, grained, &c., and keep as aforesaid at the expiration or other sooner determination of the said term [the tenant] will (subject to any proviso hereinbefore contained) peaceably and quietly give, surrender, and yield up unto the landlord together with all fittings belonging to the landlord including those mentioned in the list annexed hereto and all fixtures (usually denominated landlord's fixtures) which at any time during the continuance of the said term shall be erected on or used or fastened to the demised premises and all improvements and additions thereto."

By cl. 7 the tenant covenanted not during the term

> "without the licence in writing of the landlord cut or maim any of the walls, partitions, timbers, girders, ceilings, or other structures of the demised premises or any part thereof or in any way alter the plan, height, elevation, or arrangement of the demised premises nor erect any additional building thereon."

In November or December, 1920, Mr. Phillipson had three rooms in his flat entirely redecorated. He had purchased for 2,000 guineas some oak panelling of the Stuart period, dated about 1620, and that panelling was erected in one room. In 1922 he erected in another room some valuable pitch pine panelling, dated about 1720. Evidence was given that the value of the whole of the panelling put into the flat in the four rooms was somewhere in the neighbourhood of £5,000. When the panelling was put in, a false frieze was placed at the top of the panelling, and there was also added a false ceiling. New chimneypieces were also put in two or three of the rooms.

LUXMOORE, J., gave judgment for the defendants. In his judgment he said: It is well settled that whatever is affixed during the currency of the lease to the freehold forms part of that freehold, and cannot be removed unless it falls within certain well-known exceptions. In the case of landlord and tenant, from the earliest times relaxations of the strict rule have been made, and these relaxations have been wider with the advance of time and changes of fashion and custom. [LUXMOORE, J., referred to *Buckland* v. *Butterfield* (1); *Elliott* v. *Bishop* (2); *Re De Falbe, Ward* v. *Taylor* (3); affirmed H.L. sub nom. *Leigh* v. *Taylor* (3); *Minshall* v. *Lloyd* (4); *Hallen* v. *Runder* (5); *Holland* v. *Hodgson* (6); *Hellawell* v. *Eastwood* (7) and continued:] I have to consider what is the object and purpose of the annexation. Annexation is only one of the matters that has to be considered and may to-day be anything but the most important. The panelling and the mantelpieces are valuable chattels, they were bought by Mr. Phillipson for the purpose of decorating the flat in which he was, and which he had for a term of twenty-one years. At the time he put in the oak panelling there were only some thirteen years to run of his term. When he put in the pitch pine panelling there was still less of his term to run, only some eleven years. I have to consider the interest of the person who puts the particular chattel into the property and bear that in mind in answering the question: What was the object and purpose of the annexation? It would be a little surprising if a tenant were to spend £5,000 in purchasing panelling and put it in a flat to enjoy it for ten or thirteen years and at the end of that time lose all interest in it, so that it belonged to a complete stranger, the landlord of the premises. I have also to consider the methods of attachment. The report which has been made states:

> "It does not appear that any portion of the structure of the rooms A, B, and C was altered in order to fix the panelling ceilings and frieze. Wooded plugs and nails were inserted into the brickwork as described in the answer to the question (iii)."

When you look at question (iii), so far as rooms A, B, and C are concerned, the panelling is stated to be fixed in the same way in each of those cases, and it is said: "By inserting into the wall face a number of wooden plugs to which the panelling is attached by means of screws." In those three rooms there has been a frieze put above the panelling and a false ceiling above the frieze.

> "The frieze consists in each case of a light wooden framework upon which canvas is stretched, covered with paper or other similar material, giving the appearance of solidity. The frieze in itself is not fixed to any member either of the panelling, cornice, or the wall, but is held in position by (i) a fillet attached to the top rail of the panelling, (ii) the false bed moulding of the cornice, and (iii) vertical strips of wood nailed to the wall."

A The false ceilings are composed of slabs of fibrous plaster screwed to the joists, the joists and screw-holes being made good with plaster. It is held on the original ceiling by light ceiling joists which pass right across the room and rest at their extremities on strips of timber called plates. Two expert witnesses were called, and each of them said that the method described would be the ordinary way of affixing oak panelling of this kind to a room which had already been built, whether it was to be fixed permanently or merely for a temporary purpose. B

Considering, as I am bound to do, all those matters, what is the conclusion that I must come to in this case? I have not any doubt that what Mr. Phillipson was intending to do was to put up this panelling and to put in these chimneys and to add to the decoration of the room (for the more complete enjoyment of that panelling and those chimneypieces) certain friezes and false ceilings and so on complete; for decoration it is true, but the whole object and purpose of his work was that he C could enjoy the panelling and chimneypieces for which he had paid large sums of money. I cannot come to any conclusion that his object and purpose was merely to beautify the rooms of which he had only some thirteen years' tenancy to run. I am satisfied that, asking myself the question, what was the object and purpose of the annexation of this panelling and these chimneypieces? the answer must be, the enjoyment of the chattel by the purchaser. If that is the answer to the question, D having regard to all the cases, the only conclusion I can come to is that these things have not become landlord's fixtures. They are tenant's fixtures and, being tenant's fixtures, they are removable by the tenant or his executors, during the currency of his tenancy. Damage will be done to the plaster and the ceilings, and so on, and it will be necessary to replace with skirting boards, window linings, and so on. Those circumstances are not, in my opinion, sufficient to outweigh in any E sense the other considerations which have led me to the conclusion that these are tenant's fixtures and not landlord's fixtures.

The landlord appealed.

N. L. C. Macaskie, K.C., and *G. P. Slade* for the landlord.
Robert Peel, K.C., and *J. G. Trapnell* for the defendants.

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LORD HANWORTH, M.R. This case raises a very interesting point. The matter that we have to determine is whether certain panelling which was put into a flat is to be treated as a tenant's fixture, and so removable by the tenant or his personal representatives, or whether it passed to the landlord by virtue of having been annexed to the landlord's freehold, or, rather in this case, long leasehold.

It seems that a Mr. Paxton, who had a long term from the ground landlord, Lord G Howard de Walden, granted a lease on July 12, 1912, of a flat at 74, Portland Place, to the late Mr. Ralph Phillipson. It was for a term of twenty-one years; thus it was determinable in the year 1933. The flat was an important one; the rent was £900 a year, plus half the increase of rates which should be imposed in respect of the flat beyond the rates at which they stood at the time of the lease. The late Mr. Phillipson was minded to decorate his flat in a way which suited his taste, H in an expensive manner, but a manner not at all unknown or very unusual at the present time. In 1920 Mr. Phillipson put in some oak panelling; it was of the late Tudor or early Jacobean period, and in order to fix it there is no doubt that he removed a certain amount of furnishings—the woodwork that would be put in the flat in the shape of skirtings, oak furnishings to the windows, and the like. The panelling cost Mr. Phillipson somewhere in the neighbourhood of £2,000. In I 1922 he decorated another room by putting in some pine panelling, also of an expensive nature, old panelling of about the date 1720. That panelling at the present time has probably, according to the evidence before us, become enhanced in value. We have not got the exact price which was paid for the pine panelling, but we are told that the panelling in these rooms, if removed and sold to a willing purchaser, would pass to him at something like a price of £5,000. It is admitted that that sum would not be obtained without finding a purchaser, but it is told us in the evidence that if a purchaser comes along who is minded to possess such panelling the probability is that he would be prepared to spend round about £5,000 in order to acquire it. Those figures are comparatively unimportant; they take their proper place in perspective as indicating that the panelling was of considerable value, that it was of the nature of an ornament and a luxury which Mr. Phillipson wanted to enjoy in the way in which it could be enjoyed, namely, by being set up in his dwelling-house, this flat at Portland Place. Some little remark is made upon the fact that in July of 1922, a few months before the pine panelling was put in, we find Mr. Phillipson writing to Mr. Paxton, who at that time was his immediate landlord, asking Mr. Paxton's leave to remove a partition which was in room D, the purpose of the removal being to throw two rooms together and get a larger room as a totality. Comment is made that he asked for leave to put up this panelling. In 1928 letters passed from Mr. Wheeler, an agent, to Mr. Phillipson, it being suggested that, there being only something like five years of the lease to run, it would be a suitable time for Mr. Phillipson to secure a new lease, or, at any rate, an extension of the old one. Mr. Wheeler writes on Oct. 24, 1928:

> "As to the terms of a grant of a new lease, it is somewhat difficult for me to overlook the potentialities of the flat at the reversionary date. I should imagine, having regard to the expensive panelling and equipment generally, that it would demand a rental of £2,000 per annum exclusive of rates and taxes plus a premium for a lease of twenty-one years."

Turning that into money value, it would look as if the additions which had been made by Mr. Phillipson enhanced the value of the flat by more than £1,000 a year, because it is not merely that this new rent is to be exclusive in the future of all rates and taxes, but the granting of a lease is also to command a premium. If I am not putting it on too high a scale, it is difficult to estimate that increased value at less than £17,000 or £20,000. That is only a confirmation of the fact that what had been done by Mr. Phillipson was to erect a very valuable panelling on a site which was suitable for its erection. Mr. Wheeler gives some confirmation of his figures from another flat which he had let, and there is a letter from Mr. Phillipson of Oct. 26. He is considering whether he would like to take a new lease; the time was passing, and he was getting near the three-score years and ten. He says in the letter:

> "The little inner suite alone, arranged and done with Mr. Percy Macquoid (?) with the furniture, cost me about £20,000. It was then absolutely to period and much of it was earmarked as a gift to the Victoria and Albert Museum."

Then other changes had taken place in his domestic conditions, and he looked at the matter from a somewhat different point of view from that which he had when the expenditure had been made. Mr. Wheeler in reply re-affirms the position which he has taken up, that the landlord's solicitor had informed him that

> "while you were under no obligation to reinstate the partitions you removed at the time the alterations were made, you were not at liberty to remove at the end of your term any of the wood panellings installed by you."

On the other hand, Mr. Phillipson took the view that he was entitled to remove these panellings and was not prepared to leave them behind. I have only referred to that correspondence as indicating that it was clear that Mr. Phillipson's intention was, so far as the law allowed, to remove the panellings; and the view now presented by the evidence that they were of great value is abundantly reinforced by Mr. Wheeler's letters showing what a largely increased sum could be obtained for the flat in the condition in which Mr. Phillipson had put it. Unhappily, at the end of November, 1928, Mr. Phillipson died. The matter passed, therefore, to his executors, and on Mar. 1, 1929, the writ was issued in this action by which the landlord seeks to restrain the defendants, the executors of Mr. Phillipson, from removing the panelling which Mr. Phillipson put in.

After reading the judgment of LUXMOORE, J., I should be prepared to leave the matter where he has left it. He has recounted the facts and given, if I may respectfully say so, a lucid judgment upon the law to which it seems unnecessary to add anything. In deference, however, to the arguments that we have had, I will venture to add a few more remarks in support of the judgment which we are now affirming. It is merely a truism to say that in our law anything that is affixed to the freehold passes with the freehold and cannot, as a rule, be removed or severed from the freehold, but on that rule there have been engrafted a number of exceptions, relating to fixtures which have been put in either by the craftsman who has been working in the house, the tenant who has been occupying it, or a tenant for life in cases between him and a remainderman. In all those cases exceptions have been engrafted enabling the tenant to remove what has been put into the premises, not for the purpose of final inclusion in their structure, but in order that the tenant might enjoy them more freely. The question that we have to determine in this case is: Do the facts which are before us compel the inference that this panelling was fixed so that the removal of it was no longer contemplated, that the panelling had been finally made an integral part of the dwelling rooms; or is the right inference that the panelling had been put up with the intention on the part of the tenant of removing it as and when he was minded so to do, and that the affixing of the panelling was only for the purpose of the complete enjoyment by the tenant of that expensive panelling? It is to be remembered that this claim on the part of the representatives of the tenant is made during the currency of the term. Different considerations apply when the tenant has not attempted to exercise his right until after the expiration of the term.

We have had our attention called to a number of cases, but those cases are illustrations of how the law upon this subject has gradually been relaxed in favour of the tradesman and certainly largely in favour of the tenant. When we look at the cases themselves it will be found that tenants have been allowed to take away matters of ornament which for their enjoyment required very considerable affixture to the premises. In particular, going as far back as 1703, we find a catalogue of such matters as chimneypieces, wainscots, chimney-glasses, pier-glasses, hangings, and the like, which have been allowed to be taken away. I pause for a moment at chimneypieces, because certainly for the safe enjoyment of such a structure it is necessary that very substantial attachment of it should be provided. Here we have got this panelling fixed in the rooms, and it has been fixed, so the evidence tells us, in the only way that it could be properly fixed, whether it was set up for permanence or whether it was set up with a view to its removal. Attention has been called, and rightly called, to the fact that not only has the panelling been set up, but there have been structural alterations made to the aperture for the fireplace, and chimneypieces either removed or covered over, that the furnishings of the windows have been removed, and also that there have been ceilings attached to the original ceiling so as to make the ceiling more in keeping with the proper period to which the panelling belonged. One little point arises upon that which I think it is worth while calling attention to, a point which I made in the course of the argument. That is, that if, in the report of Mr. Head, an examination be made of his little sketch whereby—I think it is in Room A—it is seen how the panelling is set up and the frieze above it attached to the wall, it will be observed that instead of attaching that frieze to the substance of the wall itself care was taken to make a temporary structure of a framework of canvas, bringing that forward so that the wall as it stood was allowed to remain in its original condition behind the frieze. It is said that that was necessary in order that the frieze might be as nearly as may be in a vertical line with the panelling, but again I am by no means satisfied that what I have called the bracket which runs round the top of the panelling was a part of the original panelling or whether that was not a part which had necessarily to be superimposed in order to fit the old panelling together. But in any event it seems to me that that structure for the purposes of carrying the frieze was of the nature of a temporary structure faithfully preserving the moulding behind it, whereas a simpler, a more durable, and possibly less expensive method might have been

A adopted, unless a marked intention had been revealed to make the totality of the structure one which could be afterwards taken down.

I do not think we need go back to the cases beyond the tapestries case of *Re De Falbe*, *Ward* v. *Taylor* (3). In that case it is quite right to observe that there was a much lighter method of fitment than has been here adopted, but when one looks at VAUGHAN WILLIAMS, L.J.'s judgment ([1901] 1 Ch. at pp. 534, 535), he says:

B

> "There is this amount of consistency [in the cases] that, starting with the absolute rigid rule, Quicquid plantatur solo solo cedit, there has been a consistent progress towards relaxation of that rule, and in my view there has never been any substantial intermission of that relaxation."

An obvious observation falls to be made. He is speaking in 1901. I am speaking C a generation later, in 1931. If, therefore, this case is not, perhaps, exactly within the decision or the rule (though I think it is) in the *De Falbe Case* (3), yet it would only be another illustration that there has been a consistent progress towards the relaxation of the rule against tenants being required to hand over their fitments to the landlord. He adds this:

> "In dealing with the question of fixtures it sometimes becomes material to con- D sider the object and purpose of the annexation, by which I do not mean that there must be an inquiry into the motive of the person who annexed them, but a consideration of the object and purpose of the annexation as it is to be inferred from the circumstances of the case. That being so, it is impossible to say that the only matter to be taken into consideration is the quantum of fixture."

The observation there made is approved and followed by LORD MACNAGHTEN in his E speech in the same case when it came before the House of Lords, sub nom. *Leigh* v. *Taylor* (3) ([1902] A.C. at p. 162). He says this:

> "The mode of annexation is only one of the circumstances of the case, and not always the most important—and its relative importance is probably not what it was in ruder or simpler times."

F We have got, therefore, a rule showing that the tenant's right has been consistently and steadily progressively enlarged, that the quantum of attachment is a factor, but not more than a factor, and not always the most important factor, for decision. Then one considers what are the other factors. I think one must consider: Why was the article or ornament ever brought into the flat at all? Was it for the permanent enhancement of the building itself, or was it for the enjoyment of the G ornament itself? In *Leigh* v. *Taylor* (3) in the House of Lords, LORD HALSBURY says ([1902] A.C. at p. 161):

> "The principle appears to me to be the same to-day as it was in the early times, and the broad principle is that, unless it has become part of the house in any intelligible sense, it is not a thing which passes to the heir. I am of opinion that this tapestry has not become part of the house, and was never intended H in any way to become part of the house; and I am, therefore, of opinion that this appeal ought to be dismissed."

He says that the rule, whether it is between tenant for life and remainderman or between landlord and tenant, regarding the attachment and so on of these factors is practically the same. With that guidance before us, and with the definition of "fixtures" which STIRLING, L.J., gives in *De Falbe*, *Ward* v. *Taylor* (3) ([1901] I 1 Ch. at p. 538)—which is also quoted, I observe, by LUXMOORE, J.—

> "they are articles which were originally personal chattels, and which, although they have been annexed to the freehold by a temporary occupier, are nevertheless removable, and of course saleable, at the will of the person who has annexed them,"

I ask myself the question: Is there any evidence of such fixtures as can compel one to come to the conclusion that this expensive panelling was put up some ten or a dozen years before the expiration of the lease in order that the value of the flat might be enhanced to the landlord rather than put up for the purpose of the enjoyment of those ornaments by the tenant himself? Ornaments may vary from one generation to another, but it would appear that at the present time devices are resorted to to try to make a room resemble what our ancesters 100 or 200 or 300 years ago would have liked it to be. That is still a matter of ornament at the present time.

The criticism that has been made, and quite fairly made, that one finds the tenant doing very considerable injury to the premises by abstracting the skirting boards and the fitments of the windows and the like, has, to my mind, but little bearing upon the problem. Quite true it is that the tenant thereby exposed himself to a liability for breach of covenant and involved himself in a liability of replacement to a value which may be not inconsiderable; but yet all those are detailed matters, detailed risks which the tenant might be prepared to run in order to be able to set up this ornament that he wanted to enjoy. He may have been quite conscious that he was committing a breach of covenant in cutting away these details, but ready to run the risk, for at any time he could, of course, on terms have got relief from the proviso for re-entry which was the safeguard against his committing this breach of the covenant. On these grounds it appears to me that the tenant has not lost his right of removal, that, although he is liable to reinstate, you cannot, to use the words of Vaughan Williams, L.J., in *De Falbe's Case* (3), infer that the object and purpose of the annexation was to benefit the premises and the landlord rather than for the purposes of his own temporary enjoyment.

In my judgment I agree with Luxmoore, J., and the appeal must be dismissed with costs.

LAWRENCE, L.J.—The main point taken by the landlord is that the extent to which the tenant interfered with the demised premises in affixing the panelling conclusively demonstrates that his intention was to improve the demised premises and not for the better enjoyment of the panelling as a chattel. For the reasons stated by my Lord and by Luxmoore, J., with whose judgments I entirely concur, I am of opinion that the point so taken, in view of the other facts of this case, is not a good one, and that the appeal ought to be dismissed.

ROMER, L.J.—I agree. Luxmoore, J., in the course of his judgment, after referring to the well-known passage in Parke, B.'s judgment in *Hellawell* v. *Eastwood* (7) (6 Exch. at p. 312), said this:

> "I think, in fact, taking that as two considerations, the real thing is one consideration; what was the object and purpose of the annexation? And one of the matters which has to be considered in coming to a conclusion in answering the question, 'What was the object and purpose of the annexation?' or the two points to be considered are the mode of annexation, and what would happen if the mode of annexation is severed and it is sought to take the particular things away."

Speaking for myself, I think that that is a correct statement of the law. So long as the article can be removed without doing irreparable damage to the demised premises I do not think that either the method of annexation or the degree of annexation, or the quantum of damage that would be done to the article itself or to the demised premises by its removal, have really any bearing upon the question of the tenant's right to remove except in so far as they throw light upon the question of the intention with which the chattel was affixed by him to the demised premises. That, I think, is entirely consistent with the view that was expressed by Vaughan Williams, L.J., in his judgment in the case of *Re De Falbe*, *Ward* v. *Taylor* (3) ([1901] 1 Ch. at p. 536).

Appeal dismissed.

Solicitors: *Johnson, Weatherall, Sturt & Hardy*; *J. D. Arthur.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

WALTON HARVEY, LTD. *v.* WALKER AND HOMFRAYS, LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., Romer, L.J., and Eve, J.), November 25, 1930]

[Reported [1931] 1 Ch. 274; 144 L.T. 331; 29 L.G.R. 241]

Contract—Frustration—Display of advertisement—Display on defendants' premises—Knowledge by defendants that premises might be compulsorily acquired.

The defendants, lessees of a hotel, were aware that it could be acquired compulsorily, after October, 1925, under powers given to the M. corporation. On Dec. 31, 1924, they entered into two agreements with the plaintiffs, a firm of advertising agents, under the terms of which the plaintiffs were entitled to erect and exhibit for a term of seven years, with the option of a further five years, upon the front of the hotel, electrically illuminated advertisements. The plaintiffs had no knowledge of the power of the corporation compulsorily to acquire the hotel, and erected electric signs. Before the expiration of the seven years the M. corporation, in exercise of its statutory powers, served the lessees with a notice to treat for the purchase of their estate and interest in the hotel, and, the amount of compensation having been agreed, the corporation took possession and began to pull down the hotel. In an action by the plaintiffs for a breach by the defendants of the contracts of Dec. 31, 1924,

Held: when the defendants entered into the contracts of Dec. 31, 1924, they must have known of the possibility that at some date after Oct. 31, 1925, and before the expiration of seven years from Dec. 31, 1924, their premises might be compulsorily acquired by the corporation; therefore, it could not be said that the parties had contracted on the implication on both sides that there should be a continued existence of the defendants' premises, and the defendants were liable to the plaintiffs in damages.

Baily v. *de Crespigny* (1) (1869), L.R. 4 Q.B. 180 and *Taylor* v. *Caldwell* (2) (1863), 3 B. & S. 826, distinguished.

Notes. Referred to: *Mussett* v. *Standen* (1935), 79 Sol. Jo. 816; *Magnet Advertising Co.* v. *Arrowsmith* (1938), 82 Sol. Jo. 911.

As to frustration of a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 185 et seq.; and for cases see 12 DIGEST (Repl.) 417 et seq.

Cases referred to:

(1) *Baily* v. *De Crespigny* (1869), L.R. 4 Q.B. 180; 10 B. & S. 1; 38 L.J.Q.B. 98; 19 L.T. 681; 33 J.P. 164; 17 W.R. 494; 12 Digest (Repl.) 420, *3249*.

(2) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 696, *5333*.

(3) *Wilson* v. *Tavener*, [1901] 1 Ch. 578; 70 L.J.Ch. 263; 84 L.T. 48; 30 Digest (Repl.) 541, *1754*.

(4) *Frank Warr & Co., Ltd.* v. *L.C.C.*, [1904] 1 K.B. 713; 73 L.J.K.B. 362; 90 L.T. 368; 68 J.P. 335; 52 W.R. 405; 20 T.L.R. 346; 2 L.G.R. 723, C.A.; 30 Digest (Repl.) 534, *1702*.

(5) *Metropolitan Water Board* v. *Dick Kerr & Co.*, [1918] A.C. 119; 87 L.J.K.B. 370; 117 L.T. 766; 82 J.P. 61; 34 T.L.R. 113; 62 Sol. Jo. 102; 16 L.G.R. 1, H.L.; 12 Digest (Repl.) 456, *3410*.

(6) *Re Shipton, Anderson & Co., and Harrison Bros. & Co.*, [1915] 3 K.B. 676; 84 L.J.K.B. 2137; 113 L.T. 1009; 31 T.L.R. 598; 21 Com. Cas. 138, D.C.; 12 Digest (Repl.) 450, *3391*.

(7) *Nickoll and Knight* v. *Ashton, Edridge & Co.*, [1901] 2 K.B. 126; 70 L.J.K.B. 600; 84 L.T. 804; 49 W.R. 513; 17 T.L.R. 467; 9 Asp.M.L.C. 209; 6 Com. Cas. 150, C.A.; 12 Digest (Repl.) 697, *5336*.

(8) *F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Products Co., Ltd.*, [1916] 2 A.C. 397; 85 L.J.K.B. 1389; 115 L.T. 315; 32 T.L.R. 201, 677; 13 Asp.M.L.C. 467; 21 Com. Cas. 299, H.L.; 12 Digest (Repl.) 442, *3361*. A

(9) *Paradine* v. *Jane* (1647), Aleyn, 26; Sty. 47; 82 E.R. 897; 12 Digest (Repl.) 417, *3236*.

Appeal by defendants from an order of BENNETT, J., in an action in which the plaintiffs claimed from the defendants damages for an alleged breach by the defendants of two contracts made between the plaintiffs and the defendants and dated Dec. 31, 1924. B

The facts appear in the judgment of LORD HANWORTH, M.R.

Archer, K.C., and *P. B. Morle* for the defendants.

Alexander Grant, K.C., and *Charles E. Harman* for the plaintiffs. C

LORD HANWORTH, M.R.—This case raises a point of some little interest, but the difficulty is not so much to determine what the law is as to determine the exact principles which should be applied to the facts of the present case.

Under the Manchester Corporation Act, 1891, Manchester Corporation had the powers which are given to local authorities over what may be called temporary or precarious structures. By s. 18 of the Act it is provided: D

> "It shall not be lawful for any person to erect or set up in the city in any place any wooden or other structure or erection of a moveable or temporary character . . . without a licence in writing first had and obtained from the corporation for the erection or setting up of such structure or erection."

In the year 1920 another statute was passed called the Manchester Corporation Act, 1920. That Act contained powers enabling the corporation to take certain portions of their streets for various improvements, one of the improvements which they were going to make, we are told, being an improvement which covered the corner of Peter Street and Cooper Street, where a large hall would be built. By s. 11 (1) of the Act of 1920 it is provided: E

> "Unless otherwise agreed between the corporation and any of the persons who at the date of the passing of this Act are the occupiers of the premises hereinafter mentioned the corporation shall not under the powers of this Act compulsorily acquire the interest of such person and/or require vacant possession of his premises before Oct. 31, 1925, or before the corporation are authorised by Parliament to borrow money for the erection of a building under the powers of Part III (town hall and municipal buildings) of this Act, whichever shall be the later." F G

The defendants were at that time the lessees of the St. Peter's Hotel at the junction of the streets I have mentioned, and s. 11 covered an area which included the space on which the hotel stood.

Pausing there for a moment, let us consider what was the power of the corporation under s. 11. They could not compulsorily acquire the interests of any person in those areas before Oct. 31, 1925, and even then the time might be extended, unless the corporation had, before that time, borrowed the money for the erection of the building under Part III, which enables them to build a town hall and municipal buildings. So that until Oct. 31, 1925, it would seem that the owners and occupiers of the premises in that particular area could rest content, conscious that the corporation could not exercise any compulsory powers against them, and that the corporation could take the premises only by agreement with them. H I

On Dec. 31, 1924, the defendants entered into two agreements, one of which was merely subsidiary to the other, with the plaintiffs, Walton Harvey, Ltd., who are an advertising company with a registered office in London. The defendants agreed to let to the plaintiffs the exclusive right of fixing and exhibiting on the front portion of the defendants' premises, that is St. Peter's Hotel, "an electric sign or signs as shown and outlined in red on the plan annexed hereto." The principal agreement was to remain in force for a period of seven years from Sept. 29, 1924, with the possibility of renewal at the option of the plaintiffs for a further period of five years upon the same terms and conditions. Lastly, I must refer to the fact that the plaintiffs were to be at liberty forthwith, after the signing of the agreement, "to enter upon the said premises for the purpose of fixing and erecting wiring illuminating and showing the said electric sign." Having regard to the cases to which our attention has been called (*Wilson* v. *Tavener* (3); *Frank Warr & Co., Ltd.* v. *L.C.C.* (4)), I think it may be said that upon the true interpretation of that agreement it did not give the plaintiffs an interest in land or in the premises occupied by the defendants. Taking the agreement as a whole, it was, to use the words of COLLINS, M.R., in *Frank Warr & Co.* v. *L.C.C.* (4) ([1904] 1 K.B. at p. 720), which are equally applicable to this case, merely one to provide "for the exercise of privileges by the plaintiffs by way of licence, and did not create an interest in land."

When that agreement had been made the hoarding was put up on which the sign was to be fixed. It was to be fixed with good attachments to parts of the roof, and there was to be a right on the part of the plaintiffs to go up and attend to it. They made use of their rights under the agreement, but to enable them to do so they made an application for a licence to be granted under the Act of 1891. That licence was, in fact, granted on May 6, 1925, that is, four months after the agreement. It appears to me quite clear that a licence was necessary for the purpose. We are told that this hoarding was put up at a cost of £275, and it appears to me that such a hoarding would certainly fall within the meaning of the words of s. 18 of the Act of 1891, being a structure or erection of a moveable or temporary character. On Dec. 18, 1925, a notice to treat in respect of their interest in the premises was served upon the defendants by the corporation. The fact that there was this notice to treat indicates, I think, quite clearly to anyone who is familiar with the procedure under which these private Acts are obtained that there must have been an original notice served upon the defendants at the time when the Bill, which afterwards became the Act of 1920, was deposited. The defendants would be persons who would have had a right either to oppose the Bill or ask for special treatment under the Bill. I think the learned judge was abundantly justified in holding that the defendants must be deemed to have had knowledge of the terms of the Act of 1920 and particularly of s. 11.

On Dec. 18, as I have said, notice to treat was served and the defendants were required to tabulate their claim in respect of their occupation of the premises, and they did so. In that claim they included a sum of £450 which was a sum measured by four-and-a-half years' purchase of rent payable in respect of the sign, namely, £100 per year. That fact, however, is one which can be regarded as completely irrelevant to any question we have to deal with at the present time. What rights the defendants had against the corporation, what sums they were paid by the corporation in respect of those rights, do not in any way affect or alter the rights which the plaintiffs might have against the defendants. In January, 1926, the representatives of the parties on either side came to an agreement that the compensation to be paid to the defendants by the corporation was to be £3,850, and ultimately an agreement was entered into dated April 19, 1928, whereby the defendants agreed to sell their leasehold interest at that figure and to complete on a three months' notice to do so. Matters went on as they had done previously and the plaintiffs paid rent for this hoarding down to Dec. 25, 1928. On Mar. 26, 1929, notice was given by the corporation withdrawing the licence for the hoarding. It was a three months' notice and, therefore, it would be complete by June 25, 1929. On Mar. 12 the corporation gave notice to complete the purchase, and that, therefore, would have to be completed on June 12.

On June 21, 1929, the writ in this action was issued. That writ set out the terms of the agreements which I have mentioned, and referred to the fact that a notice had been given to the plaintiffs to remove the electric sign and

> "as a result of such notice the plaintiffs have been, since July 9, 1929, unable to enter into any agreement for the letting of the said electric sign and have thereby suffered and are suffering and will continue to suffer damage for which the defendants are responsible." A

The date is a curious one. It is subsequent to the issue of the writ, and, therefore, obviously refers to some matters which have taken place right down to July 9, under the rule whereby damages can be estimated down to a later date than the issue of the writ. B But it is not quite easy to see why July 9 should be fixed. To complete the facts, on Sept. 25 there was a surrender made on terms by the defendants to the corporation. The corporation took possession, and in January, 1930, they removed this hoarding and the electric sign upon it. BENNETT, J., held in favour of the plaintiffs and ordered an inquiry as to what damages they had suffered. The defendants attempted to excuse themselves by saying that what had happened, and C their difficulty in carrying out the terms of the agreement of Dec. 31, 1924, arose from circumstances which had supervened and for which they were not responsible. They contended that it was the corporation who had withdrawn the licence, that it was the corporation who had taken possession of the defendants' premises under compulsory powers, and that the failure of the defendants to carry out the agreement was wholly due to this compulsion exercised by persons who had a higher— D namely, a statutory—authority over them. The learned judge has held, and I agree with him, that the hotel was taken by compulsory powers. It was not possible for the defendants to dispute the right to give them notice to treat and all that followed, whether it was carried out by an actual fight or by agreement between surveyors, are the working out of compulsory powers. The learned judge also held that the agreement did not confer any proprietary right upon the plaintiffs, but was E in the nature of a mere licence. I also agree with him upon that. But we still have to deal with the question whether or not this is one of those cases in which one can apply the principle laid down in *Baily* v. *De Crespigny* (1), that is to say, that where some higher authority has supervened and has prevented the completion of the terms of an agreement, failure to perform the agreement is not to be imputed to one of the parties, but is due to what has made performance impossible, with the F result that the defaulting party is not to be responsible in damages to the other party. I agree that *Baily* v. *De Crespigny* (1) is to be taken as having a rather wider signification than it was interpreted as having by BENNETT, J. I think the passage he cited from *Metropolitan Water Board* v. *Dick Kerr & Co.* (5) and the speech of LORD DUNEDIN make that quite plain. In my opinion, *Baily* v. *De Crespigny* (1) is to be taken not merely as a case of a statutory assignee being forced G upon a person who had entered into a covenant against assignment, but as an illustration of something being taken away from the control of a party to the contract which has interfered with his carrying out the terms of his contract.

Now comes the question whether or not we should treat this case as one in which the parties had contracted on the implication on both sides that there should be a H continued existence of the St. Peter's Hotel whereon this sign was to be. LORD READING, C.J., in *Re Shipton, Anderson & Co., and Harrison Bros. & Co.* (6) ([1915] 3 K.B. at p. 682) put the case quite clearly in this way. He cites these words from the judgment of BLACKBURN, J., in *Taylor* v. *Caldwell* (2) (3 B. & S. at p. 833):

> " 'Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time I for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

LORD READING adds:

> "It is to be observed that in that rule stress is laid upon the perishing before the breach of the thing which is the foundation of the contract,"

and goes on to refer to a passage in the judgment of SMITH, M.R., in *Nickoll and Knight* v. *Ashton, Edridge & Co.* (7) ([1901] 2 K.B. at p. 132) in these words:

> "The true construction of the contract is that it is not a positive and absolute contract as contended for by the plaintiffs, but is a contract subject to the condition that the parties shall be excused if, before breach, performance becomes impossible by reason of the particular specified thing ceasing to exist without the defendants' default."

I will refer to one other case, and that is *F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.* (8). I agree respectfully with what LORD DUNEDIN said in *Metropolitan Water Board* v. *Dick Kerr & Co.* (5) ([1918] A.C. at p. 127) that the principles which are referred to in the *Tamplin Case* (8) by all the judges are the same, the difference being in their application of them to the particular facts which were before them. LORD HALDANE, although he made a dissenting speech, may be taken to have declared the principle which all the noble Lords were endeavouring to apply ([1916] 2 A.C. at p. 406):

> "When people enter into a contract which is dependent for the possibility of its performance on the continued availability of a specific thing, and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is primâ facie regarded as dissolved. The contingency which has arisen is treated, in the absence of a contrary intention made plain, as being one about which no bargain at all was made."

Is it possible to apply that principle to the present case? As I have said, and the learned judge has found, it would appear that the defendants were aware of the fact that their premises might be taken under the statutory powers in the Act of 1920, s. 11. The plaintiffs had no such knowledge nor can knowledge be imputed to them. In those circumstances there seems to be a difficulty in saying that the parties impliedly agreed that there should be a continued existence of the St. Peter's Hotel as the basis of their contract, for the defendants must have known that while they had a sure and certain continuance of their rights until Oct. 31, 1925 (that is for at least some ten months beyond the date when the agreement was made), there was some risk after that date. They could have provided against that risk, but they did not. The court is not very ready to imply these subsidiary additions to an agreement made between parties and, in the absence of such implication, the law as stated in *Paradine* v. *Jane* (9) still applies. The parties must, if they desire to be safeguarded against subsequent contingencies, provide for them in their agreement. If they do not do so, but have entered a contract in terms which are absolute, those terms must be carried out unless in the somewhat rare case where it can be found that there was an implied understanding on both sides that the basis of the contract was the continued existence of an essential matter to the contract. Having regard to the knowledge on the part of the defendants, the terms of the contract and the fact that the defendants were sure of their possessory rights for a certain time only, it does not seem to the court to be possible to apply the principles illustrated in the case of *Baily* v. *De Crespigny* (1) and the subsequent cases which have been referred to which arose during the war. It would, therefore, seem that the learned judge was right in saying that there must be judgment for the plaintiffs. [His Lordship then dealt with the question of damages and concluded:] For these reasons, the appeal will be dismissed with costs and the matter will take its course upon the inquiry as to damages.

ROMER, L.J.—I agree. The defendants here are relying upon a principle that has been established by numerous authorities and as to which at the present date there can be no doubt whatsoever. I am content to take the statement of the principle from the judgment of HANNEN, J., when delivering the judgment of the

Court of Queen's Bench in *Baily* v. *De Crespigny* (1). What he said was this (L.R. 4 Q.B. at p. 185): A

> "There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility B arises from the act or default of the promissor. But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." C

That being the principle, I myself do not obtain any assistance in deciding this case from a consideration of the various authorities in which the principle has or has not been applied. Each case must depend on its own circumstances.

The circumstances of the present case are that the impossibility of further performance by the defendants of their contract arose from the exercise by the corporation of compulsory powers of purchasing the hotel. D Those powers, however, had been conferred by an Act of 1920, four years before the date on which the plaintiffs and the defendants entered into the contract or contracts in question. I agree with BENNETT, J., and the Master of the Rolls that the defendants must have known of the existence of the Act and, therefore, of those compulsory powers. In those circumstances I find myself quite unable to come to the conclusion that the exercise E of those compulsory powers cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made. It seems to me rather that the exercise of those compulsory powers was an event which might have been anticipated and guarded against in the contract. I would further point out that, if the defendants are right, we have got to imply a term in the contract which would put an end to the lease of seven years on the happening of this particular event; F in other words, we should have to treat the defendants as granting to the plaintiffs a lease of this right of placing the electric sign on the top of the roof for a term of seven years or until the corporation shall exercise their compulsory powers of acquiring the property in question. Supposing we did imply such a term, it is clear the defendants would not have been able to claim from the corporation compensation for the loss of rent during the remainder of the term, G because there would be no remainder of the term to consider. Yet I find, as was mentioned by the Master of the Rolls, that the defendants, when they are claiming compensation from the corporation, claim a sum which did represent the loss to them of rent during the remainder of the term treating that term as an unconditional one. For these reasons, I agree that this appeal should be dismissed with costs.

H

EVE, J.—I have arrived at the same conclusion. The sole object of this action was to recover damages for the alleged breach on the part of the defendants of two agreements of 1924, and the breach assigned was not the compulsory acquisition by the corporation of the premises in question and the putting an end thereby to the easement which the plaintiffs were enjoying over it, but a voluntary agreement entered into, according to the pleader, in or about the month of February, 1929, I for the sale by the defendants to the corporation of the hotel for the purposes of demolition. If that had been established, undoubtedly that would have given a cause of action against the defendants for voluntarily putting an end to the agreement and thereby voluntarily disqualifying themselves from carrying out their contract. But at the trial, when the facts were ascertained, it became quite clear that so far from the defendants having voluntarily disposed of their hotel in February, 1929, the corporation had entered into a contract to purchase it by the compulsory notice given in December, 1925, and, accordingly, the plaintiffs had

A to put the case in this way: Whether it was in fact a voluntary sale which we allege in our statement of claim, or whether it was the compulsory sale brought about by the notice to treat, we say we are entitled to damages. That, I think, is the result of the decision of the learned judge and of the facts as they have been disclosed. Upon that, what is the allegation with regard to damages? The plaintiffs' original case being that there was a voluntary sale in 1929, they then B say that in the next month the corporation, with a view to what it was wanting to do consequent upon the purchase of this property, gave us notice withdrawing the licence, and the effect of that notice was that since July 9 the plaintiffs have been unable to enter into any agreement for the letting of the sign "and have thereby suffered and are suffering and will continue to suffer damages for which the defendants are responsible." One must see what the position was prior to the C date from which the plaintiffs allege that damage has been suffered. It was that the hotel was in course of being demolished. That is to say when the three months expired the corporation were entitled to enter into the premises and they had, in fact, entered in September and ultimately removed this sign, but the only damage which had accrued down to the time the statement of claim was delivered was such damage as had arisen since July 9, 1929, and in taking the inquiry as to damages D the master will, no doubt, have regard to the fact that at that date a considerable arrear of rent was due from the plaintiffs to the defendants, and that at that moment the defendants were not responsible for the fact that the sign was no longer available. The notice which the plaintiffs themselves allege was the cause out of which the damage arose was the notice given by the corporation. Having bought this hotel to pull it down, and having withdrawn the very notice to enable E them to do so, I hardly think the master will believe that the corporation was likely to renew the licence. It seems to me the more one looks at it, the more remote is the possibility of any substantial damage having been sustained by the plaintiffs in this case. I should like to express my regret that as this was an action merely for the purpose of ascertaining damages, the matter was not disposed of at the trial. It is quite true that in many cases in the Chancery Division, where there F are various legal matters to be discussed and where, as a result of that discussion, an inquiry may be directed whether damages have been sustained, an inquiry in chambers may be necessary; but in a common law action for breach of an agreement I should be sorry to think that a learned judge in the Chancery Division is incompetent to assess the damages, and I think it would have saved a lot of expense if that course had been adopted here.

G *Appeal dismissed.*

Solicitors: *Church, Adams, Tatham & Co.*, for *Cobbett, Wheeler & Cobbett*, Manchester; *Stanley B. Worth.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re HARRIS

[CHANCERY DIVISION (Clauson and Luxmoore, JJ.), July 7, 1930]

[Reported [1931] 1 Ch. 138; 99 L.J.Ch. 448; 144 L.T. 232;
[1929] B. & C.R. 211]

Bankruptcy—Execution—Retention of moneys by sheriff—Notice of petition and receiving order—Notice to high bailiff when acting as county court registrar—No notice to high bailiff as such within statutory time—Bankruptcy Act, 1914 (4 *& 5 Geo.* 5, *c.* 59), *s.* 41 (2).

By the Bankruptcy Act, 1914, s. 41 (2), where, under an execution exceeding £20, a debtor's goods are sold or money is paid to avoid sale the sheriff shall deduct his costs and retain the balance for fourteen days, and, if within that time notice is served on him of a bankruptcy petition having been presented and a receiving order is made thereon, he shall pay the balance to the official receiver or the trustee, as the case may be, who shall be entitled to retain it as against the execution creditor. The high bailiff of a county court (under s. 167 of the Act the sheriff for the purposes of s. 41 (2)), who was also registrar, became aware in this latter capacity of the presentation of such a petition.

Held: that this knowledge was a sufficient compliance with the terms of the subsection, and that moneys in his hands as high bailiff were, accordingly, payable to the official receiver.

Notes. By s. 115 (2) of the Companies Act, 1947, the rights conferred by s. 41 (2) of the Bankruptcy Act, 1914, on the official receiver or trustee in bankruptcy may be set aside by the court in favour of the creditor to such extent and on such terms as the court thinks fit.

As to the duties of a sheriff under executions followed by bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 545 et seq.; and for cases see 5 DIGEST 815 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Cases referred to:

(1) *Curtis* v. *Wainbrook Iron Co.* (1884), Cab. & El. 351; 5 Digest 919, *7521*.

(2) *Re Walker, Ex parte Nickoll* (1884), 13 Q.B.D. 469; 1 Morr. 188, D.C.; 4 Digest 105, *941*.

(3) *Lole* v. *Betteridge*, [1898] 1 Q.B. 256; 67 L.J.Q.B. 215; 77 L.T. 548; 46 W.R. 161; 14 T.L.R. 147; 42 Sol. Jo. 133; 5 Mans. 1, C.A.; 5 Digest 817, *6947*.

(4) *Latter* v. *Juckes and Page*, [1927] 1 K.B. 17; 96 L.J.K.B. 137; 136 L.T. 177; 42 T.L.R. 723; 70 Sol. Jo. 905; [1926] B. & C.R. 133, C.A.; Digest Supp.

(5) *Figg* v. *Moore Bros.*, [1894] 2 Q.B. 690; 63 L.J.Q.B. 709; 71 L.T. 232; 10 T.L.R. 490; 1 Mans. 404; 10 R. 549; 5 Digest 926, *7577*.

(6) *Bellyse* v. *M'Ginn*, [1891] 2 Q.B. 227; 65 L.T. 318, D.C.; 5 Digest 818, *6948*.

Appeal from Plymouth County Court sitting in bankruptcy.

On Jan. 11, 1930, the judgment creditors, Shell-Mex, Ltd., obtained a judgment against the bankrupt for some £77. The judgment creditors proceeded to execution, and on Feb. 25 the high bailiff was paid out by being paid the sum of £78 8s. 1d., which was the amount of the judgment, plus costs and certain costs of levying. In those circumstances it became the duty of the high bailiff, under s. 41 (2) of the Bankruptcy Act, 1914, to retain the sum so paid to him, less his costs of execution, for fourteen days, i.e., up to midnight on Mar. 11. The Act provides:

> ". . . if within that time notice is served on [the sheriff] of a bankruptcy petition having been presented by or against the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver."

It appeared that the high bailiff in Plymouth County Court—which office, by s. 167 of the Bankruptcy Act, 1914, was included in that of sheriff for the purposes of the Act—was a Mr. McCrea and that he was also the registrar of the county court.

On Mar. 11 the debtor presented his own petition in Plymouth County Court, and on the same day Mr. McCrea himself made a receiving order. On Mar. 12 the official receiver gave to Mr. McCrea notice of the bankrupt's petition and the receiving order, that being outside the limit of fourteen days ending at midnight on Mar. 11. The learned county court judge, however, held that on Mar. 11 Mr. McCrea, as registrar, but also being high bailiff, had full knowledge that the Bankruptcy Act had become operative so that the money in question had to be paid to the official receiver. The execution creditors appealed.

Tindale Davis for the execution creditors.

Roland Burrows, for the official receiver, referred to *Curtis* v. *Wainbrook Iron Co.* (1); *Re Walker, Ex parte Nickoll* (2); *Lole* v. *Betteridge* (3); *Latter* v. *Juckes and Page* (4).

Tindale Davis, in reply, relied on *Figg* v. *Moore Bros.* (5) and *Bellyse* v. *M'Ginn* (6).

CLAUSON, J. [after stating the facts:] The suggestion is that service under s. 41 (2) involves some kind of formality which was not carried out. I have asked in vain for a definition of exactly what the formality is, and I confess I do not appreciate it. The fact is that the high bailiff knew of the petition and receiving order within the stipulated time, and knew by reason of the communication made to him by the debtor and by reason of something which was effected by the high bailiff himself in his capacity as registrar, namely, the acceptance of the petition and the making of a receiving order. It appears to me that in those circumstances it would be wrong to hold otherwise than as the county court judge has held—that the Bankruptcy Act became fully operative to the knowledge of the high bailiff. Accordingly, apart from authority, I should myself have been prepared to hold that the county court judge came to a correct decision.

But the matter does not rest there. In my view, it would not be right for us sitting in this court to come to any other conclusion, for these reasons. First of all, in *Curtis* v. *Wainbrook Iron Co.* (1), before Grove, J., as long ago as 1884, that learned judge expressed a view, from which there has been no dissent, that the notice which is here spoken of as the notice to be served need not be a notice in writing. Accordingly, verbal notice is enough. Further than that, in *Lole* v. *Betteridge* (3) the section was carefully considered by the Court of Appeal, consisting of Smith, Rigby and Collins, L.JJ., who held that the requirements as to service in the then Bankruptcy Rules did not apply to the notice mentioned in the corresponding section of the Act of 1890—namely, s. 11. Rigby, L.J., used these expressions:

> "The counsel for the execution creditor drew our attention to the fact that s. 11 speaks of notice being 'served' on the sheriff of a bankruptcy petition; but, notwithstanding the use of that expression, I am clearly of opinion that the sheriff is bound under the section to hold the proceeds of the execution for the full period of fourteen days, and cannot justify handing them over to the execution creditor until that period has expired without his receiving notice of a bankruptcy petition."

I understand Rigby, L.J., in that sentence to mean that, although the section speaks of the "service" of a bankruptcy petition, yet, if the sheriff receives notice of a bankruptcy petition, the requirement of a formal service on him of notice of the petition must be taken to have been complied with. I understand the learned lord justice to mean that there is no magic about "service"; the point is that knowledge of the existence of the petition must reach the mind of the sheriff. That is the view of Rigby, L.J. It is, if I may respectfully say so, one from which I see no reason to differ. But it makes it impossible, in my view, for us to accede to the argument of counsel for the execution creditors that in this case the requirements of the section have not been complied with.

I should add this. Some observations have been addressed to us as to the difficulties which arise from the fact of one gentleman holding both the office of high bailiff and the office of registrar. Speaking for myself, I can well appreciate that A administrative difficulties may occur, the law being as it is, but with those administrative difficulties we have not to deal. The only question with which we have to deal is whether before midnight on Mar. 11 such notice of the petition which was presented on the 11th, as was required, came to the knowledge of Mr. McCrea, the high bailiff. In my view, it quite plainly did, and the county court judge was right in so finding, and, if my learned brother concurs with me, the B result is that this appeal must be dismissed with costs.

LUXMOORE, J.—I concur.

Solicitors: *W. H. Court & Son*, for *Square, Geake & Windeatt*, Plymouth; *Solicitor to the Board of Trade.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*] C

D

Re SHAWDON ESTATES SETTLEMENT

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), March 11, 1930]

[Reported [1930] 2 Ch. 1; 99 L.J.Ch. 189; 142 L.T. 566; 74 Sol. Jo. 215; [1929] B. & C.R. 152] E

Settled Land—Assurance of life interest to remainderman—Intent to extinguish interest—Intent of assignee of tenant for life—Trustee in bankruptcy—Settled Land Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 18), *s.* 105 (1).

By s. 105 (1) of the Settled Land Act, 1925: "Where the estate or interest of F a tenant for life under the settlement has been or is absolutely assured with intent to extinguish the same . . . to the person next entitled in remainder or reversion," the statutory powers of the tenant for life in reference to the property affected by the assurance shall cease to be exercised by him and will become exercisable as if he were dead.

The intent mentioned in the subsection need not be that of the tenant for life. G It can be that of an assignee—e.g., the trustee in bankruptcy—of the tenant for life, even though the tenant for life has power to charge certain portions in favour of his children, or to appoint a jointure in favour of a wife, to appoint trustees, or act as protector of the settlement.

Notes. As to the effect of a surrender of the life estate to the next remainderman, see 29 HALSBURY'S LAWS (2nd Edn.) 694, 695; and for Settled Land Act, 1925, see H 23 HALSBURY'S STATUTES (2nd Edn.) 12.

Appeal from an order of EVE, J.

By an originating summons, the applicant, William John Hargrave Pawson, claiming in the events which had happened to be tenant for life within the meaning of the Settled Land Act, 1925, under the trusts of the settlement in the matter of which the summons was intituled, applied for an order that the freehold properties I specified in the several parts of the schedule annexed to the summons, and all other (if any) the premises capable of being vested by such order, which were by any means subject to the trusts of the settlement might vest in the applicant for all the estate and interest therein of the respondent, William Hargrave Pawson, the applicant's father, upon the trusts and subject to the powers and provisions upon and subject to which under the settlement or otherwise the same ought to be held from time to time, but subject as to certain parts thereof to a legal mortgage of April 17, 1928, more particularly referred to in the summons. The settlement, A which was dated Jan. 27, 1902, was made on the occasion of the marriage of the respondent, William Hargrave Pawson, with Violet Margaret Gaskell, and the property thereby settled was limited after such marriage to the use of the respondent during his life with remainder to uses for securing a jointure rentcharge to Violet Margaret Gaskell (which failed by reason of her death in 1922) and subject thereto to the trustees thereof for a term of 1,000 years for securing portions for the B younger children of the marriage and subject to the said term to the use of the first and other sons of the marriage successively, according to seniority in tail male with divers remainders over, and the trustees thereof were thereby appointed to be trustees for the purposes of the Settled Land Acts, 1882 to 1890. The applicant was the eldest son of the marriage, and was born on Dec. 6, 1902. His father was adjudicated a bankrupt on Nov. 7, 1907, and Arthur Charles Bourner was duly C appointed the trustee of his estate and effects. By a vesting deed dated Nov. 1, 1926, and made between the respondent, John Jarvis Pawson, and George Kershaw, the then trustees of the settlement, of the one part, and the respondent, William Hargrave Pawson, of the other part, the said trustees declared that all the property remaining subject to the limitations of the settlement was vested in the said William Hargrave Pawson in fee simple, that he should stand possessed thereof D upon the trusts and subject to the powers and provisions upon and subject to which the same ought to be held from time to time, that the said John Jarvis Pawson and George Kershaw were the trustees of the settlement for the purposes of the Settled Land Act, 1925, and that additional or larger powers were conferred by the settlement in relation to the settled property, and by virtue of the Settled Land Act, 1925, operated and were exercisable as if conferred by that Act on a E tenant for life. In 1929 the applicant agreed with the trustee in bankruptcy to purchase the life estate in possession of the bankrupt in the settled property, subject to the several incumbrances thereon created by the bankrupt, for the sum or price of £4,000, and by a conveyance, dated Mar. 21, 1929, and made between Arthur Charles Bourner, of the first part, John Jarvis Pawson, and George Kershaw, of the second part, and the applicant, of the third part, the said A. C. Bourner as F trustee in consideration of the sum of £4,000 then paid to him by the applicant, conveyed to the applicant all the settled property for the residue of the life of the respondent William Hargrave Pawson, with intent to extinguish the life estate therein of the respondent and so as to vest in the applicant the statutory powers of the respondent under s. 105 of the Settled Land Act, 1925, but subject and without prejudice to the various mortgages specified in the second schedule thereto, G to any other incumbrances affecting the life estate and to the rights to which any incumbrancer would have been entitled if the powers conferred by the Settled Land Act, 1925, as amended, had remained exercisable by the respondent.

Section 105 (1), as amended by the Law of Property (Amendment) Act, 1925, s. 7, Sched., is in these terms:

> "Where the estate or interest of a tenant for life under the settlement has H been or is absolutely assured with intent to extinguish the same, either before or after the commencement of this Act, to the person next entitled in remainder or reversion under the settlement, then the statutory powers of the tenant for life under this Act shall, in reference to the property affected by the assurance . . . cease to be exercisable by him, and the statutory powers shall thenceforth become exercisable as if he were dead, but without prejudice to any incum- I brance affecting the estate or interest assured, and to the rights to which any incumbrancer would have been entitled if those powers had remained exercisable by the tenant for life.' '

By sub-s. 2:

> "In this section 'assurance' means any surrender, conveyance, assignment, or appointment under a power (whether vested in any person solely, or jointly in two or more persons) which operates in equity to extinguish the estate or interest of the tenant for life, and 'assured' has a corresponding meaning."

Eve, J., in giving judgment, said: I gather that the respondent takes the view that the operation of s. 105 is limited to cases where the intent to extinguish the estate is the intent of the life tenant and that the section does not apply when the assurance is an assignee, such as a trustee in bankruptcy, but I cannot read the section as so restricted. The wording is quite general and it is difficult to detect any limitation affecting the assignor. The assignee must be the person next entitled in remainder or reversion under the settlement, but the assignor, the individual entitled to express the intent, may be anyone in whom the life estate is vested. The particular assignee must in most cases be the purchaser most likely to give the best price for the interest in that the assurance can in his case include the statutory powers, and I cannot see any sufficient grounds for holding that the trustee in bankruptcy cannot avail himself of the section. In my opinion, therefore, the applicant is entitled to the vesting order he asks for.

The respondent, the tenant for life, appealed.

W. F. Swords, K.C., and *A. J. Belsham* for the tenant for life.
Sir Thomas Hughes, K.C., and *Charles Church* for the applicant.
H. S. G. Buckmaster for the trustee in bankruptcy.
Wynn Parry for the trustees.

LORD HANWORTH, M.R.—This is an appeal from a judgment of Eve, J., upon an originating summons. The facts are fully stated in the judgment of Eve, J. It is necessary, however, to state some facts quite shortly for the purpose of making clear the point which has been taken on the appeal.

On the occasion of his marriage, which took place in 1902, William Hargrave Pawson executed a settlement and under the settlement he became tenant for life. The applicant in this case, William John Hargrave Pawson, is the tenant in tail in remainder. Unfortunately, the father became bankrupt in 1907, and by a conveyance on Mar. 21, 1929, made between the trustee in bankruptcy and the present applicant—that is, William John Hargrave Pawson—the trustee in bankruptcy conveyed to William John Hargrave Pawson all the settled property for the residue of the life of William Hargrave Pawson with intent to extinguish the life estate therein of William Hargrave Pawson and so as to vest in the applicant, William John Hargrave Pawson, the statutory powers under s. 105 of the Settled Land Act, 1925. A contest arose between the applicant and his father and the summons was taken out to have it declared that under and by virtue of the conveyance of Mar. 21, 1929, the trustee had vested in the applicant all the estate and interest of William Hargrave Pawson in the premises which were conveyed by the conveyance. The dispute was whether or not that conveyance was effective to displace the father and to put the son in his place for the residue of the life of the tenant for life, i.e., the father. Eve, J., has held that the contention of the son is right and has made an order in the terms asked for by the summons. From that decision appeal is brought to this court.

I agree with the decision and the reasoning of Eve, J. What is said is that s. 105 does not displace the right of the tenant for life to the extent to which Eve, J.'s judgment allows it. The words of the section are:

> "Where the estate or interest of a tenant for life under the settlement has been or is absolutely assured with intent to extinguish the same, either before or after the commencent of this Act, to the person next entitled in remainder. . . ."

It is said that the intent cannot be expressed by anyone except the tenant for life himself, that no assignee, such as a trustee in bankruptcy, or any other assignee, is capable of expressing the intent, and that without the intent of the tenant for life the conveyance of Mar. 21, 1929, does not have the effect which s. 105 would give it, namely, that all the powers of the tenant for life are no longer to be exercisable by him and that the statutory powers thenceforth become exercisably by his successor as if he were dead. It is said that the personal power of the tenant for life is not excluded by the terms of this section. Eve, J., rightly calls attention to the fact that s. 105 is drawn in wide terms. There are no words in it confining the operation to the tenant for life personally, whereas, as he suggests, it might easily have been done. EVE, J., said in his judgment:

> "Had such been the intention the opening sentence might have been expected to have read somewhat as follows: 'When the tenant for life under the settlement absolutely assures his estate or interest with intent to extinguish the same.' . . ."

That is not the case. The words are wide and open without any sort of restrictive words restricting the operation to the tenant for life personally.

In my view, too, some assistance is obtained from sub-s. (2), for by sub-s. (2) it is provided:

> "In this section 'assurance' means any surrender, conveyance, assignment or appointment under a power which operates in equity to extinguish the estate or interest of the tenant for life."

That is the quality or characteristic of the surrender, conveyance or assignment which is connoted by the word "assurance" or "assured." Where, therefore, one has the words as one has in s. 105: "Where the estate or interest is absolutely assured," that means not merely that it has been conveyed or assigned, but that it has been conveyed or assigned in such a manner as operates in equity to extinguish the estate or interest of the tenant for life. That means, therefore, that in the very term used, "assured," one has a particular quality with which the conveyance is invested, and, that being so, it carries with it the intent to extinguish the same, for the persons who are parties to it must be presumed to have intended the consequences of their act and to have entered into the deed, whether for conveyance or assignment or the like, with the knowledge and intent that it shall have the quality which is attached to it by the operation of the interpretation clause. It may be that where in the deed there are some words to the negative intent, some other effect will be produced. Counsel for the tenant for life has asked us to limit our judgment to the point before us, and I am not at all reluctant to do so. I, therefore, do not intend to say more except that for reasons which I have ventured to add myself, I find myself in accord with the reasoning and decision of EVE, J., as pronounced in his judgment.

LAWRENCE, L.J.—I agree. In my judgment, the construction placed by EVE, J., on s. 105 of the Settled Land Act, 1925, is plainly right. There is nothing in the section to confine it to the case of an assurance by the tenant for life himself or to make it inapplicable to an assurance by an assignee of a tenant for life. It is clear from the provisions of ss. 104 and 107 that the tenant for life is incapable of assigning or releasing his powers under the Act, in relation to the exercise of which he is in the position of a trustee for all parties interested under the settlement. The fact that an assignee of the tenant for life is not invested with those powers, however, seems to me to be wholly immaterial in determining whether there has been an assurance operating to extinguish the estate or interest of the tenant for life within the meaning of s. 105. By virtue of that section whenever the estate or interest of the tenant for life in the settled land is assured to the person next in remainder under the settlement so as to extinguish that estate or interest, then the powers of a tenant for life under the Act cease to be exercisable by him and become exercisable as if he were dead. It is the extinguishment of the estate or interest of the tenant for life which brings about the cesser of his powers. Where there has been an assignment (by operation of law or otherwise) of the whole estate or interest of the tenant for life, the extinguishment of that estate or interest can be accomplished by an assurance by the assignee just as effectually as it could have been accomplished by an assurance by the tenant for life himself had there been no assignment of his estate or interest.

ROMER, L.J.—I agree. The first question, I think, that we have to determine is whether the estate or interest of the tenant for life under the settlement has been in this case assigned with intent to extinguish the same. I desire to dissent emphatically from the suggestion that a power of the tenant for life—not qua tenant for life necessarily, but of a settlor—to charge certain portions in favour of his children or to appoint a jointure in favour of a wife, his power to appoint new trustees, his power to act as protector of the settlement, form any part of his estate or interest under the settlement. The only reason why it is said in this case that the estate or interest of the tenant for life has not passed to the person next entitled in remainder is that he possessed such powers as I have mentioned. As was pointed out in the argument, if the contention be well founded, it is difficult to think of a case in which a tenant for life could assign his estate or interest under the settlement to a person next entitled in remainder so as to effect a merger.

The next question is whether the estate or interest has been assigned to the person next entitled in remainder with intent to merge the same within the meaning of s. 105. It is said that it has not, because the intent referred to in that section must be an intent, not of the assignor, but of the tenant for life himself. There is nothing whatsoever in the section to indicate that the intent must be the intent of somebody other than the assignor; and, unless there be some principle of construction by which we are bound to assume that the legislature never intends what it says, I cannot see how I can give effect to that argument. It was said: "If you look through the Acts you will find that the legislature has taken careful steps to preserve to the tenant for life, whatever he does or whatever he suffers, the powers of the Act." I do not take that view. One looks at the sections of the Act to which reference has been made and one finds very careful provision made by the legislature that the tenant for life shall not hand over to strangers under the settlement the carrying into effect of the powers given to him as a tenant for life; but one finds in the very sections to which our attention has been called provision made by the legislature for the exercise of those powers by people, other than the tenant for life, who are interested themselves under the settlement. Take s. 19, which is the first one, sub-s. (4), to which our attention has been called. That provides as follows:

> "A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent, and notwithstanding any assignment by operation of law or otherwise of his estate or interest under the settlement, whether before or after it came into possession other than an assurance which extinguishes that estate or interest."

Observe the last sentence. It is interesting to note that in that section no reference is made to intent, and that leads me to suppose—as, indeed, I think I should have supposed anyhow—that the reference to intent in s. 105 is inserted for the purpose of making it clear that where an intent is expressed that there shall not be a merger, the effect mentioned in sub-s. (4) shall not take place.

The next section to which our attention was called was s. 24 (1). That provides that in certain circumstances the court may make an order vesting the powers of the tenant for life in the trustees of the settlement. Finally, we come to this very section we are to deal with, s. 105, which so far as I understand provides that where the interest of the tenant for life has ceased by reason of it having become merged in the estate or interest of the person next entitled under the settlement, then the powers of the tenant for life shall cease. It seems to me that the construction Eve, J., has put upon the section is precisely in accordance with what has been called the spirit of the Act. I agree that this appeal should be dismissed with the usual consequences.

Appeal dismissed.

Solicitors: *Beachcroft, Hay & Ledward*; *Oliver, Richards & Parker*; *Mawby & Barrie.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

A

BOMZE *v.* BOMZE

[Chancery Division (Maugham, J.), October 23, 24, 29, November 11, 1930]

[Reported [1931] 1 Ch. 289; 100 L.J.Ch. 45; 144 L.T. 276; 47 T.L.R. 38]

B

Undue Influence—Payment by young woman to fiancé—No independent advice.

By an agreement dated May 6, 1929, and made between the defendant and the female plaintiff, which recited that a marriage between the parties was intended to be solemnised, it was agreed that the female plaintiff should deposit £4,000 at a bank in the joint names of the parties to repay a mortgage on C premises then occupied by the defendant and to purchase a medical practice for him. Before the marriage took place £1,000 was withdrawn for the purchase of the practice and £2,000 to pay off the defendant's overdraft at a bank which was secured by a charge. With regard to the £1,000 the brother of the female plaintiff, who, their parents being dead, had made the arrangements for the marriage and provided the £4,000 dowry, knew that the sum was to be applied D in the purchase of the practice, but he knew nothing of the withdrawal of the £2,000 and its payment to the bank without a transfer of the charge to the female plaintiff. The parties were married on June 16, 1929, but separated on Sept. 27. In an action by the female plaintiff and her brother to recover the £4,000 or such part of it as to the court seemed just,

Held: there was a great difference between gifts or dispositions from a wife E to a husband and those from a young woman engaged to be married and made by her to her intended husband; in the former case the relation was not one of those to whom the doctrine of *Huguenin* v. *Baseley* (1) (1807), 14 Ves. 273, applied, and the burden of proving undue influence lay on those who alleged it, but in the latter case the young woman in general reposed the greatest confidence in her future husband and would sign almost anything he put before F her, and the doctrine in *Huguenin* v. *Baseley* (1) applied to such a relationship; the female plaintiff had not been advised by an independent adviser regarding the withdrawal of the £2,000; and the plaintiffs were entitled to judgment for half that sum.

Notes. As to undue influence, see 17 Halsbury's Laws (3rd Edn.) 672 et seq.; and for cases, see 12 Digest (Repl.) 110 et seq.

G Cases referred to:

(1) *Huguenin* v. *Baseley* (1807), 14 Ves. 273; 33 E.R. 526, L.C.; 12 Digest (Repl.) 111, *657*.

(2) *Bank of Montreal* v. *Stuart*, [1911] A.C. 120; 80 L.J.P.C. 75; 103 L.T. 641; 27 T.L.R. 117, P.C.; 27 Digest (Repl.) 158, *1151*.

(3) *Howes* v. *Bishop*, [1909] 2 K.B. 390; 78 L.J.K.B. 796; 100 L.T. 826; 25 H T.L.R. 533, C.A.; 27 Digest (Repl.) 156, *1136*.

(4) *Nedby* v. *Nedby* (1852), 5 De G. & Sm. 377; 21 L.J.Ch. 446; 19 L.T.O.S. 294; 64 E.R. 1161; 27 Digest (Repl.) 157, *1138*.

(5) *Barron* v. *Willis*, [1899] 2 Ch. 578; 68 L.J.Ch. 604; 81 L.T. 321; 48 W.R. 26; 15 T.L.R. 469; 43 Sol. Jo. 707; reversed on other grounds, [1900] 2 Ch. 121; 68 L.J.Ch. 532; 82 L.T. 729; 48 W.R. 579; 16 T.L.R. 371; 44 I Sol. Jo. 442, C.A.; affirmed sub nom. *Willis* v. *Barron*, [1902] A.C. 271; 71 L.J.Ch. 609; 86 L.T. 805; 18 T.L.R. 602, H.L.; 27 Digest (Repl.) 156, *1134*.

(6) *Turnbull & Co.* v. *Duval*, [1902] A.C. 429; 71 L.J.P.C. 84; 87 L.T. 154; 18 T.L.R. 521, P.C.; 27 Digest (Repl.) 157, *1142*.

(7) *Caton* v. *Rideout* (1849), 1 Mac. & G. 599; 2 H. & Tw. 33; 15 L.T.O.S. 497; 41 E.R. 1397, L.C.; 27 Digest (Repl.) 160, *1167*.

(8) *Cobbett* v. *Brock* (1855), 20 Beav. 524; 52 E.R. 706; 12 Digest (Repl.) 120, *712*.

(9) *Lovesy* v. *Smith* (1880), 15 Ch.D. 655; 49 L.J.Ch. 809; 43 L.T. 240; 28 W.R. 979; 12 Digest (Repl.) 120, *711*. A

(10) *Page* v. *Horne* (1848), 11 Beav. 227; 17 L.J.Ch. 200; 11 L.T.O.S. 121; 12 Jur. 340; 50 E.R. 804; 12 Digest (Repl.) 120, *710*.

Action by the plaintiffs, Fanny Bomze, and her brother, Alfred Manuel Lederman, against the husband of the first plaintiff, Dr. Marks Bomze, to recover a sum of £4,000, or some part of that sum, provided by Alfred Lederman as a dowry for his sister, upon her marriage to Dr. Bomze. B

In April, 1929, the first plaintiff, then Fanny Lederman, was aged twenty-seven and was living with her sister, Mrs. Sherman. Her father and mother were dead, her father having died intestate, leaving a very small amount of property, and her brother, Alfred Lederman considered that it fell to him to make arrangements for her marriage and to provide a dowry. A matrimonial agent or broker approached Alfred Lederman on behalf of Dr. Bomze and inquired what Miss Lederman's dowry would be, and he was informed that it would be £4,000. In due course Dr. Bomze and Miss Lederman were introduced to each other, and on May 5, 1929, he proposed marriage to her and she accepted him. On the following day the parties entered into the following contract: C

D

> "Agreement made the sixth day of May, 1929, between Marks Bomze of 111, Cannon Street Road, London, E.1, medical practitioner (hereinafter called 'the husband') of the one part and Fanny Lederman of 35, St. John's Wood Road, London, N.W., spinster (hereinafter called 'the wife'), of the other part whereas a marriage has been agreed upon and is intended to be solemnised on July 18 between the husband and the wife and it has been agreed that the wife shall deposit the sum of £4,000 at Lloyds Bank, 210, Commercial Road, London, E.1, in the joint names of the husband and wife to be dealt with as hereinafter appearing. Now it is hereby agreed as follows: (1) The said sum of £4,000, shall after the solemnisation of the said marriage be re-deposited at the said bank on current account in the names of the husband and wife. (2) Operations on the said current account shall take place by cheques drawn by both the husband and the wife. (3) The said sum of £4,000 is intended to be applied as follows: (a) To repay an amount now secured by mortgage over premises occupied by the husband as a residence and surgery at his above-mentioned address. (b) To purchase a medical practice for the husband. (4) If the said marriage be not solemnised on or before Dec. 31, 1929, the said sum of £4,000 shall be repaid to the wife freed and discharged from all trusts. In witness whereof the said parties to these presents have hereunto set their hands the day and year first before written." E F G

Dr. Bomze's position at the date when he proposed marriage with Miss Lederman was by no means satisfactory. He owed Lloyds Bank a sum of £2,000 which he had borrowed in 1927 and had not been able to repay. He also stated that he owed £1,600 to his father, who had provided that sum to set him up in business as a doctor. His income as a doctor amounted to the sum of £8 a week gross. His expenses, as he alleged, exceeded that sum, and he was receiving at the time further assistance from his family. To provide for the expenses connected with the marriage, and of the honeymoon, it was necessary for Dr. Bomze to obtain part of the £4,000 on deposit in his name, and in that of Miss Lederman. Further, he desired before the marriage to conclude a bargain in relation to the proposed purchase of a practice which he had been negotiating with a Dr. Napthali Berman, at the sum of £1,000. As a result, on May 15, the sum of £1,000 was drawn out of the deposit account by Dr. Bomze and Miss Lederman, and was paid to Dr. Berman. On the same day Dr. Bomze entered into a provisional agreement with Dr. Berman. Both the female plaintiff and her brother knew that that £1,000 was so to be applied. On June 5 a further sum of £2,350 was withdrawn. MAUGHAM, J., found that Mr. Alfred Lederman did not know that Dr. Bomze owed £2,000 to his bank, secured by mortgage or charge, and his Lordship expressed the opinion that H I if Mr. Lederman, as a business man, had known that fact, and had been asked to assent to so large a charge, or even a lesser charge, being paid off before the marriage took place, it was almost certain that he would have proposed that the mortgage or charge should be transferred to his sister. Miss Lederman, however, went with Dr. Bomze to the bank on June 5, and signed a receipt for £2,350, by which she was bound. The marriage took place on June 16, 1929, having been expedited by a month for the reason that Mr. Alfred Lederman thought that he would have to go abroad again on business before the date originally fixed. In the meantime, Dr. Bomze had paid £2,000 to the bank, £100 to the marriage broker, £126 for the engagement ring, £109 to Cook's for the expenses of the honeymoon tour, and various sums for synagogue fees and other expenses of the wedding. On their return, Dr. Bomze again wanted money, and he obtained the signature of his wife to an authority to withdraw from the deposit £150 on Aug. 2. She knew, however, that this was for current expenses. The marriage was not a happy one, and there were numerous quarrels, but as late as Sept. 25 it seemed likely that things would settle down, for on that date Mrs. Bomze joined with her husband in signing an authority to the bank for the withdrawal from the deposit account of a sum of £350. The greater part of this sum was intended to be applied in the purchase of a motor car which Dr. Bomze thought would be useful to him in his practice, and it was so applied. The car would have been used by the wife at times when Dr. Bomze was not wanting it, and, according to him, she chose it. He contended that the car was his, not because it was given to him, but because the remaining balance of the £4,000 became his on marriage. Two days later Mrs. Bomze was, according to the evidence of herself, her sister and her two brothers, turned out of the house by Dr. Bomze. That was denied by Dr. Bomze, but his Lordship found that by Sept. 25 Dr. Bomze had obtained and spent £3,850 out of the £4,000 provided by his wife's brother, and then, in effect, made it impossible for her to remain in the house after Sept. 27, so that her relatives were forced, after an attempted reconciliation, to take her away.

Archer, *K.C.*, and *Danckwerts* for the plaintiffs.

Busse, for the defendant, referred to *Bank of Montreal* v. *Stuart* (2) and *Howes* v. *Bishop* (3).

Cur. adv. vult.

Nov. 11. **MAUGHAM, J.**, read a judgment in which he stated the facts and continued: The legal result of the facts which I have found, after a careful consideration of the evidence, must now be considered; and it is necessary to be on one's guard against the prejudice which the defendant's conduct and present attitude might well inspire. The agreement of May 6 must stand. Counsel for Dr. Bomze strenuously argued that the agreement proved that there was a gift of £4,000 to Dr. Bomze if he married Miss Lederman. In my view, the agreement, as well as the evidence, clearly proves the contrary. After the marriage neither of the spouses could use the money without the consent of the other. It was also contended, as I have said, that the true bargain was that Dr. Bomze was to be given the money without conditions; but I find that this assertion is untrue.

There remain the questions as to the withdrawals from the deposit account. The first withdrawal of £1,000 on May 15 was admittedly for the purpose of buying the practice from Dr. Berman, and it was so used. It is impossible for any part of this sum to be claimed successfully in this action. There remain the three remaining withdrawals, £2,350 on June 5, £150 on Aug. 2, and £350 on Sept. 25. There is, in my opinion, a very great difference between gifts or dispositions from a wife to a husband, and gifts or dispositions of a young woman engaged to be married to an intended husband. In the former case it is well settled that the relation is not one of those to which the doctrine of *Huguenin* v. *Baseley* (1) applies, and that the burden of proving undue influence lies upon those who allege it: *Nedby* v. *Nedby* (4); *Howes* v. *Bishop* (3); *Bank of Montreal* v. *Stuart* (2). But where there is evidence that a husband has taken unfair advantage of his influence over his wife, or her confidence in him, it is not difficult for the wife to establish her title to relief: *Willis* v. *Barron* (5), where the decision of the trial judge was reversed; *Turnbull* v. *Duval* (6); *Bank of Montreal* v. *Stuart* (2). A wife in such a transaction is obviously not in the same position as a stranger, and it cannot be doubted that the necessity of showing that a transaction of the nature of a large gift or conveyance to a husband was a fair and proper one, in a case where the wife has not been separately advised, may without much difficulty be thrown upon the husband or those who claim through him. If a wife living with her husband authorises her income to be paid to her husband, the above remarks have no application, and it is clear that she can never recall such a gift: *Caton* v. *Rideout* (7). A young woman engaged to be married is in a very different position. In most cases she does not interest herself in her future pecuniary position as between herself and her husband. In general, she reposes the greatest confidence in her future husband, otherwise she would not marry him. In many, if not most, cases she would sign almost anything he put before her. In my judgment, the doctrine of *Huguenin* v. *Baseley* (1) applies to such a relationship; and the reasons given in *Howes* v. *Bishop* (3) for not extending the equitable principle to the case of husband and wife have no application. There is authority in favour of my view: *Cobbett* v. *Brock* (8), *Lovesy* v. *Smith* (9), and those cases I think ought to be followed—see also the observations of LORD LANGDALE in *Page* v. *Horne* (10).

I return with these observations to the withdrawal of the sum of £2,350 before the marriage. Dr. Bomze has wholly failed, in my view, to establish that, if this was a gift, it was a proper one, except, perhaps, as to £350 required for expenses of a marriage and a honeymoon. If Miss Lederman had been advised by an independent adviser, I have no doubt that he would have insisted on the charge for £2,000 being transferred to her, or kept alive for her benefit. The transaction was, I think, as between those two parties, "immoderate and irrational," if I may borrow the language used by LORD MACNAGHTEN in delivering the judgment of the Privy Council in *Bank of Montreal* v. *Stuart* (2) ([1911] A.C. at p. 137). Apart from the question of onus, I find that unfair advantage was taken of Miss Lederman, and that she is entitled to relief, at least, as regards £2,000. I accept the view that Mr. Alfred Lederman was told that it was desired to withdraw £350 for the expenses of the marriage, and consented to that being done; but, as I have already said, I am satisfied that he was told nothing about the additional £2,000, which may have been an afterthought on the part of Dr. Bomze. Next, with regard to the £150 withdrawn on Aug. 2, 1929, I think on the whole that Mrs. Bomze cannot recall this sum, which was used, I gather, for the joint expenses of the husband and the wife. Such a transaction is within the principle of *Caton* v. *Rideout* (7). With regard to the sum of £350 withdrawn on Sept. 25, 1929, the case is more doubtful. I am inclined to the view that the motor car bought with this money is the property of the wife, but I cannot so decide in this action. I cannot therefore give Mrs. Bomze relief in regard to this sum.

In my judgment, the result is that the plaintiffs have established their right to succeed as regards the sum of £2,000, part of the £2,350, withdrawn on June 5. This sum ought, strictly, to be paid to the current account of Dr. Bomze and Mrs. Bomze at Lloyds Bank, pursuant to the terms of the agreement of May 6, 1929. It would seem that they have equal rights in respect of that sum, and also in respect of the sum of £150 which remains standing on deposit account in their names. But if there is no chance of the parties coming together again, the sensible course will be to consent to divide these moneys, and in that case there will be judgment for the plaintiffs for £1,000—half the sum of £2,000. As regards costs, the defendant must pay the plaintiffs' costs, except so far as they have been increased by the claim to set aside or rectify the agreement of May 6, 1929. As regards these costs, there will be the usual set-off.

Solicitors: *Denton, Hall & Burgin*; *Lawrence M. Davis.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

A

JONESCO v. BEARD

[House of Lords (Lord Buckmaster, Lord Dunedin, Lord Blanesburgh, Lord Warrington and Lord Tomlin), December 3, 5, 1929, February 13, 1930]

[Reported [1930] A.C. 298; 99 L.J.Ch. 228; 142 L.T. 616]

B *Judgment—Setting aside—Judgment obtained by fraud—Action to set aside—Jurisdiction to order new trial—Procedure on motion.*

The proper method of impeaching a completed judgment on the ground of fraud is by action in which, as in any other action based on fraud, the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires: *Flower* v. *Lloyd* (1) (1879), 10 Ch.D. C 333; *Cole* v. *Langford* (2), [1898] 2 Q.B. 36; *Baker* v. *Wadsworth* (3) (1898), 67 L.J.Q.B. 301. There is, however, jurisdiction in a special case to set aside a judgment for fraud upon a motion for a new trial, as, e.g., in *Hip Foong Hong* v. *Neotia & Co.* (4), [1918] A.C. 888; but if, for any rare and special reason, departure from the established practice is permitted, the necessity for stating the particulars of the fraud and the burden of proof is no whit abated, and all D the strict rules of evidence apply. The affidavits used must, therefore, be examined as on final trial, every particle of hearsay evidence and reference to documents not produced must be excluded, and it must be kept constantly in mind that the rules which permit on interlocutory proceedings hearsay evidence, where the exact source of the information is afforded, have no more application than they would possess were the deponent a witness in the box speaking at E the trial.

Notes. As to setting aside a judgment obtained by fraud, see 22 Halsbury's Laws (3rd Edn.) 790, 791; and as to granting a new trial, see 26 Halsbury's Laws (2nd Edn.) 124 et seq.

Cases referred to:

F (1) *Flower* v. *Lloyd* (1877), 6 Ch.D. 297; 46 L.J.Ch. 838; 37 L.T. 419; 25 W.R. 793, C.A.; subsequent proceedings (1879), 10 Ch.D. 327; 39 L.T. 613, C.A.; Digest Practice 626, *2607*.

(2) *Cole* v. *Langford*, [1898] 2 Q.B. 36; 67 L.J.Q.B. 698; 14 T.L.R. 427; Digest Practice 626, *2608*.

(3) *Baker* v. *Wadsworth* (1898), 67 L.J.Q.B. 301; Digest Practice 627, *2620*.

G (4) *Hip Foong Hong* v. *Neotia & Co.*, [1918] A.C. 888; 87 L.J.P.C. 144; 119 L.T. 588, P.C.; Digest Practice 626, *2610*.

Appeal from an order of the Court of Appeal (Lord Hanworth, M.R., Lawrence and Russell, L.JJ.).

The appellant was the defendant in an action brought against him by the respondent claiming (a) a share in eight named racehorses either as a joint owner with H the plaintiff to the extent of one-quarter or as a partner; (b) a sum of £240, the price of two horses known as Why Worry and Zette, alleged to have been sold and delivered by him to the appellant in October, 1927. By his defence the appellant stated that he employed the respondent as trainer at a remuneration of £2 10s. per week in addition to providing him with board and lodging. He denied that he ever agreed to give the respondent a one-fourth share in the said racehorses. He further I denied that the respondent sold or delivered to him two racehorses named Why Worry and Zette. The appellant further alleged that in September or October, 1927, he paid to the respondent and the respondent accepted, a cheque for the sum of £25 16s. 6d. in settlement of all disputes between the parties and in full satisfaction and discharge of the respondent's claim against the appellant. Maugham, J., who tried the action, having expressed his disbelief in the respondent's story, dismissed the action on July 12, 1928, and judgment was accordingly drawn up, passed and entered. On May 23, 1928, the respondent served a notice of appeal asking (a) for a new trial, but without specifying any grounds, or, alternatively, (b) that

judgment be entered for him in the action. On the hearing before the Court of A
Appeal affidavit evidence was filed in support of the appeal and answered. The
Court of Appeal ordered a new trial of the action on the grounds (i) that the respondent had made out a primâ facie case establishing that the documents which were used at the trial by the appellant were not what they purported to be; (ii) that in the case of one of such documents there was a confession that it was not what it purported to be; (iii) that the trial was tainted with fraud. The defendant B
appealed.

R. P. Croom-Johnson, K.C., and *Harold S. Simmons* for the appellant.

J. E. Singleton, K.C., and *A. E. Woodgate* for the respondent.

The House took time for consideration.

Feb. 13. **LORD BUCKMASTER** read the following opinion of the House.— C
The appellant in this appeal was the defendant in an action brought against him by the respondent claiming (a) a share in eight named racehorses either as a joint owner with the plaintiff to the extent of one-quarter or as a partner; (b) a sum of £240, the price of two horses known as Why Worry and Zette, alleged to have been sold and delivered by him to the appellant in October, 1927. The questions at issue were purely questions of fact and the learned judge who tried the action D
having expressed his disbelief in the respondent's story, dismissed the action with costs. Judgment to that effect, dated July 12, 1928, was duly drawn up, passed and entered. On Aug 23, 1928, the respondent served a notice of appeal asking (a) for a new trial, but without specifying any grounds, or, alternatively, (b) that judgment be entered for him in the action. The Court of Appeal have ordered a new trial and from their judgment this appeal has been brought.

On the hearing before the Court of Appeal affidavit evidence was filed in support E
of the appeal and answered. It is on these affidavits that the new trial was ordered. In part they consisted of statements as to evidence not forthcoming at the trial and in part of allegations of fraud. The former did not form the foundation of the judgment of the Court of Appeal, and, indeed, they could not have done so for there was no sufficient explanation of why the evidence had not been available at the trial and why no application for adjournment had been made. These state- F
ments do not merit examination and may be disregarded. It is the charge of fraud that is the sole reason supporting the judgment now under appeal. Viewed simply as a matter of procedure the course taken was unusual and irregular. It has long been the settled practice of the court that the proper method of impeaching a completed judgment on the ground of fraud is by action in which, as in any other action based on fraud, the particulars of the fraud must be exactly given and the G
allegation established by the strict proof such a charge requires. In *Flower* v. *Lloyd* (1) the Court of Appeal, consisting of JESSEL, M.R., JAMES and BAGALLAY, L.JJ., held there was not jurisdiction in the Court of Appeal to entertain a similar application, saying that you cannot go to your adversary and say: "You have obtained the judgment by fraud and I will have a re-hearing, until that fraud is established." *Flower* v. *Lloyd* (1) (10 Ch.D. at p. 333), *Cole* v. *Langford* (2), and H
Baker v. *Wadsworth* (3) show that the right procedure for that purpose is by action. That, however, there is jurisdiction in special cases to set aside a judgment for fraud on a motion for a new trial may be accepted. *Hip Foong Hong* v. *Neotia & Co.* (4) is one such case, but in the latter it should be remembered that this case had come up to the Privy Council on this procedure and the Board would naturally be unwilling to defeat a case at its last stage on such a ground. If, however, for any I
rare and special reason, departure from the established practice is permitted, the necessity for stating the particulars of the fraud and the burden of proof is no whit abated, and all the strict rules of evidence apply. The affidavits used must, therefore, be examined as on final trial, every particle of hearsay evidence and reference to documents, not produced, must be excluded, and it must be kept constantly in mind that the rules which permit on interlocutory proceedings hearsay evidence, where the exact source of the information is afforded, have no more application than they would possess were the deponent a witness in the box speaking at the

trial. I cannot help thinking that it is because these considerations were not properly placed before and impressed upon the Court of Appeal that they have pronounced a judgment which, in spite of the skill of counsel for the respondent, I can find no ground to support.

To explain the reasons for my opinion some examination of the facts is necessary. The fraud charges related to the claim for the price of the two horses alleged to have been sold to the appellant. Were such fraud properly established I agree with the Court of Appeal in holding that the whole judgment would thereby have been vitiated. Fraud is an insidious disease and if clearly proved to have been used so that it might deceive the court, it spreads to and infects the whole body of the judgment. Assuming, then, that the difficulty of procedure is overcome, was such fraud specified and proved here? The transaction of the sale of the two horses took place in Brussels in September, 1927. The two horses were bought on successive days. The first-named, Zette, was bought at a selling race on Sept. 5, and the second, Why Worry, from a Mr. Verheyleweghen on Sept. 6. The respondent's case was that both these horses were bought by him out of a sum of £240, which he gave to the appellant in English notes, receiving in exchange from him the necessary purchase price in francs. It is the truth of the story that was investigated by Maugham, J., and it need not be again examined. In connection with the transaction, however, four important documents were produced at the trial referred to by the Master of the Rolls as 9, 10, 11, and 12. No. 9 is a document incorrectly printed under date Feb. 5, 1927; it obviously should be Sept. 5, 1927. It purports to be a provisional receipt given from the Central Office (presumably of the Belgian Jockey Club) for 16,190 francs received from the appellant for the filly Zette; it is signed "L. Monnaye." No. 10 purports to be the official receipt for the sale of the filly Zette for 16,240 francs received from the appellant. It is dated Sept. 5, 1927, given at the Central Office of the Jockey Club and signed for them "A. Haublatz." The difference in amount between the two sums is probably due to fees. No. 11 is an invoice for 60 francs purporting to be given to the appellant by one Guillaume de Clerck dated Sept. 6, 1927, for moneys due for veterinary services to the two horses. No. 12 is a receipt for transport of the horses in these words:

> "Reçu de Monsieur Jonesco la somme de mille francs pour voyage Stockel-Anvers Why Worry, Zette.—Bruxelles, le 6 Sept., 1927.—Pourquit, Aylin, 6 Sept., 1927.—Aylin."

Taking these documents in order there is no evidence impugning 9 and 10. Neither Monnaye nor Haublatz give any evidence at all. There is nothing whatever to suggest that these gentlemen are not what they purport to be and nothing to show the receipts are not in proper order. The respondent's statement as to these documents taken from his affidavit sworn on Dec. 5, 1928, is as follows:

> "On July 17, 1928, after the trial of this action I proceeded to Belgium for the purpose of discovering the explanation how the documents produced by the defendant were issued to him. I proceeded to the Belgian Jockey Club at Brussels and saw the secretary. On July 22, 1928, I met by appointment the secretary of the Belgian Jockey Club at the Office Central (who had purported to issue the receipts to the defendant) for the purpose of inspecting the register recording the name of the purchaser of the horse 'Zette' sold to me by public auction. It took some fifteen minutes for this book to be discovered and in the presence of the secretary of the Belgian Jockey Club (Leynen), Mr. De Vreer, the chief reporter of the 'Sport Elevage' and myself, the clerk who made out document No. 10 in the bundle of correspondence produced the entry in the registry for our inspection. The entries in such register recorded the sale of the horse 'Zette' to me and the defendant's name did not appear anywhere."

As evidence on the hearing of an action, the whole of this is inadmissible, but were it otherwise it is remarkable that while the respondent purports to interview the secretary and the clerk who made out the document, by neither of them even

by this hearsay evidence are the documents themselves repudiated or their accuracy A
impugned. As to document 11, Mr. G. de Clerck says he was asked by a Mr. Heath (an important witness for the appellant) in the spring of 1928 for a duplicate in the name of Jonesco of the receipt he had already given to the plaintiff. He says the plaintiff was the only person he knew in the matter and the only person by whom he was paid. Two things are remarkable on this statement—first, that the document is not a receipt at all, and, secondly, the deponent nowhere says it is B
not a true duplicate, but that it has no value and was given "to confirm the payment by the plaintiff"—an astonishing method of confirmation if it was given in the wrong name and was not a receipt but an invoice.

This leaves only document 12, and this is the one on which the whole judgment depends, for it is the fraud believed to have been connected with this that has tainted the whole proceedings. The evidence about it is to be found in all that is C
left of an affidavit by Montague Victor Aylin and his wife filed on Oct. 15, 1928; it is as follows:

> "Sometime during the spring of this year the said William Heath called upon me and my wife at Stockel. He stated he wanted a receipt for the one thousand francs paid me by Jonesco. I asked why he wanted the receipt as it was five months or more after the payment and he stated the reason to D
> be that Beard was trying to get the money from Jonesco twice over."

The original affidavit, from the wreck of which this paragraph remains, contained a large number of other statements, all of which have been absolutely contradicted by the same deponents in a later affidavit. As witnesses I should regard these people as worthless, but supposing the paragraph quoted stands, and it is not E
answered, it proves no more than that a duplicate receipt was required stating in exact and specific terms what is the undoubted truth. That the appellant paid the money is proved by the plaintiff himself. In examination in chief, he says in explanation of how the appellant accounted for the balance of £240 said to have been placed in his hands over and above the price of the horses. "There was the transport of the horses from Brussels to Antwerp that he paid 1,000 francs," and F
again, also in chief, he said that, the man in charge of the van for transporting the horses not knowing the cost of the transport, "I told him that if Mr. Aylin, who was his master, sent the bill to Mr. Jonesco at the Palace Hotel he would pay the bill and it was done." Again, in cross-examination he says in answer to the question that his evidence in chief had rendered wholly unnecessary, "Did he (i.e., the appellant) pay for the transportation?" "He paid the bill." "Which bill?" G
"The bill for 1,000 francs." When the receipt, now said to have been fraudulent, is shown him he says, "That is perfectly right." After that evidence had been given the receipt which had become a useless document is put in, and so far as I can see never referred to again. Nor was there need for such reference since it does no more than furnish evidence of what appears to be the only clear and undisputed fact in the case. It is not surprising therefore that the learned judge who tried H
the case did not even refer to it in his judgment, and when the Master of the Rolls says of the learned judge in reference to his statement that the appellant "paid the cost of the removal of the two horses to England" he was referring to this document as "being one of the contemporary documents which could be examined to see how far they recorded the transactions carried out at the time," and again, I
"He was then looking at the receipt of Sept. 6, as one of the documents made in the ordinary course of duty as between the parties and, therefore, primâ facie entitled to afford evidence of what passed at the time," he is assuming what might have been the case had the payment been challenged and is overlooking the complete uselessness of the document having regard to the plaintiff's own evidence.

To explain how the matter strikes me let me assume A. owes B. money and pays him. He either takes a receipt or he does not. If he does, and loses it, is it a fraud for A. to ask B. to give him a duplicate? If, on the other hand, he does not take a receipt at the time and asks for one later on, is that a fraud? I ask myself who is or who can ever be deceived by the production of a receipt under such circumstances. I cannot help thinking in this case that has happened against which no vigilance can guard. Owing to some slip or omission in the conduct of the argument the actual facts were never before the court. It is clear their attention was not called to the grave irregularity of the procedure, and I feel certain also that it was not directed to the facts I have set out. The judgment cannot stand. The judgment of MAUGHAM, J., must be restored and the respondent must pay the cost here and in the Court of Appeal.

Appeal allowed.

Solicitors: *Wingfields, Halse & Trustram*; *F. W. Perkins.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

NIXON *v.* ATTORNEY-GENERAL

[HOUSE OF LORDS (Lord Dunedin, Lord Warrington, Lord Tomlin and Lord Thankerton), November 28, 1930]

[Reported [1931] A.C. 184; 100 L.J.Ch. 70; 144 L.T. 249; 47 T.L.R. 95]

Pension—Crown servant—Right to enforce claim in law—Superannuation Act, 1859 (22 *Vict., c.* 26), *s.* 2, *as amended by Superannuation Act,* 1909 (9 *Edw.* 7, *c.* 10), *s.* 1 (1) and *s.* 3 (1).

The Superannuation Acts do not confer on the servants of the Crown to whom they apply any rights to superannuation or other payments which are enforceable in a court of law, nor have the Commissioners of the Treasury any power under those Acts to bind the Crown by contract in such a way as to give servants of the Crown a right to superannuation which is enforceable as against the Crown.

Cooper v. *R.* (1) (1880), 14 Ch.D. 311 and *Yorke* v. *R.* (2), [1915] 1 K.B. 852, approved. Dicta in *Re Lupton* (3), [1912] K.B. 107, disapproved.

Notes. As to the right of servants of the Crown to superannuation, see 7 HALSBURY'S LAWS (3rd Edn.) 431 et seq., and cases there cited. For Superannuation Acts, 1834, 1859 and 1909, see 17 HALSBURY'S STATUTES (2nd Edn.), pp. 811, 818 and 854 respectively.

Cases referred to:

(1) *Cooper* v. *R.* (1880), 14 Ch.D. 311; 49 L.J.Ch. 490; 42 L.T. 617; 28 W.R. 611; 39 Digest 308, *839*.

(2) *Yorke* v. *R.*, [1915] 1 K.B. 852; 84 L.J.K.B. 947; 112 L.T. 1135; 31 T.L.R. 220; 39 Digest 308, *837*.

(3) *Re Lupton, Ex parte Official Receiver*, [1912] 1 K.B. 107; 81 L.J.K.B. 177; 105 L.T. 726; 28 T.L.R. 45; 56 Sol. Jo. 205; 19 Mans. 26, C.A.; 5 Digest 929, *7610*.

(4) *Considine* v. *McInerney*, [1916] 2 A.C. 162; 85 L.J.P.C. 168; 114 L.T. 1138; 32 T.L.R. 453; 60 Sol. Jo. 456; 9 B.W.C.C. 390, H.L.; 34 Digest 419, *3399*.

(5) *Wigg* v. *A.-G. for Irish Free State*, [1927] A.C. 674; 96 L.J.P.C. 88; 137 L.T. 460; 43 T.L.R. 457, P.C.; 30 Digest (Repl.) 168, *195*.

(6) *Re Transferred Civil Servants (Ireland) Compensation*, [1929] A.C. 242; sub nom. *Re Irish Civil Servants*, 98 L.J.P.C. 39; 140 L.T. 254; sub nom. *Re Article X of Articles of Agreement for Treaty Between Great Britain and Ireland*, 45 T.L.R. 57, P.C.; Digest Supp.

Appeal from an order of the Court of Appeal (LORD HANWORTH, M.R., LAWRENCE and ROMER, L.JJ.).

The question raised upon this appeal was whether each of the appellants being a retired civil servant of the Crown was entitled as of right to have the amount of his superannuation allowances calculated in the manner prescribed by s. 2 of the Superannuation Act, 1859, as amended by s. 1 and s. 3 (1) of the Superannuation Act, 1909, or whether the amount of such superannuation allowances was entirely in the discretion of the Lords Commissioners of His Majesty's Treasury.

The plaintiffs, who were four retired civil servants, had all of them duly complied with the statutory provisions required to enable them to qualify for a superannuation allowance, and three of them had adopted the provisions of the Superannuation Act, 1909, in pursuance of s. 3 (1), thereof. The Lords of the Treasury, purporting to act in accordance with a Treasury minute dated Mar. 20, 1922, awarded to each of the plaintiffs a superannuation allowance computed on a footing which differed from that upon which such an allowance was computed under s. 2 of the Superannuation Act, 1859, as amended by s. 1 and s. 3 (1) of the Act of 1909. The plaintiffs claimed a declaration that each was entitled to have the amount of his allowance calculated in the manner prescribed by s. 2 of the Act of 1859 as amended by s. 1 and s. 3 (1) of the Act of 1909, and that the Treasury minute of Mar. 20, 1922, so far as it purported to put any limitation on the rights which they so claimed, was of no effect, and that the application of that minute was ultra vires.

The Court of Appeal held, affirming the decision of CLAUSON, J., that, having regard to the Superannuation Acts, 1834 to 1909, which it had been enacted were to be read together, and particularly to s. 30 of the Superannuation Act, 1834, expressly providing that there should exist no absolute right to superannuation allowance, the civil servants had no legal right under the statutes to that allowance; the decisions in *Cooper* v. *R.* (1) and in *Yorke* v. *R.* (2), that the decision of the Commissioners of the Treasury as to superannuation allowances was final, and that no court of law had jurisdiction on any claim under the statutes had received strong approval by the House of Lords and Privy Council respectively in *Considine* v. *McInerney* (4) ([1916] 2 A.C. at p. 170) and *Wigg* v. *A.-G. for the Irish Free State* (5) ([1927] A.C. at p. 678), and in those circumstances it was not open to the court, even if they did disagree with those decisions to reverse them. Dicta of COZENS-HARDY, M.R., and FLETCHER MOULTON, L.J., in *Re Lupton, Ex parte the Official Receiver* (3), that retired civil servants were entitled as of right to superannuation allowances were not well founded and ought not to be followed. The plaintiffs appealed.

Schiller, K.C., and *J. V. Nesbitt* for the plaintiffs.

The Attorney-General (*Sir William Jowitt, K.C.*), *The Solicitor-General* (*Sir Stafford Cripps, K.C.*), *Stafford Crossman* and *Wilfred Lewis* for the Attorney-General.

LORD DUNEDIN.—It is the right of every litigant who has lost his case before the Court of Appeal to bring an appeal to this House, unless there is some statutory reason against it, and one cannot wonder that the gentlemen who have brought this appeal feel strongly upon the matter in which they think that they have been unjustly dealt with in regard to a pension. But although I say that, it does not make any difference as to the quality of the appeal when brought. I confess that I have listened for some hours without discovering that even the ingenuity of counsel could bring forward any argument that was much worth consideration, and they were driven, as they were in duty bound, to the ultimate virtue of persistency.

Your Lordships will best show what you think of the merits of the case by deciding the case at once, and, indeed, if you did not do so, I think you would be forcing yourselves to indulge in a process of tautology, because it is quite impossible to say anything more than has been already said in the very long and very careful judgments of the learned judges of the Court of Appeal in this case.

For myself I think that the matters mooted can be disposed of in a very few sentences, and I propose to do so.

There is, first, the question of how the matter stands upon the statutes. Counsel for the plaintiffs had to admit that in quite the early days there obviously was no actual right in a servant of the King to have a pension, and he really pinned his faith upon s. 2 of the Act of 1859. It is impossible, of course, in that section to find positive words which direct that a pension must be granted; the phrase is, "Subject to the exceptions, the superannuation allowance to be granted after the commencement of this Act to persons who shall have served shall be" so and so. All through the Acts that follow there is a frequent use of the word "entitled," but "entitled," I take it, shows no more than entitled to such as the Acts give him. I cannot do better there than quote the phrase which Lord Buckmaster used in *Considine* v. *McInerney* (4), where, summing up the position, he says ([1916] 2 A.C. at p. 170): "He was entitled to expect an annual allowance," and then he goes on, in the well-known words that have been so often quoted, to say: "This expectation, though it might be relied on with full certainty, was none the less not a legal right, and no claim for it could be enforced by any legal proceedings." But the difficulty under that Act and the following Act does not end there, because, in the first place, there is s. 30 of the Superannuation Act, 1834, which was specially exempted from the repeal which was made of all other sections, and has to be read with all the Acts up to the present date. The only argument that was presented upon that was that s. 30 of the Act of 1834 says there is to be no absolute right. To get out of a provision that you are not to have an absolute right, a positive provision that you are to have a right is an argument which has only to be stated to be rejected.

Even that is not the end of it, because there is a proviso to this very s. 2 of the Superannuation Act, 1859, which is in the forefront of the case, which provides that if any question should arise in any department—that is to say, between any of the departments who engage civil servants—of the public service as to the claim of any person to superannuation, it shall be referred to the Commissioners of the Treasury, whose decision shall be final. Therefore, that obviously excludes the courts of law, because it makes the decision of the Commissioners of the Treasury final. So far upon the statutes.

When we come to authority, it seems to me that this case is most amply covered by authority. I agree that it is not covered by authority in this sense, that there is no actual judgment which binds this House in which the precise point was the necessary and only point in the case. But the amount of learned opinion is quite overwhelming. In the first place, there are two old cases, *Cooper* v. *R.* (1) and *Yorke* v. *R.* (2), where the question was actually raised in absolute terms. No doubt they are not binding on this House, because they were decisions only of judges of first instance, but they were very learned judges, and their judgments have stood for many years without there being a single note of question raised against them in any case. Then, when one comes to more modern times, and to pronouncements in this House, there is the considered judgment of Lord Buckmaster in *Considine* v. *McInerney* (4), where, although the question may be said to be obiter to the case, it certainly was not obiter to the view that Lord Buckmaster took of the case, and accordingly he considered very carefully the series of statutes, and made that pronouncement which I have already quoted. Lord Loreburn gave an opinion to the same effect, although it was not so necessary in his view to consider that matter, but he went out of his way to say so. We have also the opinion of Lord Cave in the Privy Council in *Wigg* v. *A.-G. for the Irish Free State* (5) ([1927] A.C. at p. 678) and of Lord Reading in the Privy Council in the case of *Re Irish Civil Servants* (6) ([1929] A.C. at p. 255). That is really a very great array of authority, against which it would not be very easy to go unless there was some cogent reason for thinking that they were not right, and all that can be put against it is a casual expression, or rather, I think, an incautious expression, made by Cozens-Hardy, M.R., and Fletcher Moulton, L.J., in *Re Lupton, Ex* *parte the Official Receiver* (3), where it was not necessary for them to consider the matter, and the matter was not argued, and I am afraid they slipped into that expression without exactly knowing what the result of it would be. That ends the main point on the general question. A

As to a special position being held by these civil servants on contract, the answer to that is absolutely conclusive. If you find that the statutes gives the Lords of the Treasury a discretion, that is their power, and their only power, and they cannot possibly by contract take themselves out of it. They might by contract possibly involve themselves in personal liability, but they never could involve the Crown because they are not authorised to make any such contract. B

That ends the matter, except for what is called the second question, namely, whether, even if there is any right, nevertheless if the pension is granted it must be granted according to certain scales laid down in the Acts. My opinion upon that is that there is no second question; it is only the first question put in another way, because if you have not a right to sue at all, to say that you are to recover your pension as such, it does seem to me perfectly impossible to say that you have a right to a declaration that your pension must be so and so. Therefore the second question, I think, practically has only to be stated to show that it does not exist. For these very short reasons I move your Lordships that this appeal should be dismissed. C D

LORD WARRINGTON.—I concur, and I have nothing to add, except, perhaps, I ought just to mention the point with regard to the man who was in the service of the telephone company. Really there is no separate point in regard to him, because the Act under which he receives his superannuation allowance is to be read with the other Superannuation Acts. E

LORD TOMLIN.—I concur.

LORD THANKERTON.—I agree.

Appeal dismissed.

Solicitors: *Percy, Robinson & Co.*; *Treasury Solicitor.* F

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

SITTINGBOURNE URBAN DISTRICT COUNCIL *v.* LIPTON, LTD.

[KING'S BENCH DIVISION (Avory, Acton and Talbot, JJ.), November 24, 25, 1930]

[Reported [1931] 1 K.B. 539; 100 L.J.K.B. 109; 144 L.T. 241;
95 J.P. 18; 47 T.L.R. 120; 29 L.G.R. 83]

Street—Widening—Improvement line—Erection nearer centre line of street—Question of law—Restoration of shop front, over forecourt, to former line—Consideration of cost of acquiring premises—Public Health Act, 1925 (15 & 16 *Geo.* 5, *c.* 71), *s.* 33 (5).

By s. 33 (1) of the Public Health Act, 1925, a local authority is empowered to prescribe in relation to either side of a street, the line to which the street shall be widened—"the improvement line." By sub-s. (5): "No new building, erection or excavation shall after an improvement line has been prescribed, be placed or made nearer to the centre line of the street than the improvement line, except with the consent of the local authority. . . ."

In determining whether any works that have been constructed amount to a "new building" or an "erection" within the meaning of sub-s. (5) it is a material consideration whether what has been done will impose any further burden on the local authority, when they come to acquire the property, for the purpose of widening the street.

In 1908 the respondents set back a shop front on the ground floor of a building owned and occupied by them so as to leave a tiled forecourt, the upper storeys and side-walls of the building remaining in position, and the upper storeys being supported by the side-walls and by two iron columns standing on the tiled forecourt. In 1927 the local authority prescribed an improvement line in relation to the side of the street where was situate the respondents' building. In 1929 the respondents, without obtaining the consent of the local authority, enclosed the tiled forecourt with a new shop front, placing in the front of the tiled forecourt a door that led along a new stud partition wall to the upper storeys. These works took none of the weight of the upper storeys, and were constructed nearer to the centre line of the street than the improvement line. On an information against the respondents for that they, without the consent of the local authority first had and obtained, did place and make nearer to the centre line of the street than the improvement line, an "erection" contrary to sub-s. (5) of s. 33, it was contended on their behalf that the works executed did not constitute a new erection because the line of the new shop front was the same as that existing before 1908, and that s. 33 was not intended to apply to every erection which might be made by an occupier for his own convenience within the boundaries of an existing building. The justices dismissed the information, stating that they were of opinion that the works executed did not constitute "an erection" within the meaning of s. 33. On an appeal by the local authority by Case Stated,

Held: (i) the question whether what the respondents had done amounted to the placing or making of an erection nearer to the centre line of the street than the improvement line was a question of law for the decision of the court and not one of fact for the justices; (ii) when the time came for the local authority to exercise their powers under s. 154 of the Public Health Act, 1875, the acquisition of the portion of the respondents' shop which had been added would prove to cost more and be a greater burden than would have been the acquisition merely of the forecourt; (iii) what the respondents had done amounted to the placing or making of a new erection within s. 33 (5); and, therefore, the case must be remitted to the justices to find the charges against the respondents proved.

Notes. As to widening highways, see 19 HALSBURY'S LAWS (3rd Edn.) 204 et seq.; and as to building and improvement lines, see ibid., 221 et seq. For cases see 26 Digest 519, 565. For Public Health Act, 1925, see 19 Halsbury's Statutes (2nd Edn.) 237.

Cases referred to:

(1) *McKenzie* v. *Abbott* (1926), 24 L.G.R. 444, D.C.; Digest Supp.

(2) *Ellis* v. *Plumstead Board of Works* (1893), 68 L.T. 291; 57 J.P. 359; 41 W.R. 496; 37 Sol. Jo. 253; 5 R. 237, D.C.; 26 Digest 503, *2100*.

(3) *Lavy* v. *L.C.C.*, [1895] 2 Q.B. 577; 64 L.J.M.C. 262; 73 L.T. 106; 59 J.P. 630; 43 W.R. 677; 11 T.L.R. 525; 39 Sol. Jo. 655; 14 R. 634, C.A.; 26 Digest 503, *2102*.

(4) *Farmer* v. *Cotton's Trustees*, [1915] A.C. 922; 84 L.J.P.C. 137; 113 L.T. 657; 31 T.L.R. 478; 59 Sol. Jo. 611; [1915] W.N. 231; 6 Tax. Cas. 590; 1915, S.C.(H.L.) 109; 52 Sc.L.R. 713, H.L.

Case Stated by justices.

An information was preferred on Feb. 5, 1930, by George Henry Potter, clerk to the urban district council of Sittingbourne (hereinafter called "the appellants"), under s. 33 of the Public Health Act, 1925, against Lipton, Ltd. (hereinafter called "the respondents"), for that they, the respondents, on Nov. 25, 1929, at 106 and 108, High Street, Sittingbourne, did, without the consent of the appellants first had and obtained, place and make nearer to the centre line of the street an improvement line duly prescribed by the appellants on June 28, 1927, an erection. This information was heard and determined by the justices at petty sessions on Mar. 3, 1930, when they dismissed the information but consented to state and sign the following Case.

Upon the hearing of the information the following facts were admitted or proved. (i) The appellants having given due advertisement of their intention, duly adopted Part II of the Public Health Act, 1925, on Dec. 9, 1925. (ii) On Feb. 9, 1926, the appellants duly resolved to prescribe an improvement line for the High Street, Sittingbourne. (iii) On Feb. 17, 1927, notice of intention to prescribe the said line was served by post upon the respondents. (iv) On June 28, 1927, the appellants duly prescribed an improvement line. (v) The respondents were the owners and occupiers of premises numbered 106 and 108, High Street, Sittingbourne (hereinafter called "the premises"). (vi) In 1908 the respondents first became tenants of the premises, and, with the approval of the appellants, set back the shop front on the ground floor of the said premises. (vii) A tiled forecourt was left open to the access of the public, but was habitually used by the respondents for the exhibition of goods. (viii) The upper storeys and side-walls of the premises had throughout projected up to the line of the footpath, the upper storeys being supported both by the side-walls and by two iron columns standing on the tiled forecourt. (ix) On Nov. 15, 1929, the surveyor to the appellants observed that works were being executed by the respondents at the premises. (x) The respondents prior to commencing the execution of the said works did not submit any plan to, or make any application for consent to, the appellants. (xi) The works executed by the respondents were as follows: (a) The erection of a stud partition wall; (b) a door frame and door; (c) a new shop front; (d) the shop front consisted of a wooden framework enclosing plate glass windows, the base of the said framework was faced with marble slabs, 1¼ in. in thickness; (e) the stud partition and the shop front were wedged into position, and the tiled flooring of forecourt upon which the new shop front and partition were erected was not interfered with. (xii) The whole of the works referred to in para. (xi) did not take any of the weight of the upper storeys of the building, and involved no interference with the supporting iron columns which were encased with mirrors for the purpose of decoration. (xiii) The line of the shop front as altered in 1929 was in the same line as the shop front prior to its alteration by the respondents in 1908 and did not project over the line of the street. (xiv) The wooden portion of the new shop front referred to in para. (xi) (d) was delivered on the site ready-made, and, after being wedged into position, was glazed and the marble slabs referred to in para. (xi) (d) attached by screws. (xv) The stud partition was erected on the site and faced with matchboard.

The appellants contended that the word "erection" in s. 33 of the Public Health Act, 1925, must be construed in its ordinary and common sense meaning, and referred to *McKenzie* v. *Abbott* (1). The respondents admitted that the works constituted an erection in the sense that they stood erect, but contended: (a) That for the purposes of s. 33 of the Public Health Act, 1925, the erection which was prohibited was a new erection upon land which was not occupied by buildings at the date of the prescription of the improvement line, and which might, therefore, be acquired by the local authority under sub-s. (8) of s. 33, and that, inasmuch as the tiled forecourt was at the date of the prescription of the improvement line occupied with buildings, the land could not have been so acquired by the local authority before the works were executed, and the works would not constitute an erection within the meaning of s. 33 of the Public Health Act, 1925; (b) that the works executed did not constitute a new erection because the line of the new shop front was the same as that existing prior to 1908; and (c) that s. 33 was not intended to apply to every erection which might be made by an occupier for his own convenience within the boundaries of an existing building.

The justices were of opinion that the works executed did not constitute an erection within the meaning of s. 33 of the Public Health Act, 1925, and that the respondents were not guilty of an offence under the said Act. The question for the opinion of the court was whether upon the above statement of facts the justices came to a correct determination in point of law.

The Public Health Act, 1925, provides:

> "Section 33. (1) Where in the opinion of the local authority (a) any street repairable by the inhabitants at large is narrow or inconvenient, or without any sufficiently regular boundary line; or (b) it is necessary or desirable that such street shall be widened; the local authority may prescribe in relation to either side of the street, or at or within a distance of fifteen yards from any street corner, the line to which the street shall be widened (in this section called 'the improvement line').
>
> "(5) No new building, erection or excavation shall, after an improvement line has been prescribed, be placed or made nearer to the centre line of the street than the improvement line, except with the consent of the local authority, which consent may be given for such period and subject to such terms and conditions as they may deem expedient. . . .
>
> "(12) If after an improvement line has been prescribed by the local authority, any person offends against the provisions of this section, he shall, without prejudice to any other proceedings which may be available against him, be liable to a penalty not exceeding £5 and to a daily penalty not exceeding 40s."

J. Scholefield, K.C., and *Erskine Simes* for the appellants.

C. P. Harvey for the respondents.

AVORY, J.—The information in this case was preferred under s. 33 (5) of the Public Health Act, 1925, and it alleged that the respondents on Nov. 25, 1929, at 106 and 108, High Street, Sittingbourne, did, without the consent of the appellants, the local authority, first had and obtained, place and make nearer to the centre line of the street than an improvement line duly prescribed by the appellants on June 28, 1927, an erection. Upon the hearing of that information it was dismissed by the justices.

I desire to deal first with the point that has been taken by counsel for the respondents that this must be treated as a decision by the justices of a question of fact. In support of that view he has referred the court to two cases: *Ellis* v. *Plumstead Board of Works* (2) and *Lavy* v. *L.C.C.* (3), in which, undoubtedly, the learned judges who tried those cases delivered judgments to the effect that the magistrates there were justified in finding as a fact that the buildings or erections in question did constitute an infringement of the relevant statute. In other words, I take those judgments to mean that where there is evidence upon which the justices can come to the conclusion as a matter of fact that a particular building or erection was, or was not, infringing the particular provision of the particular statute, the Court of Appeal will not interfere with their decision. In this present case, the answer to this argument is that there was here no evidence upon which the justices could find as a matter of fact that these works which had been constructed by the respondents did not constitute an erection within the meaning of sub-s. (5) of s. 33 of the Public Health Act, 1925. Looking at the Case as it is stated, and more particularly at the contention which was put forward on behalf of the respondents, I am satisfied that the justices in this case intended to ask for the opinion of this court, as they say they do, upon a point of law, namely, whether what had been done by the respondents in this case amounted to the making or placing of an erection within the meaning of sub-s. (5) of s. 33 of this Act. I gather that in coming to their conclusion they gave effect to one or more of the contentions of law which had been put before them on behalf of the respondents—some of which have been repeated before this court to-day.

One of these contentions was that sub-s. (8) of s. 33, which provides that the local authority may purchase any land "not occupied by buildings" lying between the improvement line and the boundary of the street and that the provisions of the Lands Clauses Acts with respect to the purchase and taking of lands shall apply, applies in the present case so that, as there was no placing of an erection on land "not occupied by buildings," there was no infringement of the provisions of sub-s. (5). But that point appears quite properly to have been abandoned by counsel for the respondents in the course of the argument. The provisions of sub-s. (8) were enacted for a different purpose, and have no application to the present case.

Two other contentions were urged on behalf of the respondents before the justices. It was said that the works executed did not constitute a new erection, because the line of the new shop front was the same as that existing prior to 1908, and also that s. 33 was not intended to apply to every new erection which might be made by an occupier for his own convenience within the boundaries of an existing building. In order to determine whether what has been done here by the respondents constitutes "an erection" within the meaning of sub-s. (5) it is essential to appreciate what is the object of s. 33. That object was correctly stated by counsel for the appellants and, acquiesced in by counsel for the respondents as, first of all, to facilitate the widening of streets. The heading to s. 33 and 34 is: "Street Improvements." By sub-s. (1) of s. 33 the local authority are authorised to prescribe an "improvement line," that is, a line to which in the future it is intended that the buildings shall be set back, and it is contemplated that in the future the local authority will exercise their powers under s. 154 of the Public Health Act, 1875, to acquire any portions of buildings or erections which in fact are in front of that improvement line for the purpose of widening the street. Once one appreciates the object of these provisions it is obvious that in determining whether any works that have been constructed amount to a new building or erection it is a material consideration whether what has been done will impose on the local authority any further burden when they come to exercise their powers under s. 154 of the Public Health Act, 1875. It matters not whether the burden will be greater or much greater. In the present case what has been done is clearly described in the Case Stated, and by the plans which are before the court as part of the Case. To describe these works shortly, it is sufficient to say for the purposes of my judgment that what was a tiled forecourt in front of this building has now been enclosed and included as part of the shop. I cannot doubt that when the time comes for the local authority to exercise their powers under s. 154 of the Public Health Act, 1875, the acquisition of this piece of the shop will prove to cost more and be a greater burden than would have been the acquisition merely of the forecourt. I entertain no doubt that what was done by the respondents amounted to a new erection placed and made nearer to the centre of the street than the improvement line within the meaning of sub-s. (5) of s. 33 of the Public Health Act, 1925, and that it was not open to the justices, as they did, on the facts as shown by this Case to come to the conclusion for either of the two reasons advanced on behalf of the respondents that

A what was done here was not within the purview of sub-s. (5). In my opinion, therefore, this appeal should be allowed, and the case remitted to the justices that they may find that an offence has been committed by the respondents under sub-s. (12) of s. 33.

ACTON, J.—I agree.

B

TALBOT, J.—I think that the object of s. 33 of the Public Health Act, 1925, is plain on the face of the section. When the local authority has prescribed an improvement line that part of the street between the improvement line and the centre of the street is, so far as possible, not to be subject to changes which would make the land or premises more difficult or expensive for the local authority to C acquire. So by sub-s. (5) of s. 33:

> "No new building, erection or excavation shall, after an improvement line has been prescribed, be placed or made nearer to the centre line of the street than the improvement line, except with the consent of the local authority."

The right to decide whether such a new building, erection or excavation shall be allowed is conferred on the local authority, who, in deciding it, will judge whether D the construction of the works proposed will affect the exercise of their powers under this or any other Act. I have no real doubt, taking the description in the Case, which is very clear and definite as to what has been done by the respondents at these premises, that these works are the kind of construction aimed at by sub-s. (5), and that they do come within these words, "no new building, erection or excavation."

E Counsel has put before the court a most attractive argument on behalf of the respondents that what the justices decided here was merely a question of fact. That this is not so is, I think, shown by the Case Stated. The justices decided the question as one of law and decided it after argument on law, the three heads of which are set out separately in the case. In cases of this kind there are two questions: What are the facts? and what is the true construction of the statute? F The one is a question of fact, the other of law. Probably this is what is meant by the phrase a question of mixed law and fact. If the Act of Parliament is correctly construed, the question is whether the facts found come within its purview. Reference has been made in the course of the argument to the observations of LOPES, L.J., in *Lavy* v. *L.C.C.* (3), where he quoted a passage from the judgment of LORD COLERIDGE in *Ellis* v. *Plumstead Board of Works* (2). The distinction between a G question of law and of fact is clearly stated by LORD LOREBURN, L.C., in *Farmer* v. *Cotton's Trustees* (4) ([1915] A.C. at p. 930):

> "And as their (the commissioners') determination is conclusive unless it be erroneous in point of law, we have no jurisdiction to review it 'upon any issue of fact'. . . . If it were necessary I should be disposed to move that this case be H remitted for that information to be given. But I do not think it is necessary, because there is another ground of law upon which I think the commissioners are wrong. There is, upon a true construction of the Act, no evidence in this case upon which their decision can be supported. They have given us the relevant facts in detail, and we can see for ourselves that, taking those facts as found, there are no materials at all upon which the conclusion they reached I can be based. There was error in law, because there was no evidence for their conclusion when the Act is rightly construed."

In my view, these remarks apply to this case. LORD PARKER OF WADDINGTON said in the same case:

> "It may not always be easy to distinguish between questions of fact and questions of law for the purpose of the Taxes Management Act, 1880, or similar provisions in other Acts of Parliament. The views from time to time expressed in this House have been far from unanimous, but in my humble judgment where all the material facts are fully found, and the only question is whether

> the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only. In the beginning of his dissenting judgment LORD SUMNER said: 'My Lords, in this case the commissioners have furnished a description of the building in question, partly in words and partly by plans, so full that your Lordships know as much about it as they did. The rest is matter of law. The question is, Does No. 100, Princes Street, Edinburgh, being such as we know it to be, come within the words?' ";

and then he mentioned the particular section there in question. These passages define accurately and clearly the mutual relations of questions of law and of fact in cases of this kind. In my view, the justices in the case now before the court referred to us a question of law, and, in my view, they came to an erroneous opinion on that question. The appeal should be allowed.

Appeal allowed.

Solicitors: *Hedley, Norris & Co.*, for *Harris & Harris*, Sittingbourne; *T. H. B. Bamford.*

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

SOUTH LONDON GREYHOUND RACECOURSES, LTD. *v.* WAKE

[CHANCERY DIVISION (Clauson, J.), November 6, 7, 10, 12, 1930]

[Reported [1931] 1 Ch. 496; 100 L.J.Ch. 169; 144 L.T. 607; 74 Sol. Jo. 820]

Company—Seal—Affixed to instrument without authority—Forgery—Right of company to deny validity—Share certificate—Provision in articles protecting bona fide purchaser—Purchaser ignorant of provision.

Article 105 of the articles of association of the plaintiff company provided as follows: "The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the board of directors and in the presence of at least one director and of the secretary and the said one director and secretary shall sign every instrument to which the seal shall be so affixed in their presence, and in favour of any purchaser or person bona fide dealing with the company such signatures shall be conclusive of the fact that the seal has been properly affixed." A share certificate purporting to certify that W. was the holder of 2,000 fully paid-up shares in the plaintiff company was issued to W. in consideration of his refraining for a time from suing for a debt owing to him by another company of which D. was a director and G. the secretary. The certificate was signed by D., who was also a director of the plaintiff company, and G., the secretary thereof. The seal of the plaintiff company was affixed to the certificate in the presence of D. and G., but no board of directors had authorised the affixing of the seal on such certificate. The plaintiff company refused to recognise W.'s title to the shares, and brought this action claiming a declaration that he was not entitled to the shares and rectification of the register.

Held: (i) the seal of the plaintiff company having been affixed to the certificate without the authority of the company, the certificate was a forgery and the company was not estopped from denying its validity: Principles laid down in *Ruben* v. *Great Fingall Consolidated* (1), [1906] A.C. 439, applied; (ii) W., having been proved to be ignorant of art. 105, was precluded from

A relying on that part of the article which protected a bona fide purchaser when the certificate contained the signatures of a director and the secretary; and there would be an order rectifying the register by striking out W.'s name as holder of the shares.

Notes. As to share certificates, see 6 HALSBURY'S LAWS (3rd Edn.) 245–248, paras. 512–519; and for cases on the subject, see 9 DIGEST (Repl.) 296–301, B *1860–1894*.

Cases referred to:

(1) *Ruben* v. *Great Fingall Consolidated*, [1906] A.C. 439; 75 L.J.K.B. 843; 95 L.T. 214; 22 T.L.R. 712; 13 Mans. 248, H.L.; 9 Digest (Repl.) 298, *1881*.

C (2) *Kreditbank Cassel* v. *Schenkers, Ltd.*, [1927] 1 K.B. 825; 96 L.J.K.B. 501; 136 L.T. 716; 43 T.L.R. 237; 71 Sol. Jo. 141; 32 Com. Cas. 197, C.A.; 9 Digest (Repl.) 578, *3822*.

(3) *Balkis Consolidated Co.* v. *Tomkinson*, [1893] A.C. 396; 63 L.J.Q.B. 134; 69 L.T. 598; 42 W.R. 204; 9 T.L.R. 597; 37 Sol. Jo. 729; 1 R. 178, H.L.; 9 Digest (Repl.) 297, *1873*.

D **Witness Action.**

The following statement of facts is taken from the judgment of CLAUSON, J. In the month of March, 1928, the defendant, Mr. Wake, entered into a contract with a company called the St. Aubin's Development Trust, Ltd., under which a deposit was payable to him. A Mr. Devereux was a director of the trust, and a Mr. Greene was secretary, and it appears that business was in the course of E negotiation or transaction between Mr. Devereux as representing the St. Aubin's Trust and the defendant. The St. Aubin's Trust failed to pay a sum of £1,175, which was the balance of a deposit, and the defendant was pressing the St. Aubin's Trust either to pay the sum or to secure it. He met Mr. Devereux and came to an arrangement with him, which is recorded in a letter dated April 27, 1928, and written by the defendant's solicitors to the solicitor for the St. Aubin's Trust. It F was in these terms:

> ". . . we have to-day seen our client and he informs us that he has had a meeting with Mr. Devereux, one of the directors of your clients. Our client informs us that the following terms have been arranged, namely, that certificates for shares in the [plaintiff company] to the value of £1,000 nominal shall be deposited with our client not later than Tuesday morning G next, together with a blank transfer thereof, subject to our client giving an undertaking that he will not attempt to deal with the same provided the balance of the deposit is paid by 31st [May] which he will post to your client upon receipt of the shares certificate and blank transfer. On these conditions we are instructed to hold over service of the writ until Tuesday morning next."

H On April 30, Mr. Greene, who was also secretary of the company who are plaintiffs in this action, wrote to the defendant:

> "South London Greyhound Racecourses Limited. Dear Sir,—Enclosed please find certificate for 2,000 fully paid ordinary shares 10s. each. Receipt for same in due course will oblige. Mr. Devereux will be writing you personally to-morrow."

I The document which was sent in that letter purported to be a certificate for 2,000 shares in the plaintiff company, numbered 40,652 to 42,651; it was in the usual form, certifying that the defendant was the registered proprietor of 2,000 shares on which—on the face of the certificate—the sum of 6s. 6d. per share had been paid; it purported to be given under the common seal of the company on April 30; there was an impression of a seal which appeared to be the seal of the plaintiff company; it was signed by Mr. Devereux and by Mr. Greene, and it was not disputed that what appeared to be the signatures of Mr. Devereux and Mr. Greene were in fact their signatures. On the back there was an endorsement: "The sum of 3s. 6d.

per share was paid on the (blank) of (blank) and the shares are now fully paid up." That had been struck out, the words "fully paid" written across that indorsement, and that was signed by Mr. Greene the secretary, and Mr. Greene's signature was not suggested as being otherwise than his true signature. The defendant, having received that document, telephoned to his solicitors, and his solicitors write on May 1 to the solicitor for the St. Aubin's Trust saying:

> "referring to our letter of Friday last, we have this morning had a telephone call from our client who informs us that he has received from your clients a share certificate for 2,000 preferred ordinary shares in [the plaintiff company] credited as paid up to the extent of 6s. 6d. only. This arrangement clearly is not satisfactory to our client, as not only does he not get security in accordance with the terms arranged, but he is placed under a liability as a contributory to the extent of 3s. 6d. for each share";

and they asked the solicitor to the St. Aubin's Trust to get in touch with their clients and to inform them whether they were prepared to carry out the terms arranged, namely, to deposit share certificates to the nominal value of £2,000 with a blank transfer. The letter continued:

> "Our client can then exercise his judgment in due time, as to whether or not he will take a transfer of partly paid shares. Obviously it would be better if it could be arranged that the shares deposited with our client were fully paid. Kindly let us hear from you during the course of the day as our client informs us that he will telephone us again as to the position."

Having written that letter, the defendants' solicitors were apparently rung up by him again, and they wrote another letter on May 2,

> "He now states that there is a memorandum on the back of the certificates to the effect that the shares are fully paid. . . . Our client still takes objection to the certificate for the shares being in his own name as he does not desire that there should be any possible misapprehension on your client's part that our client desires payment of the balance of his deposit in cash and that he can only take the deposit of the shares as security."

There was some further correspondence, but, notwithstanding the solicitors' objection to the security being given otherwise than by the deposit of a share certificate and a blank transfer, the defendant acquiesced in accepting that certificate as sufficient for his purpose as giving security on the shares, and on the faith of receiving that certificate, he abstained from further hostile action with a view to recovering the deposit during the rest of the month of May. Ultimately he proceeded with the writ, which he had threatened to issue and which he did, in fact, issue on April 23; he obtained judgment against the St. Aubin's Trust, and, by means of his position as a creditor, under that judgment secured an order for the winding-up of the St. Aubin's Trust. On the register of the plaintiff company, the defendant appeared as the holder of 2,000 shares fully paid up, being the shares the numbers of which appeared on the certificate; but as to those shares and the circumstances under which the certificate was issued, CLAUSON, J., found the facts to be as follows: Those 2,000 shares, with others, were issued by the plaintiff company in the month of November, 1927, to a company called the English and Foreign Investment Trust, Ltd. That was a company of which also Mr. Devereux was a director and Mr. Greene was at the material times secretary. On the shares so issued at that date 3s. per share was paid. The issue of those shares was recorded in the register, in which there was an entry which seemed to show that in January, 1928, the English and Foreign Investment Trust, Ltd. paid £1,000 in respect of some liability on some shares. But there was no evidence to show that that £1,000 was either intended to be appropriated, or was, in fact, appropriated, by anyone, whether payer or receiver, to the particular 2,000 shares in dispute. So that so far as the page in the register was concerned on which the name of the English and Foreign Investment Trust, Ltd. appeared, it would seem that 3s.

only had been paid on those shares. There was no entry on the register showing the date on which the English and Foreign Investment Trust, Ltd. ceased to be a member in respect of those shares, as was required by the Companies Act, 1929, s. 95. What did appear on the register were certain entries in black ink under the heading of "Shares Transferred," which seemed to show that these 2,000 shares—the numbers were stated—were transferred, and transferred under circumstances which resulted in a certificate numbered 528 being issued; and it appeared that the defendant was entered under date April 30, 1928, as having acquired the 2,000 shares in question—the numbers were stated—as fully paid shares and having had a certificate numbered 528 issued to him. The defendant never signed any transfer. There was no record that any transfer of those shares was ever before the board or passed by the board. There was no evidence that any transfer of these shares, whether in writing, or, if that were possible, in any other way, was ever made by the English and Foreign Investment Trust, Ltd. The English and Foreign Investment Trust, Ltd. never transferred these shares directly or indirectly to the defendant. During April, 1928, the share register of the plaintiff company was under the physical control of Mr. Devereux and Mr. Greene, and the seal of the company was also in their physical control. In that month they made the entries which appeared in the register of the plaintiff company, which indicated the transfer of the 2,000 shares, and indicated that the defendant became the holder of those shares as fully paid shares. They made those entries without authority of any sort or kind from the board of the plaintiff company and untruthfully, the entries being so framed as to represent that a transfer had, in fact, taken place which, in fact, never did take place. Further, the certificate sent to the defendant was signed by Mr. Devereux and Mr. Greene describing themselves as director and secretary respectively of the plaintiff company, as, in fact, they were, and the seal of the company was procured by them to be affixed to the certificate without any authority from the board of the plaintiff company and fraudulently, in the interests of the St. Aubin's Trust, and in order to enable them, or to enable Mr. Devereux as the representative of the St. Aubin's Trust, to induce the defendant to think that he was in possession by way of security of the 2,000 shares in question. The plaintiff company brought this action claiming a declaration that the defendant was not entitled to the 2,000 shares in question, in spite of the fact that a share certificate signed by a director and the secretary of the company and having the company's seal affixed to it had been issued to him, and that the certificate purported to certify that he was the holder of the shares. The plaintiff company further claimed rectification of the register and other relief.

Morton, K.C., and *E. G. Palmer*, for the plaintiffs, referred to *Ruben* v. *Great Fingall Consolidated* (1), *Kreditbank Cassel* v. *Schenkers Ltd.* (2) ([1927] 1 K.B. at p. 844).

Topham, K.C., and *A. C. Edgar*, for the defendant, referred to *Balkis Consolidated Co.* v. *Tomkinson* (3).

CLAUSON, J., stated the facts and continued: In this action the plaintiff company are asking that the register should be rectified by striking out the defendant's name as the holder of the 2,000 shares, and, incidentally, for delivery up of the certificate to which the seal of the company has been affixed under the circumstances which, as I find them, I have stated. I conceive that, if the certificate is binding on the plaintiff company in the sense of being a document which has truly been sealed by the company, whether by a duly authorised agent or by a person whom the company cannot be heard to allege to be other than a duly authorised agent, it may well be that the certificate estops the company from setting up the true facts and from alleging that the defendant never became transferee of the shares, and, accordingly, has no title to them; and, if so, I conceive I should be bound to refuse the company the relief it asks. If the certificate were binding on the company but the defendant were not on the register and were now asking to be put on the register, the position would, or might be different. In such a case, it would be necessary for me to consider whether the person who holds the certificate, the validity of which the company is estopped from denying, can claim to be put on the register, though he has never, in fact, become a shareholder. In such a case, the observations of Herschell, L.C., in *Balkis Consolidated Co.* v. *Tomkinson* (3) would require very careful consideration. If, however, the certificate and the register agree, and in this case they do agree, and the person entered on the register is entitled to rely on the certificate as binding on the company, it is not easy to see how the company can succeed in a claim to have them struck off the register, although it may well be that, if the true owner of the shares—in this case, apparently, the English and Foreign Investment Trust, Ltd.—had been a party to the proceedings, the court would be bound to displace the holder of the certificate in favour of the true owner.

However, these questions—which are interesting questions—do not arise until the initial question is answered in the affirmative, namely, is the certificate a certificate which, on the evidence, has been sealed in such circumstances that it must be held to have been duly sealed on the company's behalf? On the evidence as it stands, I conceive myself bound to hold that the certificate is not binding on the company, not having been sealed in such circumstances as enable me to hold that it was duly sealed on the company's behalf.

The facts, as I have found them, appear to me to bring the case directly within the principles laid down in *Ruben* v. *Great Fingall Consolidated* (1). If I felt any doubt about that, that doubt would be removed by a statement of the law contained in the judgment of Atkin, L.J., in *Kreditbank Cassel* v. *Schenkers Ltd.* (2). In that case, the learned Lord Justice said ([1927] 1 K.B. at p. 844):

> "But we have the authority of the House of Lords in *Ruben's Case* (1) for saying that the doctrine that you need not investigate whether or not the conditions regulating the internal management of the company have been strictly carried out in accordance with the articles has no application in the case of a document which is an obvious forgery. In this case the defendants are entitled to say: 'These are not our bills and we are not precluded from denying the authority of the person who purported to sign them on our behalf.' "

In my view, on the facts as I have found them, this document must be taken to be a forgery. On reference to the articles of the company it is plain that, according to the constitution of this company, the seal cannot properly be affixed to a document so as to bind the company unless it is so affixed under the authority of the board of directors. It is quite plain in this case that no such authority was ever in fact given. It is true that art. 105, which so prescribes, says this:

> "The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the board of directors and in the presence of at least one director and of the secretary and the said one director and secretary shall sign every instrument to which the seal shall be so affixed in their presence, and in favour of any purchaser or person bona fide dealing with the company such signatures shall be conclusive of the fact that the seal has been properly affixed."

I do not understand the latter part of that article in the least to modify the earlier part, which makes it essential, in order that a document should be validly sealed, that the seal of the company should be affixed by a resolution of the board of directors. The only effect of the latter part of that article, as I understand, is that it may be that a person who has knowledge of the contents of this article and who, on the strength of this article, deals with a document to which the seal appears to be properly affixed, and which is signed by a director and the secretary as being a document properly sealed by the company, may be in a position to use the article in support of a claim that he was induced by the representation of the company to him, that a document signed by a director and the secretary would not be disallowed, to act on this particular document as a valid document. The latter part of this article does not, to my mind, in any way assist the defendant in this case, because there is no question that he knew nothing whatever about the article.

It is said, however, that, notwithstanding the statement of the law which I have cited from *Schenkers' Case* (2), I can, consistently with that case, decide that the defendant is entitled to treat this certificate as if it had, in fact, been sealed by the authority of a resolution of the board of directors. As I understand the argument, it is put in this way: It is said that the affixing of the company's seal is a matter in which normally a director would have power to act for the company; and it is pointed out, and so far pointed out quite truly, that ATKIN, L.J., says that, if you are dealing with a director in a matter in which normally a director would have power to act for the company, you are not obliged to inquire whether or not the formalities required by the articles have been complied with before he exercises that power. But there is no evidence before me even to suggest that the affixing of a company's seal to a document is a matter in which normally a director would have power to act for the company. My own experience—and as I have no evidence before me on the matter I suppose I am entitled to rely on such experience as I have—is that the affixing of the seal is a matter with which the board deals and not a director, and it is always so understood. In the case of this particular company, the constitution of the company, by the article to which I have referred, makes it quite plain that the affixing of the seal is not a matter in which normally a director would have power to act for the company. It is specifically laid down that the affixing of the seal is a matter for which the authority of the board of directors and not of a single director is required.

Accordingly, I do not see, in the circumstances, on the facts as I have found them, how I can avoid holding that this document is a forgery, so far as the affixing of the seal is concerned; that the impression of the seal has been put on the document without any authority of the company, and that this is not a case in which the doctrine can be called in aid that, where the person who takes the document is dealing with a director, in a matter in which normally a director would have power to act, he need not trouble about formalities.

I ought to mention one other thing. There is one distinction to be drawn between *Ruben's Case* (1) and this present case. In *Ruben's Case* (1) it was held that a company was not bound by a document to which the seal had been affixed without authority and on which the signature of the attesting director was forged. In this particular case with which I am now dealing, the signature of the attesting director is a true signature. It is the affixing of the seal which is the element of forgery in this case. I myself do not see that it makes any difference at all. What I am concerned to see is whether the seal of the company was affixed by the company, by its authorised agent, and whoever affixed the seal, in my view cannot have affixed it, and did not affix it, under any authority of the board of directors.

The result, it seems to me, will be this, that I must hold the certificate to be a forgery; and I do not think it will be denied that, if the certificate is a forgery and if the circumstances are such that the doctrine referred to by ATKIN, L.J., in the passage I have read as to the circumstances under which no investigation need be made as to the observance of formalities, does not apply, the result is that that certificate is a mere nullity.

The certificate being a mere nullity, there is nothing in the existence of the certificate to prevent the company setting up the true facts. The true facts, as I have found them, show that the defendant never became the holder of these shares, that the shares, so far as the information before me goes, always were and continue to this day to be the property of the English and Foreign Investment Trust, Ltd. In these circumstances, it is my duty to correct the register and to make it conform with the true facts by striking out the defendant's name as the holder of the shares.

It was suggested that there was one further answer which the defendant might set up; he might say that there have been laches, that the company ought to have come earlier—that there has been some sort of laches which precludes the company from now asking for relief. In my view, nothing which has occurred prevents the company now coming and claiming that their register be purged. I am not aware of any circumstances having been proved to me which show that there is any reason why the register should not now be brought into conformity with the true facts. In an ordinary case in which a question of laches arises with regard to the rectification of a register—cases where a man's name has been left on the register in such a way that people have given credit to the company because of his name being there—quite different considerations arise. But here, on the register in this particular case, the defendant appears to be the owner of fully paid shares, and no creditors can have been in any way affected by the fact that his name remained on the register. Accordingly, I see no reason, so far as that is concerned, why I should not make the order for which the company asks.

The right order seems to me to be an order that the register be rectified by striking out the defendant's name as holder of the shares, the numbers of which are stated in the so-called certificate, and, as I hold the certificate to be a forgery, I should order that the certificate should be delivered up to the company for cancellation by them. I see no reason for making any order declaratory of rights. The order which I propose to make seems to meet all the necessary points.

That leaves, however, one serious matter for consideration, and that is the question of costs. I have heard no argument on the question of costs, but, subject to anything that counsel for the plaintiffs may wish to say—I will, of course, hear him on the subject if he desires to address me—it appears to me, as at present advised, that the right order will be that there should be no order as to costs. The trouble has, in fact, arisen from the way in which the company's affairs have been conducted, and, although the fact that the company have allowed their seal and their register to remain under the control of untrustworthy persons does not—having regard to certain decisions with which I need not deal now—necessarily have the effect of putting them in an embarrassing position legally with regard to such matters as I have dealt with in this case, still I think I am entitled to take it into account in considering the right order to make as to costs. Accordingly, subject to anything counsel for the plaintiffs may wish to say, I propose that there should be no order as to costs.

[After further argument no order was made as to costs.]

Solicitors: *Downer & Lewis*; *Stoneham & Sons.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

ELLERMAN LINES, LTD. *v.* MURRAY. WHITE STAR LINE OF ROYAL AND UNITED STATES MAIL STEAMERS OCEANIC STEAM NAVIGATION CO., LTD. *v.* COMERFORD

[HOUSE OF LORDS (Lord Dunedin, Lord Blanesburgh, Lord Warrington, Lord Tomlin and Lord Macmillan), November 4, December 9, 1930]

[Reported [1931] A.C. 126; 100 L.J.P. 25; 144 L.T. 441; 47 T.L.R. 147; 36 Com. Cas. 159; 18 Asp.M.L.C. 184]

Shipping—Seaman—Wages—Wreck or loss of ship—Right to receive wages during period of two months from the date of the wreck if unemployed—Voyage due to end within the period of two months—Right to wages during period subsequent to date when voyage was due to end—Merchant Shipping (International Labour Conventions) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 42), *s.* 1 (1), (2).

Section 1 (1) and (2) of the Merchant Shipping (International Labour Conventions) Act, 1925, entitles a seaman whose service is terminated by reason of the wreck or loss of his ship before the date contemplated in his agreement to his wages for each day on which he is in fact unemployed during a period of two months from the date of such termination, unless the shipowner shows that the seaman's unemployment was not due to the wreck or loss of the ship, or that, in respect of any particular day, the seaman was able to obtain suitable employment. This period of two months is not to be cut down merely because the seaman's agreement contemplated the termination of his service within the said period.

Notes. Considered: *Barras* v. *Aberdeen Steam Trawling and Fishing Co., Ltd.*, [1933] All E.R. Rep. 52. Referred to: *The Terneuzen, Marsh* v. *Jensen Shipping, Ltd.*, [1938] 2 All E.R. 348.

As to a seaman's right to wages after the wreck of his ship, see 30 HALSBURY'S LAWS (2nd Edn.) 216, para. 371; and for cases on the subject see 41 DIGEST 228 et seq., *666* et seq.; for the Merchant Shipping (International Labour Conventions) Act, 1925, s. 1, preamble, sched. 1, see 23 HALSBURY'S STATUTES (2nd Edn.) 895.

Cases referred to:

(1) *Palace Shipping Co., Ltd.* v. *Caine*, [1907] A.C. 386; 76 L.J.K.B. 1079; 97 L.T. 587; 23 T.L.R. 731; 51 Sol. Jo. 716; 10 Asp.M.L.C. 529; 13 Com. Cas. 51, H.L.; 41 Digest 254, *956*.

(2) *The Neptune* (1824), 1 Hag. Adm. 227; 166 E.R. 81; 41 Digest 225, *633*.

(3) *Thompson* v. *H. & W. Nelson, Ltd.*, [1913] 2 K.B. 523; 82 L.J.K.B. 657; 108 L.T. 847; 29 T.L.R. 422; 12 Asp.M.L.C. 351, D.C.; 41 Digest 219, *582*.

(4) *Chandler* v. *Grieves* (1792), 2 Hy. Bl. 606, n.; 126 E.R. 730; 41 Digest 236, *763*.

(5) *Victoria City Corpn.* v. *Bishop of Vancouver Island*, [1921] 2 A.C. 384; 90 L.J.P.C. 213, P.C.; 42 Digest 645, *503*.

Appeal from the decision of the Court of Appeal (SCRUTTON, GREER and SLESSER, L.JJ.) in two wages actions (reported 143 L.T. 316; [1930] P. 197), which had been referred to the Admiralty Division under s. 165 of the Merchant Shipping Act, 1894.

The plaintiff in the first action signed articles as an able-bodied seaman and quarter-master on board the defendants' steamship *Croxteth Hall* for a voyage not exceeding two years' duration from Oct. 29, 1928, terminating at such port in the United Kingdom or Continent of Europe within home trade limits as might be required by the master. The *Croxteth Hall* was wrecked near Flushing on Feb. 27, 1929, and the plaintiff seaman was returned to Liverpool on Mar. 4, 1929, at the shipowners' expense and paid his wages up to Mar. 4, 1929. Had the *Croxteth*

Hall not been wrecked she would have completed the voyage in respect of which the seaman had engaged at Middlesbrough on Mar. 11, 1929. The seaman was unemployed for a period of two months from Feb. 27, 1929. He claimed wages at the rate provided for by the articles and subsistence allowance at the rate of 4s. per day. In the second action the plaintiff was an able-bodied seaman on board the defendants' steamship *Celtic*. The voyage described in the articles under which the seaman served was from Liverpool to New York, via Queenstown, Boston, and (or) if required to any ports within the North and South Atlantic Oceans, trading as might be required until the ship returned to a final port of discharge in the United Kingdom. On Dec. 10, 1928, the *Celtic* was wrecked near Queenstown whilst homeward bound for Liverpool, which would have been her final port. Had the *Celtic* not been wrecked she would have reached Liverpool on Dec. 11, 1928. The plaintiff seaman, with the other members of the crew, was brought to Liverpool by the owners on Dec. 13, 1928, and was paid his wages under the articles up to and including Dec. 11. From Dec. 11 the seaman, who was one of the regular crew of the *Celtic*, was unemployed. The seaman claimed wages for a period of two months from Dec. 11, and subsistence allowance at the rate of 4s. per day.

The Court of Appeal affirmed the decision of Lord Merrivale, P., and held (Slesser, L.J., dissenting) that a seaman was entitled to wages for a period of two months from the date when his services terminated by reason of the wreck, notwithstanding that the voyage to which his agreement related would have come to an end but for the wreck within the period of two months.

The shipowners appealed.

Sir Leslie Scott, *K.C.*, *Dunlop*, *K.C.*, and *A. J. Hodgson* for the shipowners.
Lynskey, *K.C.*, and *Fraser Harrison* for the seamen.

The House took time for consideration.

Dec. 9. The following opinions were read.

LORD DUNEDIN.—The facts in the first appeal, so far as material, are capable of being stated with the utmost brevity.

The ship *Croxteth Hall*, on board of which the plaintiff respondent Murray was a seaman, was wrecked and lost on Feb. 27, 1929. At that time she was homeward bound, and, if nothing untoward had happened, the crew would have been paid off at Middlesbrough on Mar. 11, 1929. The crew were brought home to Liverpool, and on Mar. 4 the seaman was paid off. The seaman claimed wages for two months from Feb. 27. He was, in fact, unemployed for that period, and, though he had tried, he had not been able to secure employment. The shipowners expressed their willingness to pay, and did pay, the wages up to Mar. 11, the date on which the payment for the voyage would have taken place if it had been terminated in due course, but they refused to pay any more.

The seaman started proceedings to recover the two months' wages, so far as unpaid, in a court of summary jurisdiction in Liverpool. The case was referred to the Probate, Divorce, and Admiralty Division of the High Court, under the provisions of s. 165 (iii) of the Merchant Shipping Act, 1894. Lord Merrivale gave judgment in favour of the seaman. Appeal was taken to the Court of Appeal, who, by a majority, Slesser, L.J., dissenting, confirmed the judgment. There had been, in fact, certain other points mooted before Lord Merrivale, but they have disappeared from the case and need not be mentioned. From that judgment there is the present appeal.

At common law, if a ship was lost on a voyage, a seaman who, although through no fault of his own, could not, in fact, perform his share of the contract of service could recover nothing. This was altered by s. 158 of the Merchant Shipping Act, 1894, which gave wages up to the time of the wreck that terminated the service. Then comes the statute on the interpretation of which the matter turns. It is the Merchant Shipping (International Labour Conventions) Act, 1925, and s. 1, the relevant section, is as follows:

> "(1) Where by reason of the wreck or loss of a ship on which a seaman is employed his service terminates before the date contemplated in the agreement, he shall, notwithstanding anything in section one hundred and fifty-eight of the Merchant Shipping Act, 1894, but subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of the termination of the service, to receive wages at the rate to which he was entitled at that date.
>
> (2) A seaman shall not be entitled to receive wages under this section if the owner shows that the unemployment was not due to the wreck or loss of the ship and shall not be entitled to receive wages under this section in respect of any day if the owner shows that the seaman was able to obtain suitable employment on that day.
>
> (3) In this section the expression 'seaman' includes every person employed or engaged in any capacity on board any ship, but, in the case of a ship which is a fishing-boat, does not include any person who is entitled to be remunerated only by a share in the profits or the gross earnings of the working of the boat."

I confess that I have had considerable difficulty in coming to a conclusion in this matter, but in the end I have come to think that the judgment of the Appeal Court is right. It is necessary to say that in the inquiry held before LORD MERRIVALE it was shown that it was the custom for men who had been on this ship to be allowed to sign on for the next voyage. In other words, if nothing untoward had happened, it would have been more likely than not that the seaman would at once have been taken on for the next voyage, and so would not have remained in unemployment. The shipowners were very anxious to point out that the convention, to give effect to which the Act was passed, uses the word "indemnity," and that the only proper indemnity that could therefore be given was the wages, so far as they could be due under contract, which contract was frustrated by the wreck. I do not think there is anything in this argument, and for this reason. If "indemnity" is used in a loose sense, what is given by this Act is an indemnity whichever of the two views be taken, but if it is used in a strict sense—and unless it is so used it is of no use to the shipowners—then it is very significant that although the framers of the Act are well aware of the word, for they refer to it in the preamble, when they come to the operative section they do not use it. I think, therefore, we must take the Act as it stands.

Now, I do not think that there is any doubt whatever as to the meaning, for I find no ambiguity, in sub-s. (1) of s. 1. There must be a wreck which terminates the service, which service is spoken of as being under an agreement; and, if so, it is obviously possible that the agreement provides for a definite termination. If that is so, then there must be in fact unemployment for two months, and, if all these facts concur, then the seaman is entitled to two months of his old wages running from the termination of the service, that is, the wreck. That is all expressed quite absolutely, and the question would be at an end were it not for the words "subject to the provisions of this section." That indicates that there is something else to come. That something else comes in sub-s. (2), but here the onus, so to speak, is shifted. The seaman must show the various things that I have enumerated to bring him under sub-s. (1). If he does that, his portion is accomplished. Then the shipowner, to get out of that position, must show what is demanded in sub-s. (2): "if the owner shows. . . ." It has been found as a fact in this case that the owners cannot show that the seaman was able to obtain employment on any day within the two months.

The sole question, therefore, left is: Can the owners show that the unemployment was in fact not due to the loss of the ship? I do not think they can. The onus is on them. It is not for the seaman to show that he would have been employed. It is for the owners to show that he would not have been employed, and, on the face of the evidence as to what would have happened if the ship had still been in being, I do not think that the owners can do so.

But, as Scrutton, L.J., says, each case must depend on its own facts. On the facts in this case, I think that the seaman has clearly brought himself within sub-s. (1), and the shipowners have not discharged the burden imposed upon them in sub-s. (2) to take the seaman out of the operation of sub-s. (1).

I move, therefore, that the appeal be dismissed.

The second appeal is governed by the first.

LORD WARRINGTON authorises me to state that he concurs in the opinion I have delivered.

LORD BLANESBURGH.—By s. 7 of the Merchant Shipping (International Labour Conventions) Act, 1925, it is directed that the Act is to be construed as one with the Merchant Shipping Acts, 1894 to 1923. The Act—I will now refer to it as the Act of 1925—thus becomes a constituent part of a statutory code with special meanings attached to some of its terms by definition and to others by accepted usage or judicial decision. The result of course is that a meaning may necessarily be attributable to its provisions very different from that which would attach to the same words in an independent enactment.

And the incorporation of the Act in the code with that result supervening is of its very essence. It is passed, as its preamble states, to give effect (inter alia) to the convention set forth in its first schedule; and, as a reference to s. 1 immediately shows, the method adopted to achieve that purpose is not, as it might have been, to transfer the international language of the convention to the body of the Act simpliciter, but it is to translate that language into the phraseology of the Merchant Shipping Acts and to give statutory effect to the convention in that form of words, for better or for worse.

Section 1 in the result is a pregnant section. It does not carry its full meaning upon its face. It is only by reference to the provisions of what I may call the code that its real effect can be ascertained, and most particularly is this true of the term "wages," the fundamental word of the section, three times repeated, almost insistently, and always without periphrasis or qualification. What does that word connote in the language of the code? Can it have attributed to it in its setting or at all the meaning which must be placed upon it if the seamen's claims, sustained by the Court of Appeal, are to succeed, or is its necessary interpretation such as to exclude those claims altogether?

And following an investigation of the provisions of the code, I have reached the conclusion that, whatever may be the meaning of the word in a dictionary sense, or even in a section of an isolated Act of Parliament, "wages," in a Merchant Shipping Act, has a perfectly definite signification which is quite inappropriate to quantify the seamen's present claims. It is, be it at once noted, neither compensation nor an indemnity nor a gratuity that the seaman is to receive under the section. He is to have "wages" and nothing else. The use of the word, I have satisfied myself, is deliberate. It is full of meaning as a code word. When that meaning is ascertained the first paragraph of the section, which on its face, as I quite agree, is unqualified, becomes at once restricted, inasmuch as it is now disclosed that there can be no "wages" properly so called receivable by a "seaman" properly so called beyond those provided for in his agreement with the owner current at the date of the wreck of his vessel and referred to in the section.

That conclusion, if it be right, enables me to place upon this section of the Act of 1925 a construction which appears to be at once consonant with the declared purpose of the Legislature, not inconsistent with sound sense, and in entire accord with the convention. Accordingly, I crave your Lordships' indulgence if I endeavour to justify it as concisely as I can, but nevertheless at greater length than I care for. I do so because I see in this case a problem of first importance both to the seamen and to the owners of lost ships, and it is fitting that it should be ventilated in your Lordships' House from every point of view.

In the sections of the code relating to seamen no provisions are so elaborate as those dealing with their "wages." The expression "seamen's wages," in their essential characteristics has been for generations a term of art in maritime law.

Possibly for this reason the expression is not, in the code, made the subject of full definition, "wages" being there defined only to the extent of saying that the term includes "emoluments" (Merchant Shipping Act, 1894, s. 742). And incidentally I may observe as illustrating by an early example the precision of meaning held to be attached to the word throughout the code, that even the addition to "wages" of "emoluments" does not bring "maintenance" within their ambit: (*Palace Shipping Co.* v. *Caine* (1) ([1907] A.C. at p. 393). And the content of "the term 'wages' as used in the Act," to adopt Lord Macnaghten's phrase in the case cited, is, in all essentials, not to be mistaken. To a seaman's wages, invariably so called, there are annexed in the code privileges, incidents, restrictions, safeguards, elsewhere unknown to the law, and not even made incident to any advantage from his service accruing to a seaman under some other description.

A seaman's wages, for example, whether due or accruing, are not subject to attachment or arrestment; an assignment of them prior to accruer is not binding on the seaman; a power of attorney or authority to receive them is not irrevocable; payment of wages to a seaman is valid in law notwithstanding any previous sale or assignment, attachment, incumbrance or arrestment of the same wages (Merchant Shipping Act, 1894, s. 163). Before 1906 a seaman might not insure his wages, even if earned: (see now the Marine Insurance Act, 1906, s. 11).

On the other hand a seaman had and has in respect of wages two privileges the enjoyment of which furnishes, as will be seen later, a valuable clue to the true construction of the Act of 1925. He has for his wages, but for them only, a maritime lien upon his ship and he may also recover any wages due to him in a court of summary jurisdiction which, incidentally, may be situate in or near the place "at which his service has terminated" (Merchant Shipping Act, 1894, s. 164)—words strongly indicative that there will be no "wages" coming to him after that date.

But what are the essential qualities of the "wages" to which these incidents—privileges and restrictions alike—are attached? These are, as I have already indicated, unmistakable. Beginning with the Merchant Shipping Act, 1853, when the old doctrine that freight was the mother of wages was finally superseded (see now the Merchant Shipping Act, 1894, s. 157), the word "wages" as used in Merchant Shipping Acts is in full consonance with Lord Stowell's well-known description of them in *The Neptune* (2)—a description peculiarly apposite in the present case. Lord Stowell says (1 Hag. Adm. at p. 232):

> "The natural and legal parents of wages are the mariner's contract, and the performance of the service covenanted therein; they in fact generate the title to wages."

This description is now embodied and amplified in ss. 113 and 114 of the Merchant Shipping Act, 1894. The seamen's wages are a principal subject-matter of the written agreement with the crew thereby made compulsory. That agreement, to which the old description of ship's articles still clings, must be in a form approved by the Board of Trade, and it must contain among its provisions: (a) particulars of the nature and duration of the voyage; and (e) "the amount of wages which each seaman is to receive"—the two cardinal points in the ship's articles on which, as Maclachlan observes in his book on Merchant Shipping (5th Edn.), p. 225, Lord Stowell was occasionally obliged to interpose for the protection of the seaman against the fraudulent devices of dishonesty—a task now entrusted to the Board of Trade.

And the seaman is entitled as "wages" to no sum which is not, as such, entered in that agreement. "Under ss. 113 and 114 of the Merchant Shipping Act, 1894," said Coleridge, J., in *Thompson* v. *H. & W. Nelson, Ltd.* (3), paraphrasing earlier cases to the same effect, "a seaman can only recover as wages the amount specified in the articles."

Further, it is with reference to these wages alone, as has been already indicated, that in its application to seamen the word is used throughout the code. "Maintenance," as we have seen, is not "wages." The "double pay" for which the owner may be liable under the Merchant Shipping Act, 1894, s. 135, is not "wages"; the compensation, "not exceeding one month's wages," recoverable under the Merchant Shipping Act, 1894, s. 162, is not "wages"; nor is the compensation in like circumstances recoverable by a seaman who has signed a fishing-boat's agreement: (Merchant Shipping Act, 1894, s. 411).

It should, however, be added that while the service covenanted in the articles, to repeat LORD STOWELL's words, still remains one of their parents, "wages" in the statutory sense may nevertheless be payable to a seaman who has not rendered service in respect of them, e.g., where he has been disabled by accident during the voyage: *Chandler* v. *Grieves* (4). But not for any time beyond the stipulated voyage, ibid. Accordingly, if the Act of 1925 be so limited in its operation, it has made no new departure in the use of the term. But not otherwise.

Now what are the soi-disant "wages" which each seaman is asking for in this case? They represent a sum claimed from the owners of a ship that has been lost, with whom the seaman has no agreement for its payment, in return for no service to be rendered by himself, with no voyage in contemplation, and no ship to undertake one. It is only as "seamen," of course, that the respondents are under the Act entitled to receive anything. But in relation to these claims the seamen are not even such. "A seaman" (Merchant Shipping Act, 1894, s. 742) is a "person . . . employed or engaged . . . on board any ship."

Is it not, therefore, now plain—I suggest to your Lordships it has become so—that to assert with regard to such a claim, as the seamen must, that it is a claim to receive "wages" as a "seaman," is a statutory contradiction in terms?

And this examination of the code instructs a statement of the rival views of the Act of 1925 which may at this point be helpful. The shipowners' view is that, subject to the provisions of s. 1, a seaman is entitled, during unemployment, to receive his "wages" for a period of two months after the wreck of his ship if his service contemplated by the articles would but for the wreck so long have continued; the seamen's view is that the seaman is so entitled to receive his "wages" whether these are in any sense covered by the articles, even, indeed, if they are altogether outside the articles or other agreement with the owners.

More briefly expressed, the maximum period over which wages may under the section be received is two months from the date of the wreck if, in the shipowners' view, there are for so long under the articles wages to be paid—whether, in the seamen's view, there are wages so to be paid or not.

Now, in contrasting these rival views of this section the shipowners have, I suggest, one initial advantage. They reach their conclusion without the addition to the section of any words not already there. Their construction would, of course, have been clear to demonstration if the section had run "in respect of each day of the contemplated term of service." But, if the draftsman is using the word "wages" in what I may call the sense of the code, he is entitled to have it said that words to the effect of the inserted words are already implicit in "wages" and that to repeat them would strictly be redundant, if not tautologous. And this draftsman is assuredly a man of few words.

The seamen are, in this matter, less fortunate. If wages are used in the sense of the code, then words of extension, or words making "wages" merely referential are, as it seems to me, essential, if the section is to be expanded to cover their demand. For instance, if a claim like theirs had ever been in contemplation at all, the precedent set by another section of the code—the Merchant Shipping Act, 1894, s. 162—almost in pari materia and already referred to, would surely have been followed, and the seaman declared entitled to receive not "wages" but "compensation," or, if you prefer it, "an indemnity" or "a gratuity" "at the rate of the wages to which he was entitled at that date." By the addition of some such descriptive word, with the term "wages" merely referential, the seamen's construction of the section would have been established. But none of these descriptive words are to be found, nor is anything said from which their presence may be implied. On the contrary, the other provisions of, and the omissions from, as well as the form of, the section are, I think, eloquent to show that no such implication was ever intended—in other words, that the seamen's present claim is intended to be and is in fact outside the section altogether.

I will first refer to an omission from the section in justification of this statement. The scheduled convention, to which it is the avowed purpose of the Act of 1925 to give effect, provides in art. 3 that seamen are to have the same remedies for recovering their ''indemnities'' as they have for recovering arrears of wages earned during service. The remedies there pointed at are, so far as British seamen are concerned, those provided for in the Merchant Shipping Act, 1894, s. 164, already summarised. Now there is no reference at all in the Act of 1925 to any such remedies. It is quite unnecessary, of course, that there should have been, if it is only code ''wages'' which are under the Act being made recoverable. But if, as the seamen contend, the word ''wages'' extends to something which is not code wages at all—e.g., compensation, indemnity, gratuity—then the Act fails altogether to give effect to the Convention in this respect. It was suggested on behalf of the seamen, faced with this difficulty, that it was got over by the fact that the receipts under the Act are there described as ''wages,'' a description of itself sufficient to attract to them all the code procedure relating to the recovery of wages properly so described. But here once again the seamen are called upon to recognise that the Act of 1925 is itself part of a code. And that code does not provide for such a case in that way. Section 1, if such were its effect, would be in this code quite sui generis. Where it is desired that something which is not ''wages'' shall be recoverable as such, the code says so in express terms. I refer as typical examples —the list might be greatly extended—to s. 135 (3) and s. 411 of the Merchant Shipping Act, 1894, and to s. 42 (2) of the Merchant Shipping Act, 1906. This omission from the statute, not, as I think, to be explained if the seamen's view of the enactment be correct, is, I cannot doubt, strongly confirmatory of the shipowners' contention as to the true meaning of s. 1.

But the provision of the section to which I now proceed is even more illuminating in this same direction. The Act of 1925, by s. 1, becomes operative only if by reason of the wreck of the ship on which he was employed a seaman's service ''terminates before the date contemplated in the agreement.'' The significance of these last words will not be lost when it is noted that, in point of effect, they are identical with and have been taken from s. 158 of the Act of 1894, itself referred to in s. 1. Indeed, if the two sections are laid side by side it is at once seen that they are completely complementary each to the other. A vessel is wrecked in the course of a voyage. Her seamen's wages under the articles prior to the wreck are dealt with in s. 158; these wages, or some of them, subsequent to the wreck in s. 1. But nothing except these wages is being dealt with in either section. True it is that in relation to ''wages'' one great extension, in point of principle, is made in 1925, beyond the stage reached in 1894—an extension which is never to be forgotten in this case, if the exceptional character, even of the admitted burden now laid upon owners, is to be fully appreciated. The wages for which, under s. 158, the owner is made liable are in respect of services which, albeit fruitlessly, had at least been rendered to him by the seaman. Under s. 1 of the Act of 1925 the owner is being made to pay ''wages'' although no service whatever need in return either be rendered or tendered to him by the seaman receiving them. Apart from this distinction, which certainly does not instruct judicially the extension of the owner's liability beyond express definition or clear implication, the correspondence of the two sections seems complete. The event is the same; the agreement in relation to any one seaman is the same; the ''wages'' in the Merchant Shipping Act, 1894, s. 158, are indubitably ''code wages,'' and if it remains in any way doubtful whether the ''wages'' in s. 1 of the Act of 1925 are other than the same ''wages'' which but for the wreck would have been payable under the same agreement—the limitation established, as I suggest aliter—note how that doubt is weakened if not, indeed, resolved by the fact that to make either section operative the wreck of the vessel must have taken place before the termination of the seaman's contemplated service, and not later. To s. 158 that condition was of course essential, for the reason that had it been omitted the whole section would have been otiose and superfluous. But the condition is transferred almost textually to s. 1 of the Act of 1925, and for no other imputable reason, as I suggest, than that its presence in that section, on its only true construction, was essential if the section was to be in no circumstances inoperative. There must be at least one day's "wages" to be received under it if the section is to be of any use at all to the seaman.

But, on the other hand, if the "wages" to be receivable under this Act of 1925 have in point of duration no relation to the provisions of the current articles it is, I suggest, difficult to understand why a person whose remuneration now is based upon the profits of the voyage should be excluded from the benefit of the Act, s. 1 (3), while it is inconceivable that the above condition could have been deliberately transferred over from s. 158. In relation to such an enactment as is now hypothesised the condition is alike arbitrary and senseless. This is well illustrated by the case of the *Celtic*, the subject of the second appeal. The *Celtic* foundered off Queenstown on Dec. 10, 1928, her voyage being contemplated to end at Liverpool on the next day, Dec. 11. The seaman respondent to that appeal, Comerford, has, by the Court of Appeal which accepted his contention, been awarded two months' wages from the earlier date. If, however, his vessel, instead of foundering off Queenstown on the 10th, had foundered off Liverpool on Dec. 11, all benefit to the seaman must, under the section, have been refused, and yet one can descry no alteration of circumstance which could rationally instruct so amazing a change.

It almost seems that Scrutton, L.J., was conscious of this anomaly. He felt himself dispensed from facing it, however, by an assertion which, with the profoundest respect for the Lord Justice, I am quite unable to follow:

> "It is obvious [he says] that the wreck or loss of a ship on which a seaman is serving will always happen before the date contemplated for the termination of his service."

Why is it obvious? I would ask. Is that the reason why the same condition was inserted in the Merchant Shipping Act, 1894, s. 158? In a statute which applies to any voyage without reference to circumstances is there any greater likelihood that a ship will be lost on any one day of the voyage rather than on any other day? Even in the case of the *Celtic*, might not her foundering have a priori just as well happened off Liverpool on the 11th as off Queenstown on Dec. 10, 1928?

I regret that the Lord Justice, for a reason which seems to be no reason, felt dispensed from dealing with this matter. I should have been helped by his views upon it. All I can say, for want of any answer so far made, is that I see in this condition, and in the close correspondence both as to subject-matter and otherwise between s. 158 of the Act of 1894 and s. 1 of the Act of 1925, the strongest further indication that this Act of 1925 has no reference at all to such a claim as the seamen's.

I find also in the second paragraph of the section indications pointing to the same conclusion. Note, on this view of the section, how neatly it fits into the scheme: how appropriate for the decision of a court of summary jurisdiction is the only question that can now arise before it. On proof by a seaman that his vessel was lost on the voyage, on production of the articles, and on further proof that he was in fact unemployed on days included in the articles and within two months from the wreck, his case is established and he is entitled to judgment unless the owner can disprove his case by proof of such things personal to the seaman as Scrutton, L.J., refers to, or by proof, to borrow the language of unemployment insurance, that he has not been genuinely seeking work. There is no room or occasion for proof of any special circumstance in relation to the ship, e.g., that if she had not been lost she would have been laid up or sold to another owner or otherwise disposed of, or in relation to the seaman himself that he would have been or would not have been again engaged, at the same or a lower wage, in the same or in another position. It is to my mind not without significance that in the section there is neither directly nor indirectly any reference to these vague and indefinite considerations which, if the seamen's view of it is right, are vital to every such claim as they now make.

But I do not further expand these considerations in a judgment already too long. I leave my analysis of the section at the point that I have reached, content, so far as I am concerned, with the results attained.

Three things only will I add. First, as I read SLESSER, L.J.'s judgment, he arrives at the same conclusion as I have done by reliance primarily on the second paragraph of the section. I desire to say that for myself I doubt if I could have reached the same conclusion had I not been able to find the basic justification for it in the first paragraph, and I should also have distrusted its correctness, had it involved the placing of any qualification upon the words in the first paragraph "in respect of each day on which he is in fact unemployed." These words appear to me to be quite unambiguous, and they must, I think, in any true interpretation of the section have their ordinary meaning assigned to them.

Next, having reached the above conclusion without reference to the scheduled Convention to which it is the purpose of the Act of 1925 to give effect, I would now inquire, merely as a matter of interest, whether the conclusion is or is not in accord with the Convention. I cannot doubt that it is in complete accord therewith. The difficulty in comparing the Convention with the Act consists in the fact, already alluded to, that the draftsman has not transferred to the Act the words of the Convention, but he has translated them into the technical language of the Merchant Shipping Acts. And, if the Act be interpreted as I have sought to interpret it, his translation is to my mind in this matter entirely accurate. It seems to me clear that the "two months' wages" to which by art. 2 the "indemnity . . . may be limited" are not two months taken out of the life of the seaman, but two months taken out of the "contract for service," where the unexpired term of that contract exceeds two months. I do not find any suggestion in the Convention that the owner is to be made liable either at the contract rate of wages or at any other rate for days of unemployment covered by no contract at all with himself.

If, therefore, the seamen's construction of the Act is to be accepted it means that Parliament under no international obligation in that behalf in a statute which contains no hint of any such intention, has gratuitously gone out of its way to impose on an owner a liability to a seaman for wages for which he has never contracted and, apart from the statute, is under no conceivable liability to pay. He is to have no return for the payments so to be made, and Parliament has chosen as the occasion for imposing upon him this liability, in relief it would seem, if the seaman *Comerford's Case* may be regarded as typical, of the Unemployment Insurance Fund to which he has already contributed, at the moment when the owner is already confronted with the total loss of his ship.

Parliament can, of course, do anything, and I hope that judicially I shall never be other than obedient to its directions, whatever, when they are clearly expressed, these directions may be. But I should, as I conceive, be rendering a disservice to Parliament if without compelling words I were to impute to it an enactment which as sought to be interpreted by the seamen is as entirely discordant with legislative precedent as, in my judgment, it is opposed to good sense and fairness.

I do not suggest that this Act of 1925 is clear, I do not suggest that s. 1 bears its meaning, as I have interpreted it, upon its sleeve. It yields up its secret only to the patient inquirer; its truth lies at the bottom of the well. It is obscure; it remains oblique, but it is not in the result ambiguous. The truth from the well is found, at the end of the search for it, to have been leaking out of the section itself all the time, just as the truth, in the words of a learned judge whom we all have in remembrance, may leak out sometimes even from an affidavit.

If the decision rested with me I would allow both appeals.

LORD TOMLIN (read by LORD THANKERTON).—The only question on these appeals is as to the construction of the Merchant Shipping (International Labour Conventions) Act, 1925, which I shall refer to as the Act of 1925.

At common law where a ship was lost on a voyage the seamen could recover nothing.

By s. 158 of the Merchant Shipping Act, 1894, it was enacted as follows:

> "Where the service of a seaman terminates before the date contemplated in the agreement, by reason of the wreck or loss of the ship, or of his being left on shore at any place abroad under a certificate granted as provided by this Act of his unfitness or inability to proceed on the voyage, he shall be entitled to wages up to the time of such termination, but not for any longer period."

On July 9, 1920, the general conference of the International Labour Organisation of the League of Nations adopted a draft Convention concerning unemployment indemnity for seamen in case of loss or foundering of their ship.

Article 2 of the draft Convention was in the following terms:

> "In every case of loss or foundering of any vessel the owner or person with whom the seaman has contracted for service on board the vessel shall pay to each seaman employed thereon an indemnity against unemployment resulting from such loss or foundering.
>
> This indemnity shall be paid for the days during which the seaman remains in fact unemployed at the same rate as the wages payable under the contract, but the total indemnity payable under this Convention to any one seaman may be limited to two months' wages."

The Act of 1925 is intituled

> "An Act to give effect to certain draft Conventions adopted by the International Labour Conference relating respectively to an unemployment indemnity for seamen in the case of loss or foundering of their ship"

and other matters.

The preamble of the Act of 1925 recites the adoption of the Conventions referred to in the title and that such Conventions contain the provisions set out in the First Schedule to the Act. Article 2 of the Convention of July 9, 1920, is included in the First Schedule.

The preamble further recites that it is expedient that for the purpose of giving effect to the draft Conventions such provision should be made as is contained in the Act.

Section 1 of the Act of 1925 then enacts as follows: [His Lordship then read s. 1 (1) and (2) of the Act, which are printed at p. 505, ante, in the opinion of LORD DUNEDIN.]

On Oct. 29, 1928, the seaman concerned in the first appeal was engaged by the shipowners to serve on board the steamship *Croxteth Hall* as a quarter-master and able-bodied seaman at a wage of £9 10s. per month.

The articles under which the seaman was engaged were for a voyage of not exceeding two years' duration to any ports or places within the limits of 75 deg. north latitude and 60 deg. south latitude commencing and proceeding as mentioned in the articles and to end at such port in the United Kingdom or Continent of Europe (within home trade limits) as might be required by the master.

On Feb. 27, 1929, before the date contemplated in the articles for the end of the voyage and while proceeding homewards on her voyage from Antwerp to Middlesbrough the ship was wrecked off Flushing.

Had the ship proceeded on her voyage without accident she would have reached Middlesbrough not later than Mar. 11, 1929. There the voyage would have ended and the crew would have been discharged from further service under the articles.

After the wreck the seaman was out of employment.

As the result of the judgments of the President and of the Court of Appeal (SLESSER, L.J., dissenting) the shipowners have been ordered to pay two months' wages from the date of the wreck and to satisfy the judgment by paying to the Ministry of Labour the amount which the seaman received in respect of unemployment pay from the Labour Exchange and by paying the balance, if any, to the seaman.

The shipowners contend that upon the true construction of the Act of 1925 the statutory right of the seaman to recover wages is not a right to two months' wages, but only a right to wages till the time when the voyage would have terminated if there had been no wreck, but not in any event more than two months' wages.

To my mind s. 1 of the Act of 1925, upon which the question depends, is free from ambiguity.

Under sub-s. (1), disregarding for the moment the words "subject to the provisions of this section," I think that a seaman whose service by reason of the wreck or loss of his ship terminates before the date contemplated in the agreement of service can claim wages during two months from such termination for each day on which he was in fact unemployed. But there is a qualification introduced by the words "subject to the provisions of this section." That qualification is to be found in sub-s. (2), and the effect of the subsection in question is, in my opinion, to enable the shipowner to prove certain things which if proved will disentitle the seaman to all or some part of that which otherwise he would have taken under sub-s. (1).

I cannot find in any part of the section anything which introduces a cutting down of the two months' period by reference to the date at which but for the wreck or loss the service would have terminated.

Nor do I think, assuming there is any divergence between the draft Convention and the Act, that it would be proper to resort to the draft Convention for the purpose of giving to the section a meaning other than that which in my judgment is its natural meaning. Upon this view of the matter I think that primâ facie the seaman, who has proved that he was out of employment during the two months, was entitled to two months' wages from the wreck. Further, the shipowners have not upon the evidence discharged the onus thrown on them by sub-s. (2), and the seaman's primâ facie right has therefore not been displaced.

The facts in the second appeal do not in any respect material to the matters which have been argued before your Lordships' House differ from those in the first appeal.

In my opinion both appeals fail, and should be dismissed.

LORD MACMILLAN (read by LORD THANKERTON).—I am unable to find in s. 1 of the Merchant Shipping (International Labour Conventions) Act, 1925, the ambiguity which is said to lurk in it although counsel for the appellants sought diligently to persuade the House of its existence. It was suggested that it resided in the words "in fact unemployed" in sub-s. (1), which were said to be susceptible of meaning either "out of work generally" or "not employed under the aforesaid agreement of service," and it was argued that the use of the word "wages" to describe the payment to the seaman supported the latter reading because the payment of wages connotes the existence of a contract of employment. In my view the words in question do not give rise to any such ambiguity. The uncompromising expression "in fact unemployed" seems to me to make it as precise as language can make it, that the statute requires no more of the seaman than that he shall have been actually out of work on each day of the two months for which he claims.

It is no doubt true that where the language used by the Legislature presents a choice of two or more meanings equally tenable it is admissible within certain limits to have resort to the aid of extraneous considerations and certainly to the context of the statute itself in order to discover which meaning was most probably intended: (see for example *Victoria City Corpn.* v. *Bishop of Vancouver Island* (5), per LORD ATKINSON, [1921] A.C. at pp. 387–8 and authorities there cited). But the terms of the statute in the present case offer no such choice to my mind, and only a sophisticated reading could import any ambiguity into them.

The object of representing the subsection to be ambiguous, as your Lordships were frankly told, was to pray in aid of its interpretation the language of the preamble and of the scheduled Convention, to give effect to which the statute appears to have been enacted. But if it were legitimate or necessary to go outside the terms of the subsection and resort to these aids I do not think that they assist the shipowners' case. For the word "indemnity," which both in the preamble and in the Convention is used to describe the payment to the seaman and which was specially relied on by the shipowners, is certainly not applicable in its technical sense to the benefit which sub-s. (1) confers on the shipwrecked mariner. If he has signed on for a six months' voyage and the vessel is wrecked at the end of the first month he will not receive five months' wages but a maximum of two months' wages, which may be an arbitrary compensatory payment but is not an indemnity.

The judgment of SLESSER, L.J., who dissented in the Court of Appeal, approaches the question through the second subsection. If I follow his reasoning, the learned Lord Justice holds that if the owner shows that any days included in the two months' claim are beyond the date on which the seaman's contract of employment would have terminated if there had been no wreck and the voyage had reached its natural end, then in law his unemployment during such days cannot be said to be "due to the wreck or loss of the ship." Hence the words "in fact unemployed" in sub-s. (1) must be read as meaning "unemployed during what would have been the currency of the seaman's contract of employment subsisting at the time of the wreck had it not been frustrated by the occurrence of the wreck." With all respect to the learned Lord Justice I doubt the soundness of his reasoning. Subsection (2) qualifies the right of the seaman to two months' wages, conferred by sub-s. (1) "subject to the provisions of this section," by affording the shipowner two forms of defence to a claim for two months' wages. The first defence, on which SLESSER, L.J., relies, permits the shipowner to escape liability if he can show, the onus being on him, that the unemployment which the seaman has in fact experienced "was not due to the wreck or loss of the ship." If the shipowner had been permitted to avoid liability by showing that the unemployment was not due to the premature termination of the seaman's service the argument might perhaps have had more force. But I am by no means satisfied, having regard to the common practice of re-engaging seamen for successive voyages in the same ship, that the Legislature intended that no unemployment extending in time beyond the date of the natural expiry of the frustrated contract could be regarded as "due to the wreck or loss of the ship." By the wreck of his ship the seaman is disappointed of the prospect of re-engagement for her next voyage which in the ordinary case he may reasonably entertain, and he must set about finding a new ship on which to serve, and this may not always be easy. It may well be that this was in the view of the Legislature when the arbitrary limit of two months was fixed, irrespective of the date on which the contract current at the date of the wreck would in any case have expired.

The facts in the case of the appeal relating to the steamship *Celtic* do not differ from those in the case of the appeal relating to the steamship *Croxteth Hall* in any respect material to the question argued at your Lordships' bar, and I concur in the motion that both appeals be dismissed with costs here and below.

Appeals dismissed.

Solicitors: *Hill, Dickinson & Co.*; *Pattinson & Brewer*, for *G. J. Lynskey & Sons*, Liverpool; *Alexander Smith*, for *D. H. Mace*, Liverpool.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re JONES. JONES *v.* CUSACK-SMITH

[Chancery Division (Bennett, J.), December 3, 1930]

[Reported [1931] 1 Ch. 375; 100 L.J.Ch. 129; 144 L.T. 642]

Trustee—Trust for sale of land—Trustee's duty to consult persons of full age beneficially interested in possession in rents and profits until sale—Extent of duty—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 26 (3), *as substituted by Law of Property* (*Amendment*) *Act*, 1926 (16 *&* 17 *Geo.* 5, *c.* 11), *Sched.*

The duty which s. 26 (3) of the Law of Property Act, 1925, as substituted by the schedule to the Law of Property (Amendment) Act, 1926, imposes on trustees for the sale of land to consult the persons of full age for the time being beneficially interested in possession in the rents and profits of the land until sale exists not only where the trustees are exercising their trust for sale, but also where the trustees are exercising any other trust or power arising under the Settled Land Act, 1925, or the Law of Property Act, 1925, or any additional or larger power conferred upon the trustees by the settlement or otherwise.

Notes. As to the duty of trustees to consult the beneficiaries, see 33 Halsbury's Laws (2nd Edn.) 257, para. 456. For the Law of Property Act, 1925, s. 26, as amended, see 20 Halsbury's Statutes (2nd Edn.) 471.

Case referred to:

(1) *Re House, Westminster Bank* v. *Everett*, [1929] 2 Ch. 166; 98 L.J.Ch. 381; 141 L.T. 582; Digest Supp.

Summons.

On April 2, 1930, the trustees for the purposes of the Settled Land Act, 1925, of a settlement of real estate settled by a will dated Feb. 5, 1881, obtained an order in administration proceedings that they were entitled to exercise all the statutory trusts and powers conferred upon trustees for sale by the Settled Land Act, 1925, the Law of Property Act, 1925, and the Law of Property (Amendment) Act, 1926. The trustees took out a summons in the action for the determination (inter alia) of the question whether the provisions of s. 26 (3) of the Law of Property Act, 1925, as amended by the Law of Property (Amendment) Act, 1926, which made it obligatory on trustees for sale to consult the beneficiaries, applied only in respect of sales by trustees for the purposes of the Settled Land Act in exercise of the statutory trusts, or whether it applied also in respect of all or any, and, if so, what other acts or dealings by trustees in relation to the settled estates or the moneys or investments representing the same, in exercise of the statutory trusts and powers conferred upon trustees for sale by the above-mentioned statutes.

The Law of Property Act, 1925, s. 26, provides:

> "(1) If the consent of more than two persons is by the disposition made requisite to the execution of a trust for sale of land, then, in favour of a purchaser, the consent of any two of such persons to the execution of the trust or to the exercise of any statutory or other powers vested in the trustees for sale shall be deemed sufficient. (2) Where the person whose consent to the execution of any such trust or power is expressed to be required in a disposition is not sui juris or becomes subject to disability, his consent shall not, in favour of a purchaser, be deemed to be requisite to the execution of the trust or the exercise of the power; but the trustees shall, in any such case, obtain the separate consent of the parent or testamentary or other guardian of an infant or of the committee or receiver (if any) of a lunatic or defective. (3) [As amended by the Law of Property (Amendment) Act, 1926]: Trustees for sale shall so far as practicable consult the person of full age for the time being beneficially interested in possession in the rents and profits of the land until sale, and shall, so far as consistent with the general interest of the trust, give effect to the wishes of such persons, or, in the case of dispute, of the majority

> (according to the value of their combined interests) of such persons, but a purchaser shall not be concerned to see that the provisions of this subsection have been complied with. In the case of a trust for sale, not being a trust for sale created by or in pursuance of the powers conferred by this or any other Act, this subsection shall not apply unless the contrary intention appears in the disposition creating the trust." A

B

C. J. Parton for the applicants, the trustees.

C. Montgomery-White for Jennie, Lady Cusack-Smith, one of the beneficiaries.

L. W. Byrne for various beneficiaries, referred to *Re House, Westminster Bank* v. *Everett* (1).

BENNETT, J.—The question for the determination of the court is what are the duties of trustees for the purposes of the Settled Land Act, 1925, under s. 26 (3) C of the Law of Property Act, 1925, as amended by the Law of Property (Amendment) Act, 1926. Must trustees for sale consult the persons of full age for the time being entitled in possession to the rents and profits of the land on the occasion of the exercise of any of their statutory trusts and powers, or is their duty limited to consulting the beneficiaries when they propose to exercise the trust for sale?

The question turns entirely on the proper construction of s. 26 of the Act of 1925 D as amended by the Law of Property (Amendment) Act, 1926. The material section reads as follows: [His Lordship read sub-s. (1) and continued:] It is clear, I think, from that subsection that, where the consent of more than two persons is required to the exercise of "any statutory or other powers," the subsection is not dealing merely with the exercise of a trust for sale but with the exercise of any other trust or power. [After reading sub-s. (2) his Lordship continued:] Again, in that sub- E section, what is being considered is not merely a trust for sale, but the exercise of any trust or power.

Subsection (3), as amended, is as follows:

> "Trustees for sale shall so far as practicable consult the persons of full age for the time being beneficially interested in possession in the rents and profits of the land until sale." F

Nothing is said, so far, as to the duties of trustees to consult beneficiaries. Then the subsection goes on:

> "and shall, so far as consistent with the general interest of the trust, give effect to the wishes of such persons, or, in the case of dispute, of the majority (according to the value of their combined interests) of such persons, but a G purchaser shall not be concerned to see that the provisions of this subsection have been complied with."

The question is whether the operation of that subsection is to be limited to cases in which the trustees for sale intend to exercise the trust for sale. It appears that so to limit it would necessarily lead to an inconsistency between that subsection and what seems to be the clear intention of the two earlier subsections. It seems H that, there being nothing expressed to limit sub-s. (3) or to indicate that sub-s. (3) is to have a different meaning from sub-ss. (1) and (2), I ought to adopt an interpretation which would make the whole section hang together, and the result is that the answer to the question is that the trustees must consult the beneficiaries, not only in the exercise of the trust for sale, but also in the exercise of all other trusts and powers arising under the Settled Land Act, 1925, and the Law of I Property Acts, and the additional or larger powers conferred by the settlement upon the trustees or otherwise.

Solicitors: *Boxall & Boxall*; *Indermaur & Brown* for *Edwin Boxall & Kempe*, Brighton; *Gregory, Rowcliffe & Co.*

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law*.]

LORD HASTINGS *v.* WALSINGHAM (REVENUE OFFICER)

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Branson, JJ.), April 8, 1930]

[Reported [1930] 2 K.B. 278; 99 L.J.K.B. 385; 143 L.T. 474; 94 J.P. 136; 46 T.L.R. 425; 74 Sol. Jo. 298; 28 L.G.R. 304; 1 B.R.A. 402]

Rates—Sporting rights—Rights over agricultural land—Rights severed from land, but not separately let—Not agricultural hereditament—Treatment in valuation list—Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 2.

Sporting rights over agricultural land which are severed from that land, but not separately let, constitute a separate hereditament for rating purposes. Such a separate hereditament is not an agricultural hereditament or part of one: *Alton U.D.C.* v. *Spicer* (1), [1904] 1 K.B. 678, applied; and so falls to be excluded from the special list required by the Rating and Valuation (Apportionment) Act, 1928, s. 1 (1); its net annual value should be stated separately and not added to the net annual value of the agricultural land in the valuation list, nor added to or included in the value of the agricultural land in the special list.

Semble: such sporting rights would not be excluded from the valuation list by virtue of the Local Government Act, 1929, s. 67 (2).

Notes. The Agricultural Rates Act, 1896, was repealed by the Local Government Act, 1929, s. 67 of which replaced it. Schedule 1 of the Rating and Valuation (Apportionment) Act, 1928, is now spent.

Followed: *Cleobury Mortimer R.D.C.* v. *Childe*, [1933] All E.R. Rep. 728.

As to the person rateable in respect of sporting rights, see 27 HALSBURY'S LAWS (2nd Edn.) 376; and as to the valuation of such rights for rating, see, ibid., 431. For cases on the subject, see 38 DIGEST 500, *548–552*. For the Rating Act, 1874, s. 3 (2), s. 6, the Rating and Valuation (Apportionment) Act, 1928, s. 1 (1), s. 2, and the Local Government Act, 1929, s. 67, see 20 HALSBURY'S STATUTES (2nd Edn.) 173–4 and 192 respectively.

Cases referred to:

(1) *Alton U.D.C.* v. *Spicer*, [1904] 1 K.B. 678; 73 L.J.K.B. 280; 90 L.T. 576; 68 J.P. 256; 52 W.R. 824; 20 T.L.R. 296; 48 Sol. Jo. 299; 2 L.G.R. 507, D.C.; 38 Digest 500, *551*.

(2) *R.* v. *Ellis* (1813), 1 M. & S. 652; 105 E.R. 243; 38 Digest 472, *328*.

(3) *R.* v. *Williams* (1854), 2 C.L.R. 1532; 23 L.T.O.S. 76; 18 J.P. 502; 5 Jur.N.S. 821, n.; 2 W.R. 410; 38 Digest 571, *1088*.

(4) *Eyton* v. *Mold Overseers* (1880), 6 Q.B.D. 13; 50 L.J.M.C. 39; 43 L.T. 472; 45 J.P. 54; 29 W.R. 122, D.C.; 38 Digest 572, *1092*.

(5) *R.* v. *Rhymney Rail. Co.* (1869), L.R. 4 Q.B. 276; 10 B. & S. 198; 38 L.J.M.C. 75; 33 J.P. 549; 17 W.R. 530; 38 Digest 507, *616*.

(6) *Swayne* v. *Howells*, [1927] 1 K.B. 385; 96 L.J.K.B. 148; 136 L.T. 326; 91 J.P. 16; 43 T.L.R. 14; 24 L.G.R. 578; (1926–31) 1 B.R.A. 183, D.C.; 38 Digest 443, *139*.

(7) *Towler* v. *Thetford R.D.C.* (1929), 99 L.J.K.B. 258; 143 L.T. 45; 94 J.P. 77; 28 L.G.R. 108; (1926–31), 1 B.R.A. 298; Digest Supp.

Case Stated by quarter sessions.

Lord Hastings, the appellant, was the owner of agricultural lands situated in the parish of Melton Constable, in the rating area of the Walsingham Rural District Council, in the county of Norfolk.

The lands were let to various agricultural tenants on yearly tenancies, and the owner received rent from such occupiers for the lands. The areas of the said lands let to the respective occupiers and occupied by them appear in the extracts from valuation lists hereinafter referred to; and the total of such areas was approximately 590 acres.

In such yearly tenancies the rights of sporting, as defined by s. 6 of the Rating Act, 1874, were reserved to the owners by the following clause contained in each of such tenancy agreements among the terms and conditions upon which the lands were let:

> "Reservations to the landlord: Subject to the Ground Game Act, 1880, and other Acts, all game (including nests and eggs), hares, rabbits, woodcock, snipe and wildfowl, fish and foxes, with the right for the landlord and all persons authorised by him, to preserve, hunt, shoot, fish, course, and sport over the holding."

The said rights of sporting were not let by the owner to any person, and the owner was entitled to and, in fact, did exercise such rights upon and over the said lands.

In the first new valuation list made in accordance with Part II of the Rating and Valuation Act, 1925, for the rating area of Walsingham rural district the various agricultural tenants above-mentioned were assessed as the occupiers of the said lands respectively. In estimating the gross net annual and rateable value of the said lands for the purposes of the said list, the directions contained in s. 6, sub-s. (1) of the Rating Act, 1874, were not followed, but such values were estimated as if the said rights were severed and let. No such application as is authorised by that subsection was made by any of such occupiers.

In the said first valuation list, the owner was assessed as the owner and occupier of property separately valued and described in the said list as "sporting rights over 590 acres."

The owner, being aggrieved by the last-mentioned assessment, by notice in writing dated June 24, 1929, duly made a proposal in accordance with s. 37 of the Rating and Valuation Act, 1925, for amendment of the said first new valuation list (which had by that time become the valuation list in force) asking that the said assessment should be deleted from the valuation list upon the ground that the said rights of sporting should not be separately valued or rated.

The North-West Norfolk (No. 6) Assessment Committee duly heard and determined the said proposal on July 5, 1929, and gave notice to the owner that the said proposal for the amendment of the valuation list would not be allowed and that the said committee would not amend the said valuation list.

The owner being aggrieved by the decision of the assessment committee by notice dated July 24, 1929, gave notice of appeal against such decision to the court of Quarter Sessions for the county of Norfolk, in accordance with the provisions of the said Rating and Valuation Act, 1925. Under the said Act it was not possible to make the present respondent a party to such appeal, the provisions of the Rating and Valuation (Apportionment) Act, 1928, not being applicable thereto.

In accordance with the duty imposed on them by the Rating and Valuation (Apportionment) Act, 1928, the Walsingham Rural District Council, as rating authority, duly deposited the draft special list for their rating area. In such draft special list, the said lands were entered, and the several tenants above-mentioned were assessed as occupiers thereof. Their values appearing in the said list were estimated in the manner indicated in the first new valuation list (see sup).

The owner, being aggrieved by the said draft special list, by notice in writing dated Sept. 6, 1929, made objection to the draft special list, which was duly heard by the North-West Norfolk (No. 6) Assessment Committee on Sept. 20, 1929, when the committee dismissed the objection.

The owner, being aggrieved by the decision of the assessment committee, by notice in writing dated Oct. 10, 1929, gave notice of appeal to the court of Quarter Sessions for the county of Norfolk against such decision, in accordance with the provisions of the First Schedule to the Rating and Valuation (Apportionment) Act, 1928, by which the revenue officer was entitled to receive notice of appeal.

The appeal relating to the valuation list in force and initiated by the said notice of appeal dated July 24, 1929, had been respited by the court of Quarter Sessions until after the decision of the High Court upon this Case Stated, with the consent of the parties to such appeal and in pursuance of an arrangement made between the owner and the revenue officer. Such arrangement had been made in order that the revenue officer might have an opportunity of being heard on the questions raised in the present case, certain of which arise in the said appeal relating to the valuation list in force, to which appeal the revenue officer was not a party.

The revenue officer on Nov. 6, 1929, duly gave notice of intention to appear as respondent to the present appeal, which relates to the said special list, and was initiated by the notice of appeal dated Oct. 10, 1929. The other respondents to such appeal had given no notice of intention to appear. The present case was stated on such latter appeal in pursuance of the arrangement indicated above.

If the gross and net annual values of the said lands were estimated in accordance with the directions contained in s. 6 (1) of the Rating Act, 1874, or if the rights of sporting were not severed such values would be as follows:

Assessment Number	*Gross Value*	*Net Annual Value*
No. 49	£17 9 0	£16 11 7
,, 150	117 8 6	111 11 1
,, 158	127 2 6	120 15 5
,, 167	257 2 6	244 5 5
,, 200	21 15 6	20 13 9

The entries in the first new valuation list and in the draft special list were:

Assessment Number	*Gross Value*	*Net Annual Value*
No. 49	£17 0 0	£16 3 0
,, 150	110 0 0	104 10 0
,, 158	115 0 0	109 5 0
,, 167	235 0 0	223 5 0
,, 200	20 13 0	19 12 0

In the first new valuation list Lord Hastings, the appellant owner, was assessed as the owner and occupier of property separately valued and described in the said list as "Sporting rights over 590 acres" at £44.

It was contended on behalf of the owner:

(i) That the said rights of sporting do not constitute a separate hereditament or hereditaments, and that there was no power to treat them as such for the purposes of the said first new valuation list, or of the said special list;

(ii) That seeing that the said rights of sporting are severed from the occupation of the land and are not let, and seeing that the owner of such rights receives rent for the land, the said rights should not be separately valued and should not be separately entered in the valuation list in force;

(iii) That the gross and net annual values of the said lands in the said valuation list in force and in the said special list respectively should be estimated as if the said rights of sporting were not severed;

(iv) That the rateable values of the said lands (including the rights of sporting) should be entered in the said draft special list as nil.

The revenue officer contended:

(i) That the said rights of sporting constituted a separate hereditament or hereditaments and that therefore it was necessary to treat them as such for the purposes of the said new valuation list and of the said special list.

(ii) That the said rights of sporting were not an agricultural hereditament or alternatively were not part of an agricultural hereditament or of agricultural hereditaments.

(iii) That the said separate hereditaments, namely, the rights of sporting, had properly been excluded from the said special list.

(iv) That the net annual value of the said separate hereditaments, namely, the rights of sporting, should be stated separately and not added to the net annual value A of the said lands in the said new valuation list.

(v) That no addition should have been made to and (or) no amount included in the value of the said lands appearing in the said special list in respect of the said separate hereditaments.

(vi) That the decision of the Assessment Committee upon the owner's objection herein was correct, or alternatively the said decision was correct in so far as it B related to the said special list, but that the said separate hereditaments, namely, the rights of sporting (not being agricultural hereditaments) should have been entered in the said valuation list as five separate hereditaments, and the occupier of the same stated therein to be the owner, or alternatively the occupiers of the same stated therein to be the persons entered in the said special list as the occupiers of the lands on which the said sporting rights are exercised. C

If the court were of opinion that the contentions of the revenue officer numbered (i), (ii), (iii) and (vi), or any of those contentions was correct, then the appeal was to be dismissed. If the court were of opinion that the contentions of the owner or any of them was correct, then the appeal was to be allowed and the draft special list was to be amended by inserting as the gross and net annual values of the said lands the figures set out above in accordance with s. 6 (1) of the Rating Act, 1874, D as if the rights of sporting were not severed, and by inserting therein a rateable value of nil for each of the said assessments.

If the court were of opinion other than is indicated above the appeal was to be determined and (if necessary) the said draft special list was to be amended in accordance with the judgment of the court.

The Rating Act, 1874, provided: E

> "Section 3. . . . The Poor Rate Acts shall extend to the following hereditaments in like manner as if they were mentioned in the recited Act of the forty-third year of the reign of Queen Elizabeth: that is to say . . . (2) To rights of fowling, of shooting, of taking or killing game or rabbits, and of fishing, when severed from the occupation of the land.
>
> Section 6. (1) Where any right of fowling or of shooting or of taking or killing F game or rabbits, or of fishing (hereinafter referred to as a right of sporting) is severed from the occupation of the land and is not let, and the owner of such right receives rent for the land, the said right shall not be separately valued or rated, but the gross and rateable value of the land shall be estimated as if the said right were not severed; and in such case if the rateable value is increased by reason of its being so estimated, but not otherwise, the occupier of the land G may (unless he has specifically contracted to pay such rate in the event of an increase) deduct from his rent such portion of any poor or other local rate as is paid by him in respect of such increase; and every assessment committee, on the application of the occupier, shall certify in the valuation list or otherwise the fact and amount of such increase. (2) Where any right of sporting, when severed from the occupation of the land, is let, either the owner or the lessee H thereof, according as the persons making the rate determine, may be rated as the occupier thereof. (3) Subject to the foregoing provisions of this section the owner of any right of sporting, when severed from the occupation of the land, may be rated as the occupier thereof. (4) For the purposes of this section, the person who, if the right of sporting is not let, is entitled to exercise the right or who, if the right is let, is entitled to receive the rent for the same, I shall be deemed to be the owner of the right."

The Rating and Valuation (Apportionment) Act, 1928, provided:

> "Section 2. (1) In this Act the expression "agricultural hereditament" means any hereditament being agricultural land or agricultural buildings. (2) In this Act the following expressions have the meanings hereby respectively assigned to them: 'Agricultural land' means any land used as arable, meadow or pasture ground only, land used for a plantation or a wood or for the growth of saleable underwood, land exceeding one-quarter of an acre used for the purpose

A of poultry farming, cottage gardens exceeding one-quarter of an acre, market gardens, nursery grounds, orchards or allotments including allotment gardens within the meaning of the Allotments Act, 1922, but does not include land occupied together with a house as a park, gardens (other than as aforesaid), pleasure grounds or land kept or preserved mainly or exclusively for purposes of sport or recreation or land used as a race-course; and for the purpose of this B definition the expression 'cottage garden' means a garden attached to a house occupied as a dwelling by a person of the labouring classes."

E. M. Konstam, K.C. (*Trustram Eve* with him), for the owner, referred to *R.* v. *Ellis* (2); *R.* v. *Williams* (3); *Eyton* v. *Mold Overseers* (4); *R.* v. *Rhymney Rail. Co.* (5) (Q.B. at p. 284); *Swayne* v. *Howells* (6); and *Towler* v. *Thetford R.D.C.* (7).

C *Trustram Eve* followed by leave.

The Attorney-General (*Sir William Jowitt, K.C.*), *Wilfrid Lewis* and *Colin H. Pearson*, for the revenue officer, referred to *Alton U.D.C.* v. *Spicer* (1); *Swayne* v. *Howells* (6); and *Towler* v. *Thetford R.D.C.* (7).

LORD HEWART, C.J., summarised the facts and continued: The question D which is involved, and it is an interesting question, may be stated quite simply in this way. The question is: How in relation to the law of rating, as that law has now become, do sporting rights stand where they are severed from the occupation of the land, but are not let? The argument on the part of the owner may be shortly stated in this way. As a result of successive statutes, agricultural land properly so called has now ceased to have a rateable value, but, he says, where E sporting rights, although severed from the occupation are not separately let, they form a part of the agricultural land, and as the whole has ceased to be rateable, it follows that part also has ceased to be rateable. It matters not, the owner contends, that in certain other circumstances—namely, where the sporting rights are not only severed but are also made the subject of a separate letting—they have a rateable value: where they are not the subject of a separate letting they form a F part of the agricultural land of which, as the law has now developed, the rateable value is nil. The true conclusion, therefore, as he submits, is that the rateable value of the agricultural land, plus the sporting rights severed, though not separately let, is nil.

Against that view various contentions are urged on the part of the present respondent, who is the revenue officer for the district of the Walsingham Rural District Council; and one is bound to say at first blush that it would be a little G surprising if the Legislature in its anxiety to grant relief from rates in certain hard cases had deliberately or inadvertently relieved sporting rights from rateability where they are severed from the occupation but are not separately let. If that were the true conclusion to be derived from these statutes, it would obviously be necessary to give effect to them; but is it the true conclusion?

The history of the matter is capable, I think, of tolerably brief statement. By H the Rating Act, 1874, s. 3, it was provided that the existing legislation with regard to the poor rate should extend to hereditaments other than those mentioned in the Act of Elizabeth, and accordingly, on and after the commencement of the Act of 1874, the poor rate Acts did extend to certain newly-named hereditaments in like manner as if they were mentioned in the Act of Queen Elizabeth, and among these hereditaments so named for the first time was No. 2: "Rights of fowling, of I shooting, of taking or killing game or rabbits, and of fishing, when severed from the occupation of the land." Those last words are of importance. It is not suggested that the sporting rights are the subject of rating when they are not severed from the occupation of the land. Then followed certain provisions in s. 6 with reference to the case where the sporting rights are severed indeed from the occupation of the land, but are not let, and in that case it was provided that where in such a case the owner of sporting rights receives rent for the land, the sporting rights shall not be separately valued or rated but the gross and rateable value of the land shall be estimated as if the said rights were not severed. Thereupon, where the rateable value was increased by reason of its being so estimated, it was provided that the occupier of the land might deduct from his rent such portion of any poor or other local rate as was paid by him in respect of that increase; and it was further provided that every assessment committee on the application of the occupier should certify in the valuation list, or otherwise, the fact and amount of that increase. It is to be observed that in that section the words are "the said right" shall not be separately valued or rated; that is, the right of fowling or of shooting or taking or killing game, &c., shall not be separately valued or rated. That is a different thing from saying that the right is not to be valued or that it is not to be rated. On the contrary, the section shows that regard is to be had to the value of the sporting rights, and that where the value of the land is increased by reason of the sporting rights, special arrangements are made for the proper adjustment of the burden. What is provided there is that in the case named, that is to say, where the rights are severed but not let, there should be no separate valuation or separate rating of those rights. But already by s. 3 of the Act of 1874 the sporting rights have been made and remain a hereditament.

It was in the state of affairs so produced that steps were taken from time to time to relieve the burdens falling upon agricultural land, and so the Agricultural Rates Act, 1896, s. 5, provided that in every valuation list and in the basis or standard for any county rate, and in any valuation made by the council of a borough or any other council for the purpose of raising the borough or other rate, where separate hereditaments are specified therein, the value of agricultural land shall be stated separately from that of any building or other hereditament, and also in every case the total rateable value of the agricultural land in each parish shall be stated separately from the total rateable value of the buildings or other hereditaments in such parish. And again, by s. 6 (2), for the purpose of certain returns which are made obligatory, statements showing the gross estimated rental and rateable value of the agricultural land in a parish, and, in the case of any hereditament separately valued, which consists in part of agricultural land and in part of buildings or other hereditaments, of each such part, shall be made by the overseers of every parish and corrected by the assessment committee.

Certain relief was accordingly given so far as the burdens upon agricultural land were concerned and in that statute (the Act of 1896) the definition of agricultural land was as follows:

> "The expression 'agricultural land' means any land used as arable meadow or pasture ground only, cottage gardens exceeding one-quarter of an acre, market gardens, nursery grounds, orchards, or allotments, but does not include land occupied together with a house as a park, gardens, other than as aforesaid, pleasure grounds, or any land kept or preserved mainly or exclusively for purposes of sport or recreation, or land used as a racecourse."

After some intermediate steps, important indeed in detail, but not varying the principle, further relief was given to agricultural land, until at length by the Rating and Valuation (Apportionment) Act, 1928, with a view to the grant of further relief, provision was made for the actual physical distinction in valuation lists of certain classes of hereditaments, and by s. 1 of that statute it was provided that in every valuation list the classes of hereditaments hereinafter mentioned shall in the prescribed manner be distinguished from each other and from all other hereditaments —and first in the catalogue is "agricultural hereditaments."

One looks to see what the definition of agricultural hereditaments is. It is provided by s. 2, where it is said that "the expression 'agricultural hereditament' means any hereditament being agricultural land or agricultural buildings"; and, further, the expression "agricultural land" is defined as meaning

> "any land used as arable, meadow or pasture ground only, land used for a plantation or a wood, or for the growth of saleable underwood, land exceeding one-quarter of an acre used for the purpose of poultry farming, cottage gardens exceeding one-quarter of an acre, market gardens, nursery grounds, orchards

> or allotments, including allotment gardens within the meaning of the Allotments Act, 1922, but does not include land occupied together with a house as a park, gardens other than as aforesaid, pleasure grounds, or land kept or preserved mainly or exclusively for purposes of sport or recreation, or land used as a racecourse."

And, finally, to complete the history of this relief, by the Local Government Act, 1929, which was passed on Mar. 27, 1929, and which is future from the point of view of some of the dates comprised in the present case, it was provided by s. 67 that no person shall in respect of any period beginning on or after the appointed day, be liable to pay rates in respect of any agricultural land or agricultural buildings, or be deemed to be in occupation thereof for rating purposes, and notwithstanding anything in the principal Act or in the Rating and Valuation (Apportionment) Act, 1928, no such land or buildings shall be included in any rate made in respect of the period beginning on and after that date.

It is in those circumstances, founding himself indeed on the legislation leading up to the Act of 1929, but reinforcing the argument by the provisions of that Act, when it comes to be enforced, that the owner contends that these sporting rights severed, but not let, have a nil value because the land over which they are exercised is agricultural land having a nil value. The revenue officer contends, on the contrary, that the rights of sporting constitute a separate hereditament or hereditaments, and that therefore it was necessary to treat them as such for the purposes of the said new valuation list and of the said special list.

In my opinion that contention is correct. I think that on the true construction of the Act of 1874 that conclusion follows, and although it may well be that in certain cases some of the machinery comprised in s. 6 of the Act of 1874 is not indeed expressly repealed, but in effect rendered obsolete, this contention that the rights of sporting severed from the occupation but not separately let, constitute a separate hereditament, is correct.

A second contention on the part of the revenue officer is that these rights of sporting are not an agricultural hereditament, or alternatively are not part of an agricultural hereditament or of agricultural hereditaments. That contention, too, I think is sound, and with regard to that contention reference may be made to *Alton U.D.C.* v. *Spicer* (1), in which it was held that where a right of sporting over land is severed from the occupation of the land and is let, s. 211 of the Public Health Act, 1875, does not apply to entitle the lessee of that right to be assessed in respect of the same to the general district rate in the proportion of one-fourth part only of the net annual value thereof. In that case LORD ALVERSTONE, C.J., said, speaking of the Act of 1874 ([1904] 1 K.B. at p. 681):

> "The Act therefore created a new rateable hereditament independent of occupation in the ordinary sense of the word when considered as the test of rateability";

and then a little later:

> "It was argued for the respondent that he was entitled by that provision (s. 211 (1) (b) to be rated in respect of his sporting right at one-fourth of the net annual value. The answer is that he is not an occupier of land used as arable, meadow or pasture ground only, or as woodland; he is the statutory occupier, in the sense that the Act says he is to be rated as if he were the occupier of a special hereditament, namely, the sporting right."

Mutatis mutandis, those considerations apply, and just as land kept or preserved mainly or exclusively for purposes of sport is excepted from the definition of agricultural land in s. 2 of the Act of 1928, so a fortiori the incorporeal hereditament consisting of sporting rights where they are severed from the occupation is also excepted from the definition of agricultural land. It is not true, therefore, to say that the part takes the complexion of the whole. The fallacy consists in treating the incorporeal hereditament of sporting rights as being a part of the corporeal hereditament of agricultural land.

Further, the revenue officer contended that the said hereditaments, namely, the rights of sporting, were properly excluded from the special list, that is to say, they were not to be treated as forming part of that which was valued at nil. That contention follows from the other. And again, that the net annual value of the said separate hereditaments, namely, the rights of sporting, should be stated separately and not added to the net annual value of the said land in the said new valuation lists. And again, that no addition should have been made to and (or) no amount included in the value of the said lands appearing in the said special list in respect of the said separate hereditaments. All these contentions appear to me to be sound and conclusive.

The sixth contention of the revenue officer is as follows: that the decision of the assessment committee on the owner's objections herein was correct in so far as it related to the said special list, but that the said separate hereditaments, namely, the rights of sporting (not being agricultural hereditaments), should have been entered in the said valuation list as five separate hereditaments and the occupier of the same stated therein to be the owner, Lord Hastings, or alternatively the occupiers of the same stated therein to be the persons entered in the said special lists as the occupiers of the lands on which the said sporting rights are exercised. I refrain from the task which has been indicated to the court of settling the form of valuation lists which is suitable to the new circumstances. I am content to express the view that these contentions as to the true nature of sporting rights severed but not let are, in substance, correct. It is suggested that the crux arises, or may hereafter arise, by reason of the provisions of sub-s. (2) of s. 67 of the Local Government Act, 1929. If and when that difficulty does arise, no doubt suitable steps will be taken to meet it. The difficulty consists in these words. The section provides that for the purposes of valuation lists in force at the appointed day, agricultural land and agricultural buildings shall be deemed to have no rateable value, and notwithstanding anything in the enactments hereinbefore in this section mentioned, no particulars with respect to such land or buildings shall be included in any subsequent valuation list. To construe this subsection is not necessary for the purposes of the present case, and yet the difficulty is indicated as one which lies in wait for rating authorities at no long time from to-day. I cannot help thinking that that subsection is to be read closely in connection with the limiting definition of agricultural land. True, no particulars with respect to agricultural land, properly so called, strictly defined, are to be included in any subsequent valuation list, but speaking for myself, that does not seem to me to raise insuperable difficulty in the way of sufficiently identifying the sporting rights exercised over land which is agricultural.

In these circumstances, and for these reasons, without entering into some further questions which do not appear to be necessary for decision in this case, I think that the present appeal ought to be dismissed.

AVORY, J.—I am of the same opinion. The cardinal question in this case is whether the sporting rights do or do not constitute a separate hereditament or hereditaments, and whether they should be treated as such for the purpose of the new valuation list and of the special list. The Act of 1874 beyond question has made sporting rights when severed from the occupation of the land, a rateable hereditament, and as such they are liable, and remain liable, to be treated as a separate rateable hereditament. The Agricultural Rates Act, 1896, required that

> "In every valuation list . . . where separate hereditaments are specified therein, the value of agricultural land shall be stated separately from that of any building or other hereditament."

I have no doubt that that statute means to include in the words "other hereditament" the sporting rights which by the Rating Act, 1874, had been constituted a rateable hereditament; and there is nothing in the Act of 1928 or 1929 to destroy the character of sporting rights when severed from the occupation of land as separate rateable hereditaments. In those circumstances, whatever difficulty may practically arise when sub-s. (2) of s. 67 of the Act of 1929 comes into operation, I am satisfied that for the purposes of this present case the answers which my Lord has given to the several contentions are the correct ones, and that for those reasons this appeal should be dismissed.

BRANSON, J.—I agree.

Appeal dismissed.

Solicitors for the appellant, *Peacock & Goddard* for *Hill & Perks*, Norwich; *The Treasury Solicitor.*

[*Reported by* C. G. Moran, Esq., *Barrister-at-Law.*]

CARPENTER *v.* HAYMARKET HOTEL, LTD.

[King's Bench Division (Swift and Acton, JJ.), October 17, 1930]

[Reported [1931] 1 K.B. 364; 100 L.J.K.B. 33; 144 L.T. 119;
47 T.L.R. 11; 74 Sol. Jo. 703]

Inn—Loss of guest's property—Ring placed by guest in suitcase in bedroom—Notice in hall of hotel limiting innkeeper's liability—Notice in bedroom that articles of value be deposited at hotel office—No negligence on part of guest—Innkeepers' Liability Act, 1863 (26 *&* 27 *Vict.*, *c.* 41), *s.* 1, *s.* 3.

The plaintiff and her husband booked a bedroom at the defendants' hotel. During the evening the plaintiff, who was wearing a diamond ring, replaced it by a pearl ring, putting the diamond ring into a jewel case which she placed in her suitcase. The plaintiff and her husband then went to a dance, leaving the suitcase in the bedroom. The next morning the plaintiff discovered that the diamond ring was missing, and the defendants were so informed. The defendants had exhibited in the hotel a copy of s. 1 of the Innkeepers' Liability Act, 1863, and in the plaintiff's bedroom there was a notice that all articles of value should be deposited at the hotel office. In an action by the plaintiff claiming from the defendants damages for the loss of the ring, it was found that the plaintiff had not been guilty of any negligence.

Held: there being no evidence of an undertaking of the exclusive control of the ring by the plaintiff sufficient to relieve the defendants of their liability as insurers of the safety of their guests' goods, or of negligence on the part of the plaintiff, she was entitled to judgment against the defendants.

Jones v. *Jackson* (1) (1873), 29 L.T. 399, distinguished.

Notes. The Innkeepers' Liability Act, 1863, has been repealed and replaced with certain different provisions by the Hotel Proprietors Act, 1956.

Distinguished: *Wright* v. *Embassy Hotel* (1934), 79 Sol. Jo. 12.

As to grounds for the liability of a hotel proprietor for guests' property, see 21 Halsbury's Laws (3rd Edn.) 451–458, paras. 950–957; and for cases on the subject, see 29 Digest 10–15, *128–187.* For the Innkeepers' Liability Act, 1863, s. 1 and s. 3, see 12 Halsbury's Statutes (2nd Edn.) 1171, 1172; and for the Hotel Proprietors Act, 1956, see 36 Halsbury's Statutes (2nd Edn.) 465–469.

Cases referred to:

(1) *Jones* v. *Jackson* (1873), 29 L.T. 399; 37 J.P. 776; 29 Digest 14, *185.*

(2) *Aria* v. *Bridge House Hotel* (*Staines*), *Ltd.* (1927), 137 L.T. 299; Digest Supp.

(3) *Sanders* v. *Spencer* (1566), 3 Dyer, 266 b; 73 E.R. 591; 29 Digest 13, *173.*

(4) *Richmond* v. *Smith* (1828), 8 B. & C. 9; 2 Man. & Ry.K.B. 235; 6 L.J.O.S.K.B. 279; 108 E.R. 946; 29 Digest 12, *149*. A

Appeal by the plaintiff from Westminster County Court.

The plaintiff, Mrs. Carpenter, and her husband, a Brighton solicitor, booked a room at the defendants' hotel on Oct. 30, 1929. At about 5.30 p.m. they arrived at the hotel with their suitcases and went into the bedroom allotted to them. At B
that time the plaintiff was wearing a diamond ring on her finger. During the course of the evening, between 5.30 p.m. and 9 p.m., she took the diamond ring from her finger and in its place put a pearl ring. She put the diamond ring into a jewel case which she placed in her suitcase, of which she clasped down the lid, and she and her husband then went out to a dance. Next morning, on looking into the jewel case, she discovered that the diamond ring had gone, and communication was C
made to the defendants' manager. No search of the suitcase was made then as the plaintiff had to return to Brighton. In the hall of the hotel there was the usual notice under the Innkeepers' Liability Act, 1863, limiting the innkeeper's liability for loss to £30. In the bedroom was a notice to the effect that the hotel company would not be responsible for any property lost in the hotel, and earnestly requesting visitors to lock their doors and leave the key with the hotel porter. D
The notice concluded with the words: "All articles of value should be deposited at the office and a receipt obtained for the same." The plaintiff brought an action in the county court claiming from the defendants the maximum amount to which their liability was limited by the Innkeepers' Liability Act, 1863. At the trial it was established by the evidence of the plaintiff that the diamond ring had been lost at the defendants' hotel, and the county court judge found that the plaintiff E
had not been guilty of any negligence in respect of the lost property. The county court judge gave judgment for the defendants, holding that the decision in *Jones* v. *Jackson* (1) obliged him to do so. The plaintiff appealed.

C. Grundy, for the plaintiff, referred to *Aria* v. *Bridge House Hotel (Staines) Ltd.* (2), and *Jones* v. *Jackson* (1).

H. H. Maddocks, for the defendants, referred to *Jones* v. *Jackson* (1), *Sanders* v. F
Spencer (3), *Richmond* v. *Smith* (4), and 17 HALSBURY'S LAWS (1st Edn.) p. 320 [Vol. 21 (3rd Edn.) p. 457].

SWIFT, J.—This is an appeal from a decision of his Honour Judge TURNER given at the Westminster County Court, in an action in which the plaintiff claimed damages for the loss of a diamond ring which had been taken by her as a guest to the defendants' hotel on Oct. 30, 1929. G

At the close of the plaintiff's case it was submitted on behalf of the defendants that they had no case to answer because in the bedroom a notice was exhibited to the effect that the company would not be responsible for any property lost in the hotel. The notice further recommended visitors to lock their doors, and stated that all articles of value should be deposited at the office and a receipt obtained for the same. Before the county court judge it was contended that the failure to H
deposit this diamond ring at the office amounted to negligence, and it was suggested that the innkeeper defendants were not responsible because the loss had been brought about by the negligence of the plaintiff herself. There was not, before the county court judge, as, of course, there could not be, any dispute as to the liability of an innkeeper. The innkeeper is an insurer of the goods of the guests which are brought to the hotel. He is relieved from the liabilities attaching to I
that position if the loss is occasioned by the negligence of the guest himself. He is also relieved from the liability as an insurer if a guest so conducts himself in relation to his goods as to show that he has relieved the innkeeper from responsibility for their protection and has undertaken the protection himself.

Before the learned county court judge, the only question which appears to have been discussed was whether or not the plaintiff had been guilty of negligence. He came to the conclusion as a fact that she had not been guilty of any negligence, and I should have thought that he was perfectly right in coming to that conclusion of fact. Certain it is that there was ample material in the evidence which was before him which justified him in coming to the conclusion that the defendants had not proved that the plaintiff was in any way herself guilty of negligence which brought about the loss of the diamond ring. And I also think that there was no evidence that she had so acted as to show that she had retained to herself the protection of her own property as to relieve the innkeeper of his liability in that respect. To say that a guest who leaves some valuable article in his bedroom shows that he intends to relieve the innkeeper of his common law liability to insure it against theft or loss in any way seems to me quite unarguable. Counsel for the defendants admitted that he would not expect a lady to go down from her bedroom to the office in order that she might deposit the ring which she had taken off her finger with the clerk at the office, rather than put it in her suitcase. It seems to me, with regard to these points, that the learned county court judge was perfectly right in coming to the conclusion of fact in favour of the plaintiff.

But, having come to the conclusion that the plaintiff was not guilty of any negligence, the judge decided that he was bound to give judgment in favour of the defendants because of a case decided in 1873, to which his attention was called. In that case—*Jones* v. *Jackson* (1)—it was held by the Court of Exchequer that the plaintiff's conduct amounted to such negligence as not to entitle him to recover against the innkeeper for goods or money which he had left in his room after a certain notice had been given. The county court judge has failed to appreciate that all that the decision in that case amounted to was that there was evidence in that particular case, and in the circumstances of that particular case, on which the jury were entitled to find that the plaintiff had been guilty of negligence. So there may have been, in the circumstances of the present case, evidence on which the judge, sitting as a jury, might have been entitled to find that the plaintiff had been guilty of negligence, but, in fact, he found that the plaintiff had not been so guilty. The fact that, in any particular case, a jury find that certain facts amount to negligence in no way guides or assists, and certainly does not bind, any other tribunal concerned with a similar state of facts in quite a different case, to find that these facts amount to negligence. The judge found that the plaintiff had not been guilty of negligence, and that she had not retained control of her own goods so as to relieve the innkeeper of his liability. In those circumstances, he ought to have entered judgment for the plaintiff for the amount of damages to which she was entitled. The ring was valued at £45, and the damages claimed under the Act were £30, and judgment should have been given for that amount, with costs.

It is said on behalf of the defendants that, even if the judge was wrong, and judgment ought not to have been entered for the defendants, judgment ought not to be entered for the plaintiff, but a new trial ought to be ordered on the ground that the defendants were not allowed to put or were prevented from putting their evidence before the judge. I have come to the conclusion that there is really nothing in that contention. What happened, as I gather from counsel, was that counsel on behalf of the defendants took the point that the plaintiff had not made out any case for the defendants to answer. The county court judge agreed, and thereupon counsel for the defendants relied on that—he was content. If the judge had disagreed, and had held that the plaintiff had made out a case, counsel was going to call some evidence to show that the ring had not been lost in the hotel. It may well be that the judge did not seem inclined to listen to any evidence on the point. I find nothing to make me suppose that evidence was tendered to him and that he refused to accept it in such a way as to entitle the defendants to claim now that their evidence was not heard in regard to this matter. My view regarding this matter is strengthened by the fact that the judge mentioned in court at the close of the proceedings that judgment should be entered for the plaintiff for £30, if he were wrong. It was assumed by everybody that that was an end of the whole matter, and that all the evidence had, in fact, been given.

In the circumstances, I cannot accede to the suggestion that there should be a new trial. Judgment should be entered for the plaintiff for £30, with costs,

ACTON, J.—I agree. I think that the learned county court judge, having arrived at the finding of fact at which he was perfectly entitled on the evidence to arrive, went erroneously against his own judgment by holding, in the face of the conclusion of fact, that he was bound by *Jones* v. *Jackson* (1) to give judgment for the defendants.

With regard to the matter which has just been under discussion, I think that, on the production of the judge's note, it is reasonably clear that the question whether this ring was or was not lost in the hotel was never a substantial issue in this case at all. The judge's note of his judgment begins: "In this case I was satisfied that the plaintiff had taken reasonable care of the ring," and that the loss was not caused by the wrongful act of the defendants.

The county court judge does not purport to deal in any way with the suggested issue as to the way in which the ring was lost. In these circumstances, to my mind, it does not appear from the note by which we have, of course, to be guided, that there really was any substantial issue on this question at all. He was entitled to decide, and did decide, only the question of the liability of the innkeeper on the assumption that the ring had, in fact, been lost in the hotel. I agree that this appeal should be allowed, and judgment entered for the plaintiff for £30, with costs.

Appeal allowed.

Solicitors: *Gordon, Gardiner, Carpenter & Co.*; *Rye & Eyre.*

[*Reported by* T. R. F. BUTLER, ESQ., *Barrister-at-Law.*]

Re SIMMS, Ex parte TRUSTEE

[CHANCERY DIVISION (Clauson, J.), January 28, February 7, 28, 1930]

[Reported [1930] 2 Ch. 22; 99 L.J.Ch. 235; 46 T.L.R. 258;
143 L.T. 326; [1929] B. & C.R. 129]

Bankruptcy—Act of bankruptcy—Fraudulent conveyance—Delaying creditors—Transfer of assets and liabilities to company—Covenant by company to discharge transferor's liabilities—Intention of transferor immaterial—Bankruptcy Act, 1914 (*4 & 5 Geo. 5, c. 59*), *s.* 1 (1) (*b*).

The transfer by a debtor of substantially the whole of his property, whether by way of charge or by way of sale, will be an act of bankruptcy, within s. 1 (1) (b) of the Bankruptcy Act, 1914, if the necessary consequence of the transfer will be to defeat or delay his creditors. The substitution, in place of a going business and substantial business assets, of shares in a private company which has taken over the debtor's assets and liabilities, together with a right of action by the debtor against that company on its covenant to discharge his liabilities, must necessarily have the result of delaying creditors and cannot be treated as providing something which the creditors can reach just as easily and satisfactorily as the assets which have been transferred. As a result the title of the trustee in bankruptcy overrides that of the company and the property which was the subject-matter of the transfer must be treated as having continued to be the property of the debtor and to have vested in the trustee, with the consequence that the company must account for all such property or the proceeds of it which have come into the hands of the company or any agent of it. A fraudulent transaction remains a fraudulent transaction (at all events if the parties know all the facts which stamp it in law as a fraudulent transaction) although it is the view of the parties that it may be the best thing for the debtor or may result in effectually paying the creditors.

Notes. As to acts of bankruptcy, see 2 Halsbury's Laws (3rd Edn.) 259 et seq.; and for cases see 4 Digest 48 et seq. For Bankruptcy Act, 1914, see 2 Halsbury's Statutes (2nd Edn.) 321.

Cases referred to:

(1) *Smith* v. *Cannan* (1853), 2 E. & B. 35; 22 L.J.Q.B. 290; 17 Jur. 911; 1 W.R. 338; 118 E.R. 682; sub nom. *Cannan* v. *Smith*, 21 L.T.O.S. 231; 1 C.L.R. 179, Ex. Ch.; 4 Digest 58, *502*.

(2) *Young* v. *Waud* (1852), 8 Exch. 221; 22 L.J.Ex. 27; 20 L.T.O.S. 101; 155 E.R. 1328; 4 Digest 65, *558*.

(3) *Re Wood* (1872), 7 Ch. App. 302; 41 L.T. Bcy. 21; 26 L.T. 113; 20 W.R. 403, L.JJ.; 4 Digest 57, *488*.

(4) *Re King, Ex parte King* (1876), 2 Ch.D. 256; 45 L.J.Bcy. 109; 34 L.T. 466; 24 W.R. 559, C.A.; 4 Digest 62, *534*.

(5) *Re Ellis, Ex parte Ellis* (1876), 2 Ch.D. 797; 45 L.J.Bcy. 159; 34 L.T. 705, C.A.; 4 Digest 57, *487*.

(6) *Re Sinclair, Ex parte Chaplin* (1884), 26 Ch.D. 319; 53 L.J.Ch. 732; 51 L.T. 345, C.A.; 4 Digest 67, *567*.

(7) *Re Chapman, Ex parte Johnson* (1884), 26 Ch.D. 338; 53 L.J.Ch. 762; 50 L.T. 214; 32 W.R. 693, C.A.; 4 Digest 65, *555*.

(8) *Administrator-General of Jamaica* v. *Lascelles, De Mercado & Co., Re Rees' Bankruptcy*, [1894] A.C. 135; 63 L.J.P.C. 70; 70 L.T. 129; 42 W.R. 416; 10 T.L.R. 238; 1 Mans. 163; 6 R. 445, P.C.; 4 Digest 68, *580*.

(9) *Re Hirth, Ex parte Trustee*, [1899] 1 Q.B. 612; 68 L.J.Q.B. 287; 80 L.T. 63; 47 W.R. 243; 15 T.L.R. 153; 6 Mans. 10, C.A.; 5 Digest 645, *5786*.

(10) *Re Sharp, Ex parte Gundry and Johnston* (1900), 83 L.T. 416; 4 Digest 51, *427*.

(11) *Re Slobodinsky, Ex parte Moore*, [1903] 2 K.B. 517; 72 L.J.K.B. 883; 89 L.T. 190; 52 W.R. 156; 19 T.L.R. 616; 47 Sol. Jo. 710; 10 Mans. 341; 4 Digest 70, *598*.

(12) *Re David and Adlard, Ex parte Whinney*, [1914] 2 K.B. 694; sub nom. *Re David and Johnson, Ex parte Whinney*, 83 L.J.K.B. 1173; 110 L.T. 942; 30 T.L.R. 366; 58 Sol. Jo. 340; 21 Mans. 148; 4 Digest 71, *600*.

(13) *Re Harris, Ex parte Trustee* (1906), 54 W.R. 460; 50 Sol. Jo. 241; 14 Mans. 127, D.C.; 4 Digest 70, *599*.

(14) *Re Jukes, Ex parte Official Receiver*, [1902] 2 K.B. 58; 71 L.J.K.B. 710; 86 L.T. 456; 50 W.R. 560; 46 Sol. Jo. 452; 9 Mans. 249; 4 Digest 57, *491*.

(15) *Re Dombrowski, Ex parte Trustee* (1923), 92 L.J.Ch. 415; [1923] B. & C.R. 32; Digest Supp.

(16) *Re Gunsbourg*, [1920] 2 K.B. 426; sub nom. *Re Gunsbourg, Ex parte Trustee*, 89 L.J.K.B. 725; [1920] B. & C.R. 50; sub nom. *Re Gunsbourg, Ex parte Cook*, 123 L.T. 353; 36 T.L.R. 485; 64 Sol. Jo. 498, C.A.; Digest Supp.

(17) *Re Goldburg, Ex parte Silverstone*, [1912] 1 K.B. 384; 81 L.J.K.B. 382; 19 Mans. 44; 4 Digest 251, *2392*.

(18) *Re Connolly Bros., Ltd. (No. 2), Wood* v. *The Company*, [1912] 2 Ch. 25; 81 L.J.Ch. 517; 106 L.T. 738; 19 Mans. 259, C.A.; 10 Digest (Repl.) 793, *5150*.

Motion in bankruptcy.

The bankrupt, Frederick Simms, who was carrying on a business of builder, had contracted debts to the extent of £34,000, including a debt to one Jameson of £6,000. He had also overdrawn at Barclays Bank to the extent of £6,500. Lloyds Bank agreed to make the bankrupt advances up to £12,500, in consideration of his floating a private company to take over all his assets and liabilities and such company issuing to the bank a debenture to secure such advances. On Jan. 9, 1929, in pursuance of this agreement, the bankrupt floated a private company and transferred to it all his assets in consideration of the company allotting him 17,000 £1 shares and taking over his liabilities. By Jan. 18, 1929, a debenture for £12,500 was sealed in favour of Lloyds Bank. At the time of

the issue of the debenture there were two unsatisfied judgment debts against the A
bankrupt to the value of £400, but neither of the judgment creditors was informed of the issue of the debenture to Lloyds Bank. On Dec. 21, 1928, Lloyds Bank had paid off the bankrupt's overdraft with Barclays Bank, and received from Barclays Bank certain title deeds belonging to the bankrupt which had been held as security for the overdraft. Jameson accepted the company as his debtor for £6,000 without security. When the bankrupt's other creditors knew of the formation of the com- B
pany and the issue of the debenture, they began to press the bankrupt, and on Feb. 14, 1929, Lloyds Bank put in a receiver under the debenture. The bankrupt having committed an act of bankruptcy, a receiving order was made, and an adjudication was made on May 23, 1929. By the present motion the trustee in the bankruptcy asked for a declaration that the transfer of the assets of the bankrupt to the company of Jan. 9, 1929, was void as against him (the trustee) by virtue C
of s. 1 (1) (b) and s. 37 (1) of the Bankruptcy Act, 1914, and also asking for other relief.

Tindal Davis for the trustee in bankruptcy.

Rayner Goddard, K.C., and *Harold Christie* for the respondents.

Cur. adv. vult.

Feb. 28. **CLAUSON, J.**, read the following judgment: The first question with D
which I must deal is, whether the sale agreement of Jan. 9, 1929, was an act of bankruptcy. The agreement was followed, after five days, by formal transfers, and the subject-matter of the sale was admittedly taken over by the company within that time, so that no question turns on the document being an agreement for sale and not a conveyance.

The execution of the sale agreement was an act of bankruptcy if thereby the E
bankrupt made a fraudulent transfer of his property or any part thereof: see s. 1 (1) (b) of the Bankruptcy Act, 1914. The interpretation of those words, so far, at all events, as such a case as that before me is concerned, seems to me to be, in a court of first instance, now free from doubt. The authorities stand thus. In *Smith* v. *Cannan* (1) the Court of Exchequer Chamber had to deal with the Bankrupt Law Consolidation Act, 1849, s. 67, which enacted that a trader committed an F
act of bankruptcy if he made a fraudulent conveyance of any of his lands, goods or chattels with intent to defeat or delay his creditors. JERVIS, C.J., said the real test is: Has the trader by the deed put his property out of his control, so as to deprive himself of the present power to satisfy his creditors, as, but for the deed, he might do? POLLOCK, C.B.'s view was that the fact that the deed necessarily delayed the creditors was evidence to go to the jury that it was a fraudulent conveyance G
made with intent to defeat or delay the creditors. PARKE, B., said that the test is whether the necessary effect of the deed is to delay the creditors. It will be observed that the question whether the document was a fraudulent conveyance made with intent to delay the creditors had been left to the jury, and the jury had found a verdict which involved the affirmative of the question. The judges all thought that the circumstance that the conveyance was a conveyance of all the H
bankrupt's property, with only a small exception, was evidence on which the jury might properly find the conveyance to be a fraudulent conveyance made with intent to delay the creditors, notwithstanding that the conveyance was to secure a debt of such an amount that there was an ample surplus left in the equity of redemption. JERVIS, C.J., however, pointed out that a conveyance of the whole of a man's property would almost necessarily delay his creditors, and that as a man must be I
taken to intend the necessary consequences of his acts, the question whether such a conveyance was a fraudulent conveyance made with intent to delay creditors was scarcely a question to be left to a jury. It is interesting to notice that a few months before PARKE, B., in the Court of Exchequer, in *Young* v. *Waud* (2), had laid it down that a transfer of property, which must necessarily in its results be known to the bankrupt to lead to the delay of the creditors, is an act of bankruptcy, on the principle that a man is bound to contemplate the necessary result of his own acts.

In *Re Wood* (3), James and Mellish, L.JJ., sitting as a Court of Appeal in Bankruptcy, had to deal with s. 6 of the Bankruptcy Act, 1869, which made it an act of bankruptcy for the debtor to make a fraudulent transfer of his property or of any part thereof. The words are the same as the words of the present Act. It will be observed that the words of intent, which appeared in previous Acts, are absent, and a great part of the argument turned on the absence of those words. But Mellish, L.J., points out that where the question was whether a transfer was made fraudulently with intent to defeat or delay creditors, the practice was not to leave the question of intent to the jury; that there were various classes of conveyances which the court held to be fraudulent, some of which he enumerates; but that in all such cases the law assumed the transfer to be made with intent to defeat or delay, since that result was the necessary consequence. This accords entirely with the law as one would expect to find it after the weighty pronouncements made nineteen years earlier in *Smith* v. *Cannan* (1). The actual decision was that a transfer of the whole of a bankrupt's property to secure a past debt was a fraudulent transfer, and the decision is all the more significant in that it reversed the decision of the judge below, who considered that the security had been given in good faith, and for a valuable, though past, consideration. The transfer was held to be a fraudulent transfer on the ground that its necessary consequence, whether intended or not, was to delay creditors, because it prevented other creditors from issuing effective execution. This appears from the language used by Mellish, L.J. Of course, as was pointed out by James, L.J., in *Re King*, *Ex parte King* (4), there might be some further fact which would prevent a transfer of the whole of a man's property to secure a past debt having as a necessary consequence the defeat or delay of his creditors, as, e.g., if, upon the transfer, there were a further advance obtained with a bona fide intention of carrying on the business. This was, in fact, the position in *Re Ellis*, *Ex parte Ellis* (5), where Mellish, L.J., took occasion to point out quite clearly once again that an assignment of a debtor's whole property as security for a past debt without more would be an act of bankruptcy, whatever the motives of the parties might have been, the reason of course being that such an assignment would necessarily delay the other creditors.

I must refer next to two cases which came before the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) in March, 1884. In *Re Sinclair*, *Ex parte Chaplin* (6), the court had to deal with a type of fraudulent transfer which differed from those dealt with in the cases already cited, in that it was not a case of the transfer of the assignor's whole property by way of security, but was, as the court found, though on the face of it the document bore a different character, a transfer of the whole of the bankrupt's property to a creditor in consideration of the creditor releasing his own debt and agreeing to pay off all the assignor's other creditors. The transfer was thus not by way of security, but by way of sale. Cotton, L.J., held the transfer fraudulent on the ground that it withdrew all the debtor's property from the reach of his creditors so as to prevent them from enforcing their legal rights and remedies without the debtor obtaining anything which could be a substitute or equivalent for the creditors; and he pointed out that the transfer was fraudulent whatever may have been the view of those who were engaged in the transaction that it might be the best thing for the debtor, or that it might afford an effectual way of paying the creditors. Bowen, L.J., takes the same ground, and holds that, while the transferees had no intention of defrauding the creditors, they intended to do that the necessary result of which was to delay them. Fry, L.J., dealt with the case under the statute of Elizabeth (13 Eliz., c. 5). *Re Chapman*, *Ex parte Johnson* (7) was a case of a mortgage to secure an existing debt and a further advance, and the transfer was held not to be fraudulent because, though the transfer included the whole of the debtor's property, the further advance was made to enable the debtor to carry on his business, and with a reasonable belief that it would have that effect. This case was recognised in the Privy Council in the very similar case of *Administrator-General of Jamaica* v. *Lascelles & Co., De Mercado* (8) as correctly laying down the law.

In *Re Hirth* (9) the Court of Appeal held that the transfer of part of the bankrupt's property (the evidence as to whether or not the whole was transferred seemed to Lindley, L.J., to be of doubtful sufficiency) to a company in which he held substantially all the shares, in return for an issue of fully paid shares and an agreement by the company to pay his debts, was in the particular circumstances of the case fraudulent as being a juggle and a fraud. In *Re Sharp* (10) a transfer of the bankrupt's whole property for a sum which was to be applied in paying the creditors was held to be fraudulent, though there was no fraudulent or improper motive, as necessarily tending to defeat any creditors (and there were in fact some) who were not paid, and as necessarily tending to substitute for the administration of the estate in bankruptcy a different mode of administration. In *Re Slobodinsky* (11) a transfer by the bankrupt to a company was held to have been made in circumstances of very clear fraud and accordingly to be an act of bankruptcy. In *Re David and Adlard* (12) a transfer of a bankrupt's business to a company in good faith for shares and debentures was held by Horridge, J., to be a fraudulent transfer, and as such an act of bankruptcy, because it tended to defeat and delay any creditors who wished to enforce their rights against the bankrupt's estate. In that case the learned judge considered a decision of Bingham, J., in *Re Harris* (13), in which a conveyance to a company for debentures was upheld, and treated that decision as a case in which the consideration given was treated as providing, in fact, something which the creditors, in order to obtain payment of their debts, could reach just as easily (and, I suppose, satisfactorily) as the assets for which the consideration was substituted.

The result of these authorities appears to me to be that a transfer by a debtor of substantially the whole of his property, whether by way of charge or by way of sale, will be an act of bankruptcy, if the necessary consequence of the transfer will be to defeat or delay his creditors; and, with these authorities to guide me, I feel no difficulty in holding that the substitution, in place of a going business and substantial business assets, of (a) shares in a private company which has taken over the debtor's assets and liabilities together with (b) a right of action by the debtor against that company on its covenant to discharge his liabilities, must necessarily have the result of delaying the creditors, and cannot be treated as providing something which the creditors can reach just as easily and satisfactorily as the assets which have been transferred. The fact that it was in the contemplation of all parties that further finance should be secured by placing a prior charge on the transferred assets, certainly makes the position no better for those who seek to argue that the creditors will not be delayed. It follows that I must hold the sale effected by the agreement of Jan. 9, 1929, to be a fraudulent transfer and an act of bankruptcy. From this it results that the trustees' title overrides that of the company, and that the property which was the subject-matter of the agreement must be treated as having continued to be the property of the debtor and to have vested in the trustee, with the consequence that the company must account in the usual way for all such property, or the proceeds of it which have come to the hands of the company or any agent of the company. Whether the receiver was such an agent is a matter which I cannot determine in his absence.

It was, however, suggested that in some way or other the company could claim the protection of s. 45 of the Act of 1914. As I understood the argument in its final shape it was admitted (as in this court, in view of *Re Jukes* (14) and *Re Hirth* (9) it was necessary to admit) that that section must be read as protecting bona fide transactions only, as, indeed, is indicated by the marginal note which appears, I understand, on the Parliament Roll, and, accordingly, seems to form part of that which has been enacted by Parliament. I am afraid that I failed to appreciate how the company, having been a party to a transaction which is held to be a fraudulent transfer, with not only notice but knowledge of all the facts which carry this legal result (the knowledge of the debtor and his solicitor, who were the only directors, being necessarily the measure of the company's knowledge) can set up bona fides as a defence. The suggestion, I think, was that all the parties honestly thought that this transfer which the law holds—and they must be assumed to have known that the law would hold—to be fraudulent was the best thing in everyone's interests. But I can rely on the authority of Cotton, L.J., in *Re Sinclair, Ex parte Chaplin* (6) for the proposition that a fraudulent transaction remains a fraudulent transaction (at all events if the parties know all the facts which stamp it in law as a fraudulent transaction) although it is the view of the parties that it may be the best thing for the debtor, or may result in effectually paying the creditors. That authority alone makes it impossible for me to accede to the argument which would claim protection for the company in the present case on the footing of bona fides.

In the view of the law which I have stated, I must on this motion declare that the agreement in question was a fraudulent transfer, as necessarily tending to delay the bankrupt's creditors, and was, accordingly, an act of bankruptcy. I prefer, in this case, this form of declaration to that adopted in *Re Dombrowski* (15). I will go on to declare that the whole of the assets comprised in the said agreement form part of the assets of the bankrupt divisible among his creditors and vest in the applicant. I will then order (following the form in *Re Dombrowski* (15)) that the respondents, William Simms, Ltd., do deliver up to the trustee, or account to him for such of the said assets as have come to the hands of the said respondents or any person by the order or for the use of the said respondents and the proceeds of sale thereof, and that all such accounts as may be necessary be taken before one of the registrars of this court. The order will be that the trustee's costs be paid by the respondents, that is to say, the company and the bank, and the bank must pay the trustee's costs of the bank's application to be added as parties, if provision has not already been made for those costs. The bank suggested that they or the respondent company ought to be recouped, or to have credit for moneys expended in paying in full certain of the bankrupt's creditors. My order will not prevent the respondents setting up any claims to prove which they or either of them may desire to set up; but I fail to see how any lien for, or claim for payment in full of, any moneys so expended can be established. A somewhat similar point was raised in *Re Sinclair, Ex parte Chaplin* (6), and the way in which Cotton, L.J., dealt with the matter seems to justify me in leaving the matter in the way I do.

A question was raised whether the trustee ought not to be ordered to give up the shares which were received as consideration for the transfer. I did not clearly appreciate either what it was desired that he should do with the shares or the legal ground on which one party to the fraudulent transaction could base a claim to get back that which was handed over as part of the fraudulent transaction. Nor did I appreciate how it was proposed to get over the statement of the law expressed by Warrington, L.J., in *Re Gunsbourg* (16). However, as it was doubtful whether the point was of any practical moment, it was arranged to leave the matter over for further discussion. In order to register this, the order will reserve to the respondents, William Simms, Ltd., special liberty to apply as to the shares in that company now standing in the name of the trustee. There may, notwithstanding my decision that the transfer to the company must be set aside, be a question between the parties whether the bank who on paying off to Barclays the bankrupt's overdraft took over from Barclays the bankrupt's title deeds deposited with Barclays by way of security, can claim a charge upon the premises comprised in those deeds. It is a question which may entail a consideration of *Re Goldburg* (17) and possibly *Re Connolly Bros. (No. 2)* (18). But as the parties desire that this point should be kept open, I do not propose to deal with it now. This will be recorded by inserting in the order special liberty to the respondents, Lloyds Bank, to apply as they may be advised in regard to any property comprised in such documents of title, if any, as stood deposited with them on Jan. 9, 1929.

Solicitors: *Stafford Clark & Co.*; *Adler & Perowne.*

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law.*]

BULLER & CO., LTD. *v.* T. J. BROOKS, LTD.

[KING'S BENCH DIVISION (Wright, J.), February 6, 12, 1930]

[Reported 142 L.T. 576; 46 T.L.R. 233; 74 Sol. Jo. 139;
35 Com. Cas. 205]

Larceny—Revesting of property in stolen goods—Delivery of goods by wholesale dealer to customer introduced by retail dealer—Goods invoiced to retail dealer—Goods pawned by customer—Claim by wholesale dealer for return of goods from pawnee—Sale of Goods Act, 1893 (56 *&* 57 *Vict.*, *c.* 71), *s.* 24 (1).

By the Sale of Goods Act, 1893, s. 24 (1): "When goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods . . . notwithstanding any intermediate dealing with them . . ."

The plaintiffs, who were wholesale jewellers, had as customers a retail company who introduced to them as a customer, M. With the authority of the retail company and of M., the plaintiffs supplied X. (a friend of M.) with a bracelet which was invoiced to the retail company. X. pawned the bracelet with the defendants and was later convicted of larceny of it, but no order for restitution was made. The plaintiffs sought to recover the bracelet from the defendants, who, it was found, had acted in good faith.

Held: the words "the owner of the goods" in the Sale of Goods Act, 1893, s. 24 (1), meant the owner of the goods from whom they were actually stolen and not some previous owner from whom the title had been derived; the owner of the goods was the retail company, the sale having been to them; and, therefore, the plaintiffs had no title to maintain the action.

Notes. As to disposition of goods by the buyer in possession, see 29 HALSBURY'S LAWS (2nd Edn.) 113–116, paras. 137–139; and for cases on the subject, see 39 DIGEST 535–536, *1462–1466*. For the Sale of Goods Act, 1893, s. 24, see 22 HALSBURY'S STATUTES (2nd Edn.) 1001.

Cases referred to:

(1) *Kirkham* v. *Attenborough*, *Kirkham* v. *Gill*, [1897] 1 Q.B. 201; 66 L.J.Q.B. 149; 75 L.T. 543; 45 W.R. 213; 13 T.L.R. 131; 41 Sol. Jo. 141, C.A.; 39 Digest 508, *1252*.

(2) *Folkes* v. *King*, [1923] 1 K.B. 282; 92 L.J.K.B. 125; 128 L.T. 405; 67 Sol. Jo. 227; 28 Com. Cas. 110, C.A.; 15 Digest (Repl.) 1040, *10,234*.

(3) *Payne* v. *Wilson*, [1895] 1 Q.B. 653; 64 L.J.Q.B. 238; 72 L.T. 110; 43 W.R. 250; judgment abandoned on appeal, [1895] 2 Q.B. 537; 65 L.J.Q.B. 150; 73 L.T. 12; 43 W.R. 657; 3 Digest 110, *348*.

(4) *Oppenheimer* v. *Frazer and Wyatt*, [1907] 2 K.B. 50; 76 L.J.K.B. 806; 97 L.T. 3; 23 T.L.R. 410; 51 Sol. Jo. 373; 12 Com. Cas. 280, C.A.; 15 Digest (Repl.) 1037, *10, 196*.

(5) *Heap* v. *Motorists Advisory Agency, Ltd.*, [1923] 1 K.B. 577; 92 L.J.K.B. 553; 129 L.T. 146; 39 T.L.R. 150; 67 Sol. Jo. 300; 39 Digest 531, *1441*.

Action tried before WRIGHT, J.

The facts appear in the judgment.

Sir Reginald Coventry, K.C., and *H. M. Andrews* for the plaintiffs.

G. Malcolm Hilbery, K.C., and *A. Safford* for the defendants.

Cur. adv. vult.

Feb. 12.—**WRIGHT, J.**, read the following judgment: This is a claim in detinue or for conversion in respect of a bracelet of the value of £365. The plaintiffs, a company carrying on business as wholesale jewellers, do not sell retail to buyers, but they had as customers a retail company called Services Shipping Co., Ltd., who were in the habit of sending their buyers direct to the plaintiffs, and the plaintiffs, in respect of articles chosen by such buyers, handed them over to the buyers, debiting, at the wholesale price, Services Shipping Co., Ltd., who, in turn, debited their customer at the retail price. It thus happened that, on April 12, 1929, a Captain Le Mesurier was introduced to the plaintiffs by Services Shipping Co., Ltd. He came accompanied by a gentleman, whom he introduced as his friend Mr. Maude, a connection of General Maude, but his real name was Moore and, therefore, I shall call him Moore hereafter. Captain Le Mesurier gave as his address the Naval and Military Club. He bought and took away a diamond ring, which the plaintiffs debited in their books and invoiced at £165 to Services Shipping Co., Ltd., and the latter in turn invoiced it and debited it at £180 to Captain Le Mesurier. The plaintiffs have been paid the £165 by Services Shipping Co., Ltd., but Captain Le Mesurier has not paid anything to Services Shipping Co., Ltd.; in fact, Mr. Moore at once pawned the ring for £70 with the defendants. The only inference from all the facts of the case in my opinion is that Captain Le Mesurier was a party to what was a scheme for raising money on the ring without paying for it. On April 19, 1929, Mr. Moore again appeared at the plaintiffs' premises and said he wanted some bracelets for the approval of Captain Le Mesurier, who, he said, was then in Scotland. Mr. Hooker, the plaintiffs' managing director, an excellent witness, telephoned Services Shipping Co., Ltd., whose manager, Commander Farrell, authorised him to supply Mr. Moore as agent of Captain Le Mesurier. Mr. Hooker hesitated to give several bracelets for approval and offered one, which Mr. Moore took away. Mr. Moore said he thought it would suit Captain Le Mesurier, but, if not, it could be returned. The bracelet was debited in the books of the plaintiffs to Services Shipping Co., Ltd., at £345 and invoiced accordingly, with a note that it was supplied for Captain Le Mesurier and the price to him was £380, and Services Shipping Co., Ltd., invoiced it to Captain Le Mesurier at £380. Services Shipping Co., Ltd., have not paid the £345 to the plaintiffs for the bracelet, which had never been returned, but not, as I gather, because Services Shipping Co., Ltd., dispute their liability to pay the plaintiffs. Captain Le Mesurier has not paid Services Shipping Co., Ltd., for the bracelet any more than for the ring. On April 19, 1929, Mr. Moore pledged the bracelet to the defendants for £170, and, a few days later, redeemed both pledges, and then came and pledged them again for £250 in all. How or why he came to do so Mr. Moore has not explained. On May 1, 1929, Services Shipping Co., Ltd., wrote to Captain Le Mesurier in Berlin asking to be paid the price of the ring and bracelet supplied by them to him as they had been compelled to pay the plaintiffs. On May 2, 1929, they telegraphed to him at Berlin asking him to confirm the purchase in his name by Mr. Moore of the bracelet. Captain Le Mesurier replied by telegrams that he was writing and that the bracelet was "O.K," and I think I ought to accept these cables as the cables of Captain Le Mesurier. The letter from Services Shipping Co., Ltd., confirms the view I have formed on the documents that there was a sale by the plaintiffs to Services Shipping Co., Ltd., and by Services Shipping Co., Ltd., in turn to Captain Le Mesurier, and the cables confirm that Mr. Moore was the agent of Captain Le Mesurier, and support the inference that, in the case of the bracelet, as in the case of the ring, Captain Le Mesurier was in concert with Mr. Moore in pledging; that is to say, in raising money on things which he only bought in order to pledge, without paying for them. I find that, in each case, the property passed, first from the plaintiffs to Services Shipping Co., Ltd., and then from Services Shipping Co., Ltd., to Captain Le Mesurier.

A question was raised whether the transaction was on sale or return and not a sale out and out. Mr. Hooker says he thinks it was a transaction on sale or return, but the documents are all as of a sale out and out, and I think that Mr. Hooker's evidence means that the bracelet was bought, but might be exchanged if not satisfactory to Captain Le Mesurier. The point is not material, because I find that the pledging was by the authority of Captain Le Mesurier, the purchaser, and hence the property passed: *Kirkham* v. *Attenborough* (1), s. 18, r. 5, of the Sale of Goods Act, 1893. Captain Le Mesurier was in Germany, but Mr. Moore was

arrested and convicted of having stolen the bracelet, and the Court of Quarter A
Sessions who tried him refused a restitution order which was asked for under s. 45 of the Larceny Act, 1916. The defendants, I am satisfied on their evidence, acted in good faith and without notice of anything wrong. Counsel for the plaintiffs contended that this is a simple case under s. 24 of the Sale of Goods Act, 1893, which provides by sub-s. (1) that

> "Where goods have been stolen and the offender is prosecuted to conviction, B
> the property in the goods so stolen revests in the person who was the owner of the goods or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise."

Subsection (2) then goes on to provide that

> "Notwithstanding any enactment to the contrary, where goods have been ob- C
> tained by fraud or other wrongful means not amounting to larceny, the property shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender."

On this he contends that his claim to succeed is complete, if not in detinue because no demand is shown before action, at least in conversion. That contention must be considered. The criminal court who, under s. 45 (1) of the Larceny Act, 1916, D
had a discretionary power to order restitution, having refused to exercise that discretion, the matter must be considered as in a civil action between the plaintiffs and the defendants, and on the evidence before this court, which is not bound by the finding of the jury in the criminal case, even if that finding were clear. On the assumption that my finding is correct that Captain Le Mesurier authorised the purchase, I do not think there was larceny by a trick because the sellers intended E
not only to pass the possession in the bracelet but also either the property, or, at least, the power of acquiring the property by approving the article, which, according to the decision of the Court of Appeal in *Folkes* v. *King* (2), is not larceny by a trick. I think it is a case of obtaining goods by false pretences; that is, on the assumption that there is no intention to pay for the article, and the case is similar to that of a man who goes to a restaurant and orders and consumes what F
he has no means or intention of paying for. In that case, s. 24 (2) of the Sale of Goods Act provides that the goods shall not revest. If, however, the case be regarded as larceny by a bailee on the ground that Captain Le Mesurier or his agent, Mr. Moore, fraudulently pledged the goods before the property had passed, then the case would fall within s. 25 (2) of the Sale of Goods Act or s. 9 of the Factors Act, 1889, but, in my judgment, s. 24 of the Sale of Goods Act must be read as G
subject to these enactments. This was so held by the Divisional Court in *Payne* v. *Wilson* (3). In that case the judgment was abandoned on appeal, but on another ground, and I think its authority on this point is unimpaired. In any case, I should arrive at the same conclusion. The question in this court depends not on criminal but civil law as to goods as set out in the Sale of Goods Act. Section 21 of that Act, which is the first section in the division dealing with transfer of title, H
in which division s. 24 also comes, states in terms, in sub-s. (2) (a), that "The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof," are not to be affected by anything in the Act of 1893. But I think s. 24 must be read as subject to s. 25 and to the Factors Act. Section 24 expressly mentions market overt, and does not in terms mention the Factors Act, which, I think, it must have done, if it is to be I
construed as overriding it, despite s. 21 (2) (a). The policy of the legislature has been to protect the various transactions falling under the Factors Act, whereas dispositions in market overt and analogous dispositions, such as a transfer of property by foreign law, may well be deemed to be transactions of less general importance. If, however, what happened was larceny by a bailee, namely, by the fraudulent pledging while Captain Le Mesurier or his agent merely held the goods on approval, then the case, in my opinion, falls within s. 9 of the Factors Act and s. 25 (2) of the Sale of Goods Act, because there was a disposition by the purchaser

who had obtained the goods with the consent of the seller and who made a pledge to a person receiving the same in good faith and without notice of any lien or any other right of the original seller in respect of the goods. Indeed, the same position would, in my judgment, arise even if the case could be regarded as one of larceny by a trick, because in such a case I think the correct view is that the consent of the seller postulated by the section is a consent in fact to the buyer having the possession, which clearly exists in the seller's mind in such a case as the present. So that the state of mind of the buyer, who is fraudulently intending to get the possession which he knows the seller would not give him if he knew the state of the buyer's mind, becomes immaterial in these questions of civil right, however material the criminal state of mind may be in questions of criminal responsibility.

I think this is the true state of the law, both on principle and on authority, after the elaborate discussion in *Folkes* v. *King* (2), in which the more artificial reasoning to the contrary in *Oppenheimer* v. *Frazer and Wyatt* (4) was not approved, the point not being necessary for the decision of the latter case. But, apart from these considerations, there is a more fundamental point which I think is fatal to any claim by the plaintiffs under s. 24 (1). I think that the words "owner of the goods" in that subsection means the owner from whom they were actually stolen, and not some previous owner from whom that owner derived title. In the present case, I have found that there was a sale and transfer of property from the plaintiffs to Services Shipping Co., Ltd., and the bracelet was not stolen from the plaintiffs but, if stolen at all, from Services Shipping Co., Ltd. Hence, if s. 25 (1) applies, the property would revest not in the plaintiffs but in Services Shipping Co., Ltd. The plaintiffs, in my judgment, have no claim in law to the property, but their rights in the matter are to be paid the price by their buyers, Services Shipping Co., Ltd. Hence the plaintiffs have no title to maintain this action.

This consideration would be fatal to their claim even if I were wrong in my finding of fact that Mr. Moore was not the agent of Captain Le Mesurier to acquire the bracelet, but merely used Captain Le Mesurier's name dishonestly and without authority in order to deceive Services Shipping Co., Ltd., and the plaintiffs and obtain possession of the bracelet, by falsely inducing them to think they were selling it to Captain Le Mesurier. In that case, I think Mr. Moore would be guilty of larceny by a trick, because, in fact, there was no intention on the part of the plaintiffs or Services Shipping Co., Ltd., to give either the possession or the property to Mr. Moore except as agent of Captain Le Mesurier. There was no contract with Captain Le Mesurier because Captain Le Mesurier never authorised the dealing, and there was no consent by the vendors to the possession by Mr. Moore in the only sense in which he took possession, that is for himself and without Captain Le Mesurier's authority. Such a case is not dissimilar in fact to *Heap* v. *Motorists Advisory Agency, Ltd.* (5), where LUSH, J., held that there was larceny by a trick, and I think would not be within s. 25 (2) of the Sale of Goods Act or s. 9 of the Factors Act, because there would be no possession by the buyers, since there would be no buyer in fact—Mr. Moore not purporting to buy for himself and Captain Le Mesurier having given no authority—and no consent on the part of the seller to Mr. Moore's possession in his own right or otherwise than as agent for Captain Le Mesurier, which on these assumptions he was not. I do not regard this view of the facts as the true one, but, even on this view, the plaintiffs must fail as not being the owners from whom the goods were, on these assumptions, stolen. It is true that Services Shipping Co., Ltd., only authorised delivery of the bracelet because they thought Captain Le Mesurier was buying it and only bought from the plaintiffs on the belief and for the motive that Captain Le Mesurier was buying, but the falsity of that belief and the failure of that motive does not, I think, affect the validity of the transfer and sale as between the plaintiffs and Services Shipping Co., Ltd., nor is it material that the plaintiffs were labouring under a similar misconception. There was some suggestion of an application to substitute Services Shipping Co., Ltd., for the plaintiffs, but it was not effectively made and could not, I think, at this stage be effectively made.

There will, therefore, be judgment for the defendants with costs.

Solicitors: *C. O. Humphreys & Son*; *Attenboroughs.*

[*Reported by* R. A. Yule, Esq., *Barrister-at-Law.*]

FRY *v.* SALISBURY HOUSE ESTATE, LTD.

[House of Lords (Lord Dunedin, Lord Warrington, Lord Atkin, Lord Tomlin and Lord Macmillan), March 3, 4, 7, April 4, 1930]

[Reported [1930] A.C. 432; 99 L.J.K.B. 403; 143 L.T. 77; 46 T.L.R. 336, 358; 74 Sol. Jo. 232; 15 Tax Cas. 266]

Income Tax—Profits—Letting of offices—Assessment under Sched. A—Additional assessment under Sched. D—Validity—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sched. A*, *No. VII*, *r.* 8 (*c*), *Sched. D.*

A company owned a building comprising some 800 rooms which it let to a large number of tenants as unfurnished offices. The company maintained a staff of servants to operate lifts, act as porters and clean the building. Charges were made to tenants for each fire lighted by them, for the electric lighting of corridors and staircases, and for cleaning. The company paid all rates and taxes, and was assessed to income tax under the Income Tax Act, 1918, Sched. A, No. VII, r. 8 (c), on the gross value of the premises ascertained in accordance with the Valuation (Metropolis) Act, 1869. The Crown also claimed income tax under Sched. D on the profit shown in the company's profit and loss account (i.e. including rents), less the amount of the assessment under Sched. A. The company admitted liability under Sched. D on the amount of profit from cleaning and other services, but resisted the claim to tax under Sched. D on the income or profits from the building itself.

Held: the rents of the building must be excluded from the assessment under Sched. D because the annual income derived from the ownership of land was liable to income tax only under Sched. A and could not be liable also under Sched. D.

Rosyth Building and Estates Co., Ltd. v. *I.R. Comrs.* (1), 1921 S.C. 372 (in so far as it decided that the Crown had an option whether to assess a taxpayer to income tax under Sched. A or Sched. D), overruled.

Coman v. *Governors of Rotunda Hospital, Dublin* (2), [1921] 1 A.C. 1, distinguished.

Notes. The Income Tax Act, 1918, Sched. A, No. VII, r. 8, was replaced by the Income Tax Act, 1952, s. 109. Schedule D, Case 1, of the Act of 1918, was replaced by s. 123 and s. 127 of the Act of 1952. By virtue of s. 175, s. 176 and s. 177 of the Act of 1952 (replacing the Finance Act, 1940, s. 15, s. 16 and s. 17) income tax was charged under Case VI of Sched. D (see s. 123 and s. 135 of the Act of 1952) in respect of rents.

Explained: *Hoare & Co.* v. *Collyer* (1932), 48 T.L.R. 256. Considered: *Thompson* v. *Trust and Loan Co. of Canada*, [1932] All E.R.Rep. 647; *Glanely* v. *Wightman* (1933), 149 L.T. 121; *Stewart* v. *Normandy Estate Co.* (1933), Tax Cas. 244; *Windsor Playhouse, Ltd.* v. *Heyhoe* (1933), 17 Tax Cas. 481; *Neumann* v. *I.R. Comrs.*, [1934] All E.R.Rep. 398. Applied: *Elliott* v. *Burn*, [1934] All E.R.Rep.

A 665. Considered: *Simpson* v. *Grange Trusts, Ltd.*, [1935] All E.R.Rep. 671; *Loughan* v. *Marstons Dolphin Brewery, Ltd.*, *Whelan* v. *Alfred Leney & Co., Ltd.*, [1936] 1 All E.R. 468; *Collyer* v. *Hoare & Co., Ltd.* (*No. 2*), [1937] 3 All E.R. 491; *Utting & Co., Ltd.* v. *Hughes*, [1938] 4 All E.R. 411; *Shop Investments, Ltd.* v. *Sweet*, [1940] 1 All E.R. 533; *Croft* v. *Sywell Aerodrome, Ltd.*; *Sywell Aerodrome, Ltd.* v. *Croft*, [1942] 1 All E.R. 110; *I.R. Comrs.* v. *Buxton Palace Hotel,* B *Ltd.* (1948), 29 Tax Cas. 329; *Baron* v. *Littman*, [1952] 2 All E.R. 548; *Jennings* v. *Middlesbrough Corpn.*, [1953] 2 All E.R. 207. Referred to: *I.R. Comrs.* v. *Scottish Central Electric Power Co.*, [1931] All E.R.Rep. 746; *Assam Railways and Trading Co., Ltd.* v. *I.R. Comrs.*, [1933] 2 K.B. 576; *Heastie* v. *Veich & Co.*, [1934] 1 K.B. 535; *Hughes* v. *Bank of New Zealand*, [1936] 3 All E.R. 975; *I.R. Comrs.* v. *New Sharlston Collieries Co., Ltd.*, [1937] 1 All E.R. 86; *Dawson* C v. *Counsell*, [1938] 3 All E.R. 5; *Bomford* v. *Osborne*, [1940] 1 All E.R. 91; *Cull* v. *I.R. Comrs.*, [1939] 3 All E.R. 761; *Mosley* v. *George Wimpey & Co.*, [1945] 1 All E.R. 674; *I.R. Comrs.* v. *Iles*, [1947] 1 All E.R. 798; *Russell* v. *Scott*, [1948] 2 All E.R. 1; *Nash* v. *Tamplin & Sons Brewery, Brighton, Ltd.*, *Davies* v. *Webbs* (*Aberbeeg*), [1951] 2 All E.R. 869; *London Investment and Mortgage Co.* v. *I.R. Comrs.*; *London Investment and Mortgage Co.* v. *Worthington*, [1957] D 1 All E.R. 277.

For the Income Tax Act, 1952, s. 109, s. 175, s. 176 and s. 177, see 31 HALSBURY'S STATUTES (2nd Edn.), pp. 102, 172 to 175.

Cases referred to:

(1) *Rosyth Building and Estates Co., Ltd.* v. *I.R. Comrs.*, 1921 S.C. 372; 58 Sc.L.R. 363; 1921 1 S.L.T. 306; sub nom. *Rosyth Building and Estate* E *Co., Ltd.* v. *Rogers*, 8 Tax Cas. 11; 28 Digest 55, *t*.

(2) *Coman* v. *Governors of Rotunda Hospital, Dublin*, [1921] A.C. 1; 89 L.J.P.C. 162; 123 L.T. 529; 36 T.L.R. 646; 64 Sol. Jo. 548; sub nom. *Governors of Rotunda Hospital, Dublin* v. *Coman*, 7 Tax Cas. 517, H.L.; 28 Digest 82, *462*.

(3) *A.-G.* v. *Metropolitan Water Board*, [1929] 1 K.B. 883; 97 L.J.K.B. 214; F 138 L.T. 346; 44 T.L.R. 135; 72 Sol. Jo. 30; 13 Tax Cas. 294, C.A.; Digest Supp.

(4) *I.R. Comrs.* v. *Miller*, post, p. 713; [1930] A.C. 222; 99 L.J.P.C. 87; 142 L.T. 497; 46 T.L.R. 207; 74 Sol. Jo. 138; sub nom. *Lady Miller* v. *I.R. Comrs.*, 15 Tax Cas. 25, H.L.; Digest Supp.

(5) *A.-G.* v. *L.C.C.*, [1900] 1 Q.B. 192; 69 L.J.Q.B. 241; 81 L.T. 698; 64 J.P. G 68; 48 W.R. 294; 16 T.L.R. 122, C.A.; reversed sub nom. *L.C.C.* v. *A.-G.*, [1901] A.C. 26; 70 L.J.Q.B. 77; 83 L.T. 605; 65 J.P. 227; 49 W.R. 686; 17 T.L.R. 131; 4 Tax Cas. 265, H.L.; 28 Digest 73, *392*.

(6) *Hill* v. *Gregory*, [1912] 2 K.B. 61; 81 L.J.K.B. 730; 106 L.T. 603; 6 Tax Cas. 39; 28 Digest 8, *28*.

(7) *Back* v. *Daniels*, [1925] 1 K.B. 526; 94 L.J.K.B. 304; 132 L.T. 455; 41 H T.L.R. 162; 69 Sol. Jo. 160; 9 Tax Cas. 183, C.A.; 28 Digest 15, *74*.

(8) *Carlisle and Silloth Golf Club* v. *Smith*, [1913] 3 K.B. 75; 82 L.J.K.B. 837; 108 L.T. 785; 29 T.L.R. 508; 57 Sol. Jo. 532; 11 L.G.R. 710; 6 Tax Cas. 198, C.A.; 28 Digest 17, *90*.

(9) *Smith* (*Surveyor of Taxes*) v. *Lion Brewery Co., Ltd.*, [1911] A.C. 150; 80 L.J.K.B. 566; 104 L.T. 321; 27 T.L.R. 261; 55 Sol. Jo. 269; 5 Tax Cas. I 568; 75 J.P.Jo. 87, H.L.; 28 Digest 57, *291*.

(10) *Edinburgh Southern Cemetery Co.* v. *Kinmont* (*Surveyor of Taxes*) (1889), 17 R. (Ct. of Sess.) 154; 27 Sc.L.R. 71; 2 Tax Cas. 516; 28 Digest 8, *r*.

(11) *Revell* v. *Edinburgh Life Insurance Co.* (1906), 5 Tax Cas. 221; 28 Digest 60, *h*.

(12) *Liverpool and London and Globe Insurance Co.* v. *Bennett*, *Brice* v. *Northern Assurance Co.*, *Brice* v. *Ocean Accident and Guarantee Corpn.*, [1912] 2 K.B. 41; 81 L.J.K.B. 639; 106 L.T. 323; 28 T.L.R. 279; 6 Tax Cas. 327, C.A.; affirmed sub nom. *Liverpool and London and Globe Insurance Co.* v.

Bennett, [1913] A.C. 610; 82 L.J.K.B. 1221; 109 L.T. 483; 29 T.L.R. 757; 57 Sol. Jo. 739; 20 Mans. 295, H.L.; 28 Digest 60, *305*.

(13) *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, [1915] A.C. 433; 84 L.J.K.B. 417; 112 L.T. 651; 31 T.L.R. 104; 6 Tax Cas. 399, H.L.; 28 Digest 56, *287*.

Appeal by the Crown from the decision of the Court of Appeal (Lord Hanworth, M.R., Lawrence and Slesser, L.JJ.) (reported [1930] 1 K.B. 304), on a Case Stated by the Special Commissioners of Income Tax under the Income Tax Act, 1918, s. 149, for the opinion of the High Court.

The Case Stated was as follows:

At a meeting of the Commissioners for the Special Purposes of Income Tax held at York House, Kingsway, London, on Feb. 21, 1928, Salisbury House Estate, Ltd. (hereinafter called "the company") appealed against assessments made upon it under Sched. D of the Income Tax Acts for the four years ending April 5, 1928, in the sums of £16,822, £18,585, £20,344 and £20,453 respectively by the additional commissioners of income tax for the city of London.

The company was incorporated on Jan. 7, 1902, to take over some land with a block of buildings upon it in the city of London, known as Salisbury House. Salisbury House was at the time in course of erection or had been recently completed, and the object for which the company was formed was to hold the same and let it out as offices and turn it to account in any way which might be possible or expedient. Under its memorandum and articles of association, the company has wide powers conducive to this object. The company has since 1902 held, maintained, let out and managed Salisbury House as contemplated at its inception. It has not acquired, managed or dealt in any other property.

Salisbury House has a very large floor space and contains some 800 rooms, and these rooms have been let out by the company to some 200 tenants as offices singly or in suites, which may or may not be self-contained. The building itself is of nine floors and contains seven lifts and several entrances. The company provides and operates the lifts and also provides a uniformed staff of twenty-five men for this purpose and to act as porters and watch and protect the building. There is also a staff of sixty-one cleaners. The halls, corridors and staircases of the building are lighted and kept clean by the company and the building is under the care of a housekeeper whose duty it is to supervise the staff, to prevent the intrusion of unauthorised persons, to take in letters for the tenants and distribute the same, and to see that the building is locked up and safe at night. There are a few radiators in the passages which are provided by the company for heating purposes. The company is rated as occupier. It has retained an office for its own use in the building. It has a board of directors, a secretary, and a clerical staff of three persons. It maintains a share register, holds meetings of directors and shareholders and management committees and distributes dividends in the manner usual in the case of a limited company.

At the time of the appeal the rooms in Salisbury House had been let out subject to the arrangements made by the company as indicated above for the whole building, under seventy-eight leases, generally for periods of from three to twenty-one years, eighty-nine tenancy agreements for shorter periods, and twenty-six tenancies by letter. The company does not usually grant leases for more than twenty-one years, but it has granted one lease of a part of the premises for a term of seventy-eight years and another for a term of twenty-eight years. The rents agreed upon had been fixed in all cases by having regard to the accommodation provided according to a general scale which takes account of the floor space and situations of the offices let. In no case were offices let furnished. A standard form of lease or agreement, which permits of modifications in certain respects as indicated hereunder has been used by the company, and under this form additional rents or charges are made for services provided by the company beyond the rent for the rooms themselves.

The following notes were given in explanation of various paragraphs in the form:

(a) The lavatories in the building are, as appears from the form, let out and used in common. (b) The "additional rent" of 1s. 3d. a day for each fire lighted is optional. Tenants are not required to have fires and if they choose they may supply (and in some cases have supplied) themselves with wood fires or electric heating. (c) Though a charge is made for cleaning, this in practice is also optional, and tenants may make their own arrangements to clean their own offices. They are not obliged to have their offices cleaned by the company, and there are some who do not, but if a tenant requires his office cleaned the company supplies the cleaners. No charge is made by the company for cleaning if it does not do the cleaning. (d) The "additional rent" for the cost of lighting the halls, corridors, and staircases is a common charge apportioned as near as may be between the various tenants. (e) With reference to the covenant by the tenant to procure electric light from the company or its assigns, it was stated that the entire supply of electric lighting for the premises is taken from one electric lighting company, and that the company receives from it a small commission on the price of the current consumed on the premises. This electric lighting company is the only company supplying the neighbourhood with current. The company has never nominated the electric lighting company—it has had no choice in the matter. The tenants pay for electric current consumed by them (whether for light or heating) according to meters in their offices.

Although tenants are not required to keep their windows clean, the company makes arrangements with a separate contractor to clean windows for those who so desire and it makes a profit out of so doing. The company does not provide heating apparatus for its tenants. Prior to the war, however, the company did on one occasion provide a central heating installation for an important tenant, but the agreement under a special term of which this heating was installed became obsolete before the war. The company provides no tenant's fixtures. It is possible upon occasion that such fixtures as partitions or divisions of floor space and counters may have been left behind by previous tenants and included in subsequent lettings, but, apart from these, it has not supplied landlord's fixtures.

Salisbury House was assessed to income tax under Sched. A upon the gross value as appearing in the valuation list, in accordance with the Valuation (Metropolis) Act, 1869, s. 45. The value so fixed in 1925, when the last valuation was made, was £47,786. The assessments in accordance with Sched. A, No. VII, r. 8 (c), have been made upon the company as landlords and the tax due upon such assessments demanded and paid by the company. A part of the ground floor of the building had been let on terms that the tenants (a bank) paid the rates in respect of the premises occupied by them rated gross at £3,131.

The company admitted at the hearing that it is liable to be assessed under Sched. D of the Income Tax Act upon any profit which it derives from Salisbury House tenants outside the mere rents for the offices which are let to the tenants, so far as such profits may be described as resulting from a trade. In accordance with its admission it put forward a computation, showing a profit amounting to £4,189 9s. 4d. for the year to Dec. 25, 1925, as on p. 542, post:

The company similarly admitted that its assessable profits under Sched. D for the two previous years arrived at on the same basis were £2,997 and £3,385 respectively.

For the purpose of the assessments appealed against the profits of the company were computed by taking the total of its receipts from all sources including the rents received by it from the lettings of the rooms in Salisbury House and deducting therefrom its expenses and the amounts of the assessments under Sched. A made upon the company in respect of the said premises.

On behalf of the company it was contended: (i) That the receipts of rents of offices were receipts arising from the ownership of land. (ii) That receipts from lands were chargeable under Sched. A of the Income Tax Act and had been so charged in this case. (iii) That the company could not be assessed under Sched. D for any amount by which the assessments under Sched. A might be insufficient to cover the rents received by it. (iv) That the rents received by the company did

Sched. D.—SALISBURY HOUSE ESTATE, LTD., 1926–27

	£	s.	d.	£	s.	d.
Net profit as per profit and loss accounts for year ending Dec. 25, 1925:						
Interest	601	11	9			
Cleaning	2,225	10	9			
Firing	2,637	6	10			
Tenants' sundries	266	8	7			
Commission	233	10	1			
Transfer fees	0	12	6			
	5,965	0	6			
Less: Lighting	122	15	3			
				5,842	5	3
Deduct: Proportion of general expenditure and bad debts which the trading income bears to the gross income.						
$\frac{11659.18.4 \times (5842.5.3. + 7899.9.1)}{44426.16.3. + 44742.0.3. + 7899.9.1. - 122.15.3.} = \frac{11660 \times 13742}{96946}$				1,652	15	11
				£4,189	9	4

not arise from any trade carried on by it. (v) That the assessments should be discharged.

On behalf of the Crown it was contended (inter alia): (i) That the company was in respect of all its activities carrying on a trade in the United Kingdom. (ii) That accordingly in computing its profits for the purposes of Sched. D all its receipts, including the receipts from rents, and all expenses should be taken into account and an allowance given for tax assessed under Sched. A. (iii) That the assessments appealed against were correctly made and should be confirmed subject to some slight revision of the figures.

The assessments appealed against had been made in accordance with the Crown's contentions and the amounts thereof have (apart from the questions of principle involved) been agreed between the parties at the following amounts: for the year ending April 5, 1925, £16,822; for the year ending April 5, 1926, £19,461; for the year ending April 5, 1927, £21,243; and for the year ending April 5, 1928, £20,445.

The commissioners felt bound, following a previous decision of the Special Commissioners, and in deference to opinions expressed in the Court of Session in *Rosyth Building and Estates Co., Ltd.* v. *I.R. Comrs.* (1) and in the Court of Appeal in the recent case of *A.-G.* v. *Metropolitan Water Board* (3), to decide that the assessments under Sched. D were rightly made to include the amounts by which the total receipts of the company (including its rents from offices) less expenses exceeded the Sched. A assessments. They accordingly confirmed the assessments appealed against in the amounts stated above. The company declared dissatisfaction and required a Case for the opinion of the High Court.

The Court of Appeal held, reversing the decision of ROWLATT, J., that it was not in accordance with the intent or terms of the Income Tax Act, 1918, to hold that it was possible to tax the company in part under Sched. A and again under Sched. D, and deduct the Sched A payment; that could only be done under r. 5 of the Rules applicable to Cases I and II of Sched. D, but that rule was not applicable in the present case. On the finding of the commissioners the business of the company could not be held to be the business of a hotel proprietor. The clear direction of the Income Tax Act, 1918, applied, and the company must be assessed in respect of the building as a landlord under Sched. A. There was no power to superimpose on the tax on the annual value under Sched. A a tax on a margin of rents which the Crown would like to tax if it were entitled to do so under

Sched. D. So far as the decision in the *Rosyth Case* (1) was opposed to the decision in the present case the court did not agree with it.

The Attorney-General (*Sir William Jowitt, K.C.*) and *R. P. Hills* for the appellant.

A. M. Latter, K.C., and *Cyril King* for the respondents.

The House took time for consideration.

April 4. The following opinions were read.

LORD DUNEDIN.—This is an important case with probably far-reaching consequences, and we had the benefit of a very full and able argument from the Attorney-General on behalf of the Crown, but in the end I have come to the conclusion, though not without difficulty, that the judgment appealed from is right and should be affirmed. The facts which give rise to the question are as follows:

Salisbury House is a building of considerable size in the City of London and is owned by a limited company which was formed for the express purpose of acquiring the property known as Salisbury House and utilising it. The house contains about 800 rooms. These rooms are let to tenants as offices. There is no residential occupation. No furnishings are provided. The company maintain a staff of servants to operate the lifts and act as porters and look after the building, and there is also a large staff of cleaners all under the orders of a housekeeper paid by the company. The tenants have the exclusive use of the rooms let, but are bound to leave the keys at night with the housekeeper so as to allow access in the case of fire breaking out. The company retain certain rooms as an office. By the terms of the leases the company have to pay all rates and taxes. The company were assessed to income tax under Sched. A upon the gross value of the premises as appearing in the valuation roll in accordance with the Valuation (Metropolis) Act, 1869. This assessment was imposed on the company as landlords, instead of on the various individual tenants who are the occupiers, in accordance with r. 8 (c) (i) of No. VII of Sched. A of the Income Tax Act, 1918, which provides for the assessment of landlords instead of tenants in the case of any house or building let in different apartments and tenements and occupied by different persons severally, and the amount of the assessment was duly paid by the company. The inspector of taxes then served on the company a notice of assessment under Sched. D. He arrived at the assessment by calculating the amount of profit as brought out in the profit and loss account of the company, after deducting expenses of management and upkeep, and then he proposed to deduct from the assessment so brought out the amount of assessment already paid under Sched. A. The company admitted that they had to pay under Sched. D on the amount of profits which they made from the cleaning and other services, but contended that, so far as the proceeds of the property were concerned, that had already been taxed under Sched. A and could not again be brought in computo under Sched. D and demanded a Case. A Case was stated by the commissioners which sets out the above facts. The figures, apart from the question of principle, have been agreed on.

ROWLATT, J., took the view that the commissioners had decided the case rightly and dismissed the appeal. He thought the case was ruled by the judgment of the Court of Session, given in *Rosyth Building and Estates Co., Ltd.* v. *I.R. Comrs.* (1). The appeal being taken to the Court of Appeal, that court unanimously reversed the judgment, and the Crown now appeals to your Lordships.

This is one of those cases which may be approached from very different angles, and according as one approaches it from one angle or another a different conclusion may seem to be the one that is right to follow. I can only say that, after the best consideration I could give it, my opinion is that the angle from which I now approach it is the right one. The cardinal consideration in my judgment is that the income tax is only one tax, a tax on the income of the person whom it is sought to assess, and that the different schedules are the modes in which the statute directs this to be levied. In other words, there are not five taxes which you might call income tax A, B, C, D, and E, but only one tax. That tax is to be levied on the income of the individual whom it is proposed to assess, but then one has to consider the nature, the constituent parts, of his income to see which schedule one is to apply. If the income of the assessee consists in part of real property one is, under the statute, bound to apply Sched. A. Schedule A may get in touch with the assessee in different ways, according to the condition of affairs. It may touch property in occupation which actually brings in no money return. A good example will be found in the case decided within the last few weeks in this House in *I.R. Comrs.* v. *Miller* (4). There a lady enjoyed the use of a mansion house under the provisions of the will of her deceased husband which was feudally vested in trustees. The mansion house brought her in no money, but she was reckoned as for income tax in order to arrive at super-tax on the yearly value of the house. In this matter it differs from all the other schedules, all of which only deal with actual return. When, as in the present case, a subject is let, the rent, if it represents a fair bargain, is taken as the measure of that part of the income of the lessor, and he suffers the tax by way of deduction by his tenant from the rent due or as in the present case by paying it himself. The result is that by the operation of the assessment under Sched. A which is made imperative by the statute, and was in fact applied here, the income of the assessee is so far dealt with and cannot be dealt with again. Of course that does not mean that the assessee may not be liable in respect of other income under other schedules. He might be liable under Sched. B, which says in terms that the amount there is to be in addition to the assessment made under Sched. A, though the underlying subject is the same. But he might be liable under any of the other schedules if he has income to which they apply, and in particular he might be liable under Sched. D. It is a mere commonplace to remark that a man who possesses real property and is assessed under Sched. A, may also have investments and other forms of property which will be assessed under Sched. D.

Now, turning to this case, the income of the respondents, as represented by rents, is admittedly assessed and properly assessed under Sched. A. "But then," says the appellant, "you are carrying on a business, and a business falls to be assessed under Sched. D." To which the respondent replies, "Quite so, and I am willing to pay on the profits which I make on the cleaning and other services." To this the appellant replies, "No, that is not enough. Your business is one business, not a congeries of businesses, and if I estimate your profits from your own profit and loss account, I will get the higher figure which I ask." The answer to that is: "You cannot bring out that balance of profit without taking the rents I receive in computo. Now, these rents are also part of my income or property and the statute says that any income which represents the value of real property is to be assessed in the manner directed under Sched. A." I think the final answer is good. The rents, having been assessd under Sched. A, are exhausted as a source of income, and the so-called concession made by the appellant that there should not be double taxation, and that therefore he would be willing to allow deduction of the sum paid under Sched. A is a concession which is beside the mark. It is a concession to avoid double taxation, but the concession cannot come into being where double taxation does not exist, and here it does not exist because, it being imperative to deal with the rents under Sched. A, there is no possibility of subsequently dealing with them under Sched. D.

I have preferred to consider this question on the statute alone, without reference to authority, but I am far from anxious to put my judgment on a mere ipse dixit, and I will therefore analyse my own argument to see if it is supported by authority. The cardinal proposition is that income tax is one tax, and the schedules merely the different means of collecting it, and that there are not so many taxes as there are schedules. This point was raised in the most distinct manner in *L.C.C.* v. *A.-G.* (5). I quote from the argument of the taxpayer: "There is no ground for the distinction made by the Court of Appeal between Sched. A and Sched. D. There is only one tax, and the schedules constitute not separate imposts but one tax under several heads." And now I quote from the language of the counsel for the Crown: "It is not correct to say that there is one tax known as the income tax. The Act of 1842 speaks in the preamble of the several rates and duties mentioned in the several schedules contained in the Act and marked respectively A, B, C, D, and E. The separation is maintained throughout the Act. There are thus five different taxes." This view of the case had been upheld by the Court of Appeal, but it was rejected by this House. LORD MACNAGHTEN, who delivered the leading judgment, says, among other things:

> "It (income tax) is one tax, not a collection of taxes essentially distinct. . . . In every case the tax is a tax on income, whatever may be the standard by which the income is measured. . . . The expression 'profits or gains' . . . is constantly applied without distinction to the subjects of charge under all the schedules."

And then, commenting on the Court of Appeal's judgment, he quotes from it: "The tax under Sched. D is a tax upon 'gains and profits,' an entirely different tax from the tax under Sched. A," on which he says, "With all deference, I do not think that that is a sound view of the Income Tax Acts." The other members of your Lordships' House agreed with him.

The next proposition is that when income is dealt with in the proper schedule the same income cannot be dealt with again under another schedule. There is no stronger foundation for this proposition than may be found in the fact of the option given not to the Crown but to the taxpayer who is assessed under Sched. B to be assessed under Sched. D. This obviously points to the fact that, once assigned to its appropriate schedule, the same income cannot be attributed to another schedule. The same may be gathered from various decisions. There are the general words of HAMILTON, J., as he then was in *Hill* v. *Gregory* (6) ([1912] 2 K.B. at p. 70), quoted in this case by the Master of the Rolls: "The very terms which define the subject-matter of Sched. D exclude from it the several matters which fall within Sched. A." Then there is *Back* v. *Daniels* (7). Daniels was a wholesale potato merchant, and was assessed under Sched. D for the profits of the business. Part of these profits consisted of profits made by the sale of potatoes on lands held by him under special agreements with the farmers who were in possession of the lands. It was held that the profits from these sales fell to be reckoned in the question of a Sched. B assessment in respect of the lands under the agreements, and could not be included in the amounts under Sched. D. SCRUTTON, L.J., put the matter thus ([1925] 1 K.B. at p. 544):

> "When there is a separate and distinct operation unconnected with the occupation of the land, such as a cheese factory dealing with the milk of a dairy farm, or a butcher's shop dealing with the beasts of a cattle farm, I can understand a separate assessment of that operation; but I do not think that the fact that the farmer sells his produce either on the farm or at the local market, or at Mark Lane, or even if he sells it in a shop, justifies an assessment under Sched. D as well as or in substitution for Sched. B."

In this connection it would be desirable to deal with *Coman* v. *Governors of Rotunda Hospital, Dublin* (2). This case had the peculiarity of being claimed by learned counsel on both sides as authority. The facts were these. The Rotunda Hospital in Dublin was a charity and it owned buildings. Part of the buildings which was not actually used as a hospital was permitted to be used on occasions by various persons for entertainment purposes in return for a money payment. Now, the exemption from tax in respect of charitable institutions is different under Sched. A and Sched. D. It therefore became necessary, as LORD BIRKENHEAD pointed out, to analyse the particular income in question to see whether it fell within Sched. A or Sched. D. But the rooms were not let to anyone. There was no question of including the rents of the rooms in the profits which were calculated under Sched. D; the hospital was held to be in occupation of the whole premises. What was done in that case was this: the total profits made out of the fees paid were calculated under Sched. D, and then the calculated assessable value of the premises under Sched. A was deducted. (There had been no actual assessment A made under Sched. A because it had been assumed that the premises were occupied by a charity.) This was done because there was in the Irish Act a rule corresponding to r. 5 in Cases I and II of Sched. D of the Act of 1918, which exempts from taxation under Sched. D the profits or gains arising from the annual value of the premises occupied for the purposes of the business. Now, that was a perfectly different operation from what is proposed here. If that case had been treated as B the Crown wish to treat this one, the assessable value of the premises ought to have been added to the receipts in making up the trade profits, and then from the tax so brought out, not the value of the premises, but the tax calculated as under Sched. A in the premises ought to have been deducted.

To resume the general argument in favour of the distinction between the schedules. There is the phraseology of s. 208 C

> "The provisions in this Act contained which are applied to the tax under any particular schedule shall, if also applicable to the tax under any other schedule and not repugnant to the provisions for ascertaining, charging or levying the tax under such other schedule, be applied in ascertaining, charging and levying tax under that schedule, as if the application of those provisions thereto had been expressly and particularly directed," D

which points very clearly to the different schedules being distinctly applicable to only one class of property. Now, it is obvious that although land must be assessed under Sched. A, there may be activities connected with the land which will fall under another schedule. Schedule B gives the simplest example, but then there are also activities which fall under Sched. D. It would be rash indeed for anyone E to say that he had in his mind all the cases decided in regard to the Income Tax Acts, but at any rate no case was produced by Crown counsel here, in which, in computing profits under Sched. D, the rents of lands, which had been let, and were not in the occupation of the assessee under Sched. D, are taken in computo. It is, therefore, of no use to cite cases of which *Carlisle and Silloth Golf Club* v. *Smith* (8) is an instance, where profits arising from the use of land were taxed F under Sched. D, but where the assessee was not the person liable under Sched. A in respect of those lands. There are dicta against doing so. LORD LOREBURN, L.C., in *Smith* (*Surveyor of Taxes*) v. *Lion Brewery Co., Ltd.* (9), said ([1911] A.C. at p. 155):

> "You cannot, by saying that a man carried on the business of owning house property, shift the method of assessing that property for income tax from Sched. A to Sched. D." G

It is true that there LORD LOREBURN, L.C., was delivering a dissenting judgment, but the point on which he differed, viz., the question of the right to a deduction in assessing the profits under Sched. D, does not affect the dictum above quoted. In this very case, ROWLATT, J., states the law generally to this effect: H

> "Real property is always liable to Sched. A, and under no circumstances can you take it out of Sched. A—discard Sched. A—and throw it into a Sched. D account and treat it under Sched. D."

I confess I cannot reconcile this with his judgment except on the view that he considered himself bound by the *Rosyth Case* (1). There is a very instructive I passage in the judgment of LORD M'LAREN in a Scottish case, *Edinburgh Southern Cemetery Co.* v. *Kinmont* (*Surveyor of Taxes*) (10). That was a case of a cemetery company which rented a piece of land which they utilised as a cemetery by selling lairs to persons to be used for burial purposes, and to belong to them in perpetuity. The actual decision was that this was a concern of the like nature to the enumerated properites in r. 3 of Sched. A of the Act of 1842, and so fell to be assessed under that schedule in the way there stated. LORD M'LAREN seems almost to anticipate the present case. He says (17 R. (Ct. of Sess.) at p. 165):

> A "It is certainly not sufficient to bring a particular use of land within the scope of r. 3 that the proprietor of the land is using it in connection with his trade or for purposes of trade; because in such cases it is generally possible to separate the income into two parts, the one representing the rent or annual value of the heritable property, and the other representing the commercial profit. Where this can be done, the proper mode of assessing seems to me to be to assess B under Sched. A in respect of annual value, and also under Sched. D for the commercial profits of the business of manufacture carried on within the heritable subjects."

I now come to the case which is undoubtedly to the opposite effect, the *Rosyth Case* (1). That case does not contradict my general assertion as to no case having been produced in which the Crown had done what they here propose to do. But C notionally, for the purpose of deciding as to repayment of part of an assessment, it was done, and it is a direct authority in point. The Master of the Rolls and the other judges of the Court of Appeal were, I think, affected with too great politeness to the Court of Session, and dealt with this case by saying it was a Scottish case, and they could not quite understand it. There is no question of Scottish as discriminated from English law involved in it, but in any case I am afraid I could D not shield myself under the same excuse. I say directly it was wrong. Nor do I think it is at all difficult to see why it was wrong; and it is just here I touch what I have always felt to be the difficulty in this case. The company there had duly been assessed under Sched. A, but the point was, might it have been assessed under Sched. D instead of under Sched. A. The Lord President says (1921 S.C. at p. 377):

E

> "It is settled that it is for the Crown to choose in which capacity the company shall be charged—as property or investment owner on the one hand, or as trader conducting a business on the other. . . . The house property in this case is not occupied for the purposes of the company's business; it is occupied by tenants to whom the company lets it. Accordingly, I think the Crown is F alternatively entitled to treat the rents either as chargeable in respect of the company's property under Sched. A, or as constituents of the profits arising or accruing to the company from its business chargeable under Sched. D."

Now that that settles the point I do not think can be doubted. But when one comes to look at the cases which were cited, and on the effect of which the Lord President says "it is settled, etc.," it will be found that they are all cases not of G choice between schedule and schedule, but between the various cases in Sched. D. It had been settled long ago that in the case of insurance companies who held large investments the Crown might proceed to reckon under either Case I in Sched. D or under any of the other cases which may be found to apply. I myself said it in *Revell* v. *Edinburgh Life Insurance Co.* (11), and what I said was approved and adopted by COZENS HARDY, M.R., in *Liverpool and London and Globe Insurance* H *Co.* v. *Bennett* (12). From this the Lord President has without authority deduced the view that as there is an option between cases so there must be an option between schedules, and he bases this in argument on the possibility of an insurance company having securities which would fall under Sched. C and others falling under Sched. D. I confess this has been the difficult part of the case to me. It is very obvious to suggest that if the Crown can opt as between cases why should I it not opt as between schedules. And that the company is carrying on a business I do not doubt. The memorandum of association shows that it is. But I think the answer is that an option between cases does not in any way disturb the general scheme of the Act, an option between schedules would. I think on a general survey of the history and policy of the Income Tax Acts one finds the great distinction that there is between Scheds. A and B on the one hand and the other three schedules on the other. I think it would upset the whole scheme of taxation if you were in the case of real property to be allowed to ignore Scheds. A and B. There is no conflict between Scheds. C and D if, as is the hypothesis put by the

Lord President, the Crown elects to charge in Sched. D on cases other than Case I. Schedule C is not, so to speak, upset. On the contrary, the charge on the particular form of investment under Sched. C fits in with the charge on other investments made under, say, Case III of Sched. D. But in the case of real property, if you do what is here asked, Sched. A is upset altogether.

With great respect to the learned judges in the Court of Session, I think it was only LORD SKERRINGTON who said that by a side wind they were asked to introduce a great novelty. LORD SKERRINGTON says (1921 S.C. at p. 381):

> "The Inland Revenue do not seek to assess the appellant company according to the rules under the first case in Sched. D, but it is essential to their success in this litigation to demonstrate that they would have been entitled to make such an assessment if they had so wished. . . . I should have listened to the argument with more satisfaction if, at the outset, we had been informed that a company in the position of the appellant company had never, so far as known, been assessed according to the rules under the first case in Sched. D, and if we had been invited to attend to the provisions of the Income Tax Acts for the purpose of considering whether there was any good reason why such an assessment should not now be imposed for the first time."

I think this shows that the immense importance of the case had not been before the court, and that no argument as to the imperative character of Sched. A as to real property had been presented.

As I have said, I recognise the case to be full of difficulty, but on the whole I have come to the conclusion that the decision of the Court of Appeal is right. What are known as the brewery cases have, I think, no application to the question in hand. I move that the appeal be dismissed with costs.

LORD WARRINGTON.—The respondents are a company incorporated under the Companies Acts. They are the owners of a large building in the City of London known as Salisbury House. This building contains some 800 rooms, which have been let by the company to some 200 tenants as offices singly or in suites at rents varying according to the accommodation provided, the situation of the several rooms, and so forth. The company provides a staff of porters and cleaners who perform certain services for the tenants for which additional rents and charges are made by the company. The question in this appeal is whether the company in thus letting the premises owned by it is carrying on a trade within the meaning of the rule applicable to Case I of Sched. D of the Income Tax Act, 1918, and is therefore liable to be charged under that schedule in respect to the gains and profits of that trade, the Crown contending that in that case they would be liable to bring into account as part of their gross receipts the amount of the rents received by them from the tenants of the several rooms and offices so let by them as hereinbefore mentioned.

The company is already charged as landlord under r. 8 of No. VII of the Rules applicable to Sched. A in respect of the annual value of Salisbury House as appearing in the valuation list under the Valuation (Metropolis) Act, 1869, which is by that Act made conclusive for the purposes of income tax in the case of hereditaments within the administrative County of London. This annual value is considerably less than the amount of the rents payable by the several tenants. The Crown admits that if the company were charged under Sched. D in respect of the gross amount of rents received as well as under Sched. A in respect of the annual value, it would be taxed twice over in respect of the same subject-matter, and concedes that if they are right in their contention that the company should be assessed under Sched. D, the amount of the assessment under Sched. A must be deducted from the total receipts of the company including rents less expenses. The company, on the other hand, admits that it is liable to be assessed under Sched. D on any profit which it derives from tenants outside the rents themselves so far as such profits may be described as resulting from a trade, but insists that on a landowner letting the hereditaments of which he is owner he is not carrying on a trade, and is liable only to be assessed under Sched. A in respect of the annual value of the hereditaments.

The company having been assessed in accordance with the contentions of the Crown for the four years ending April 5, 1928, appealed to the commissioners, who confirmed the assessments. They were required to state a Case. By that Case they stated in full detail the facts summarised above, and concluded that they were bound by authority to decide that the assessments under Sched. D were rightly made to include the amounts by which the total receipts of the company (including its rents from offices), less expenses, exceeded the Sched. A assessments. They further state that the sole question on which the opinion of the court is desired is whether the rents received by the company on letting the offices in Salisbury House are properly to be included in the assessment as trade receipts of the company for purposes of Case I of Sched. D of the Income Tax Act, 1918. The Case came before ROWLATT, J., who confirmed the view of the commissioners, but on appeal to the Court of Appeal his order was reversed, and the Case was remitted to the commissioners to amend the assessments. The Crown appeals to this House.

It is well settled that though the tax under Sched. A is a tax on income like that under all the other schedules, it is not a tax on rents. It is assessed on annual value which, in the present case, is fixed by the valuation list above referred to. The latest case on this subject is *Miller's Case* (4), before this House, in which it was held that a person in actual enjoyment of and occupying lands is liable to the tax, although he is not in receipt of rent therefrom nor even, by reason of the nature of his tenure, capable of converting his enjoyment into rent. The effect of the Crown's contention, if it be correct, would be indirectly to convert this tax on annual value to a tax on rents, and therefore it seems to me that a heavy burden is cast on the Crown before its contention can succeed.

The first question to be determined is whether in its capacity as landowner deriving rents from its land the company is carrying on a trade within the meaning of Sched. D and the rules thereunder, and if this question is answered in the negative the further questions raised and argued in this House do not arise.

Now in the first place the commissioners have not in my judgment decided this question as one of fact, and it is therefore open to the House now to express their own views thereon. The commissioners have contented themselves with stating the facts as to the mode in which the company deals with the property of which it is the owner, and then express the opinion that the assessments under Sched. D were rightly made to include the amounts by which the total receipts of the company, including rents from offices less expenses, exceeded the Sched. A assessments, and state that the sole question is whether the rents are properly included as trade receipts. That is to say whether, assuming the company is liable to be assessed under Sched. D as a trader, the rents are properly included in the gross receipts.

There is nothing in the facts stated in the Case which would properly lead to the conclusion that in dealing with the property the company is acting otherwise than an ordinary landowner would act in turning to profitable account the land of which he is the owner. It would in my opinion be impossible to hold that in such a case the landowner is carrying on a trade. Such a person would, I think, clearly be assessable under Sched. A only, and his taxable income would be measured by the conventional annual value and not by the amounts of the rents he actually received. But the Crown contends that the fact that the taxpayer is a limited company may distinguish its operations from those of an individual. Assuming the memorandum of association allows it, and in this case it unquestionably does, a company is just as capable as an individual of being a landowner and as such deriving rents and profits from its land, without thereby becoming a trader, and in my opinion it is the nature of its operations, and not its own capacity, which must determine whether it is carrying on a trade or not. Nor do I see any reason why, as in the present case, some of its operations under the wide powers conferred by the memorandum should not be operations of trade, whereas others are not.

Many cases have been cited in argument, but they do not, in my opinion, touch the present point. That which comes nearest is I think the *Rosyth Company's Case* (1), but when that case is examined it will be found that the fact that the company was carrying on a trade was assumed as common ground. The Lord President in his judgment says (1921 S.C. at p. 379):

> "It may sometimes be difficult to draw the line between landownership and commercial enterprise in land; but that is a question of fact of a kind which is not infrequently met with under the Income Tax Acts, and it is solved in the present case in favour of the Crown, because it is common ground that the appellant company 'is a land investment concern.' "

In this case the point is open.

The brewery cases seem to me not to be in point. The last one, *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (13) is, if it be relevant at all, in the plaintiffs' favour, for though the taxpayer there was a company trading as a brewery company the rents received from its tied houses were not regarded as receipts from the brewery business except only to this extent, that inasmuch as the company was claiming as a deduction from gross receipts sums expended in repairs to tied houses it could only make good its claim to deduct the net sum so expended and therefore must allow against the cost of repairs such sums as were received by way of rent from the houses repaired.

I come then to the conclusion that the Crown fails to make good the ground on which its claim to have a right to assess the company under Sched. D is based, except, of course, to the limited extent to which it is admitted, and that the question asked by the commissioners was properly answered in the negative by the Court of Appeal.

For the reason given above I express no opinion on the further points raised in argument, and in particular on the correctness or otherwise of the decision in the *Rosyth Co.'s Case* (1) or of the views expressed by the learned judges in that case; but in saying this I must not be taken to dissent from the views expressed by my noble and learned friend on the Woolsack whose opinion I have read. The appeal in my opinion fails and should be dismissed with costs.

LORD ATKIN.—The respondents are a limited company who own hereditaments in the City of London consisting of a large building known as Salisbury House, which they let out to tenants as unfurnished offices. They have been assessed to income tax in respect of property in the hereditaments on the annual value thereof under Sched. A. The assessment and charge has been made upon the owners direct under the provisions of Sched. A, No. VII, r. 8 (c), relating to any house or building let in different apartments or tenements and occupied by two or more persons severally. They have also been assessed under Sched. D in respect of the profits or gains of the trade said to be carried on by them in letting the offices and providing services for the tenants. The assessments under Sched. D are made upon the footing of including in the gross receipts of the trade the actual rents received from the tenants and deducting the cost of earning them. It is admitted that if the respondents are taxed on their full profits and gains on this footing they would be doubly taxed to income tax in so far as the annual value under Sched. A represents rents received. From the gross receipts therefore is also deducted the annual value on which the respondents have already paid income tax under Sched. A. By this adjustment they are assessed under Sched. D upon so much of the profits and gains received from rents as exceeds the annual value of property assessed under Sched. A. The respondents admit that they are liable to assessment under Sched. D in respect of the profits they make for services rendered to tenants, which appear to consist of cleaning offices and providing fuel. They contend, however, that in respect of the profits and gains they make from letting the offices the assessment can only be made under Sched. A, whether the rents exceed

A the annual value or not. The Inland Revenue on the other hand contend that they have an option to charge under whatever schedule is more advantageous to them, always making an adjustment against double taxation. They say that the respondents carry on a trade and for the full profits and gains of such trade they are chargeable whether the income is derived from property in land or not.

The sum in dispute is considerable. Except in London the question would B hardly arise. Annual value under Sched. A as measured by r. 1 is the actual rent if the hereditaments were let at a rack-rent within seven years of the assessment, or if not the rack-rent which they are actually worth subject to the statutory allowances. The Inland Revenue can hardly lose and may gain on this computation of income. But in the administrative County of London, as provided by the terms of Sched. A, the annual value is to be the annual value as fixed under the C Valuation (Metropolis) Act, 1869. It, therefore, may happen that the fact that the valuation is made quinquennially, that an allowance is made for empties, and that the actual cost of repairs in any year or three years may be less than the statutory allowances will cause the profits calculated under Sched. D to be greater than the annual value. Of course the opposite result may follow, and in such case the tax-gatherer would doubtless exercise his option for Sched. A.

D I think that this case should be decided in favour of the respondents on the simple ground that annual income derived from the ownership of lands, tenements, and hereditaments can only be assessed under Sched. A and in accordance with the rules of that schedule. In my opinion it makes no difference that the income so derived forms part of the annual profits of a trading concern. For the purpose of assessing such profits for the purpose of Sched. D the income so derived is not E to be brought into account. The option of the revenue authorities to assess under whichever schedule they prefer in my opinion does not exist and is inconsistent with the provisions of the Income Tax Acts throughout their history.

The scheme of the Income Tax Acts is and always has been to provide for the taxation of specific properties under schedules appropriated to them and under a general Sched. D to provide for the taxation of income not dealt with specifically. F Schedule A provides for the taxation of income derived from property in land; Sched. B, for income derived from the occupation of land; Sched. C, for income derived from government securities; Sched. E, for income derived from employment in the public service. It is unnecessary to go further back than the Income Tax Act, 1842, the provisions of which were incorporated in every Customs and Inland Revenue or Finance Act up to 1918, when the present consolidation Act was G passed. I need not repeat the familiar schedules altered and extended by the Act of 1853. It is only necessary to refer to s. 100 of the Act of 1842, which defined the tax to be imposed under Sched. D:

> "The duties hereby granted, contained in the schedule marked (D) shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act and to refer to the said last-mentioned H duties, as if the same had been inserted under a special enactment.
>
> Schedule D: The said last-mentioned duties shall extend to every description of property or profits which shall not be contained in either of the said Schedules (A), (B), or (C), and to every description of employment or profit not contained in Schedule (E)."

I Nothing could be clearer to indicate that the schedules are mutually exclusive: that the specific income must be assessed under the specific schedule: and that D is a residual schedule so drawn that its various cases may carry out the object so far as possible of sweeping in profits not otherwise taxed. For this reason no doubt the actual schedule was drawn in the widest terms.

> "For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere,"

&c. Such language covers income from land in Sched. A and from government securities in Sched. C. Its true meaning is made apparent by s. 100. Moreover, the dominance of each schedule, A, B, C, and E, over its own subject-matter is confirmed by reference to the sections and rules which respectively regulate them in the Act of 1842. They afford a complete code for each class of income dealing with allowances and exemptions, with the mode of assessment and with the officials whose duty it is to make the assessments. Thus under Sched. A and Sched. B the assessment and collection is regulated by the general commissioners: under Sched. C the assessment is by commissioners specially appointed for the purpose: under Sched. E the assessment and collection is made in the departments or by the officers of the public corporations concerned: while under Sched. D the assessment is regulated by additional commissioners. I find it impossible to conceive that these various commissioners had an option to encroach on the duties of one another: or that the taxpayer was exposed to having his income freed from the restrictions and exemptions imposed by statute under one schedule in order to be subject to a different set of restrictions and exemptions imposed by statute under another schedule. To take a concrete instance which has been before the courts it seems to me impossible that the legislature intended that a farmer taxed for profits of his occupation under Sched. B might, at the option of the authorities, after a successful year or term of years be taxed on his profits under Sched. D. The point was decided by the Court of Appeal in *Back* v. *Daniels* (7). It was argued that this decision turned on the express option given to the occupier to be assessed under Sched. D, which therefore negatived an implied option in the authorities to assess him under that schedule. The express option to the occupier was not given until 1887 by the Customs and Inland Revenue Act of that year. I confess I fail to see why an option given to the taxpayer should negative the existence of an option in the tax gatherer: still less how an option given for the first time in 1887 should destroy an option in the tax gatherer which on the hypothesis had been in existence since 1842. The judgments do not support any such contention. Similarly I am of opinion that income derived by a trading company from investments of its funds whether temporary or permanent in government securities must be taxed under Sched. C: and cannot for the purposes of assessment under Sched. D be brought into account. I am clearly of opinion that the Act of 1918 which is expressed to be a consolidation Act did not alter the law so as to give to the authorities an option they did not possess before. It is true that the words of Sched. D and the cases are wide as before: the words as to annual profits or gains arising to any person residing in the United Kingdom from any kind of property whatever are repeated. But they must not be cut down as they were before. I may refer to one expression in the rule applicable to Case III, 1 (a) where it is provided that the tax shall extend to . . .

> "any other annual payment whether payable as . . . a personal debt or obligation by virtue of any contract or whether the same is received and payable half-yearly or at any shorter periods."

This would include rent under a lease, but it is obviously not intended to cover cases under Sched. A. I attach no importance to the express exception in some of the rules under Sched. D of income coming within named other schedules. They are inserted ex majori cautela, and similar instances can be found in the rules under the former Act where, as I have stated, the position was clearly expressed by s. 100. Believing as I do that the specific Scheds. A, B, C, and E, and the rules thereunder contain definite codes applying exclusively to their respective defined subject-matters I find no ground for assessing the taxpayer under Sched. D for any property or gains which are the subject-matter of the other specific schedules. In the present case the income from the offices should be and has been assessed under Sched. A on the annual value as prescribed by statute. It therefore is not the subject-matter of assessment under Sched. D. I should add that if there had been an option to assess under Sched. A or Sched. D I cannot conceive a more conclusive election under the option than the assessment and receipt of payment under Sched. A, but this point need not be determined.

The *Rotunda Case, Coman* v. *Governors of Rotunda Hospital, Dublin* (2), much relied on by the appellant, appears to me to afford them no help. In that case LORD BIRKENHEAD expressed the view that the lettings were not such as to constitute the relation of landlord and tenant but the possession and occupation of the rooms remained with the respondents. LORD CAVE expressly held that the profits in question were not assessable under Sched. A and accordingly fell to be assessed under Sched. D. LORD FINLAY appears to have been of the same opinion. The case merely decided that the respondents, the governors of the hospital, used their own premises, of which they were in occupation for the purpose of carrying on a profitable trade, and that they were liable to be assessed under Sched. D for those profits with the statutory deduction of the annual value assessed under Sched. A. The case entirely differs in its facts and appears to throw little light on the law in question before this House.

The *Rosyth Case* (1), so far as it decided that the Inland Revenue authorities have an option to select which schedule they prefer, must, I think, be held to be wrongly decided. The actual decision may possibly be supported on the view that for the purpose of the particular claim for exemption the whole profits must be calculated under a notional Sched. D, which would pay no regard to other schedules. It is unnecessary in the present case to discuss that matter. I desire to add that I do not desire to throw any doubt on decisions which indicate that the Inland Revenue authorities may have an option as to the several cases of any given schedule on which they may determine to assess the taxpayer. An option within a schedule is not the same thing as an option to select schedules.

It may well be that another mood of expressing the result I have stated is to hold that a person capable of being assessed under Sched. A cannot be said in respect of his income from land to be earning profits from "trade." This view appears to commend itself to some of your Lordships. I do not dissent from it; but I view it with some misgiving. I find it difficult to say that companies which acquire and let houses for the purposes of their trade, such as breweries in respect of their tied tenants, and collieries and other large employers of labour in respect of their employees do not let the premises as part of their operation of trading. Personally I prefer to say that even if they do trade in letting houses their income so far as it is derived from that part of their trading must be taxed under Sched. A and not Sched. D. I agree that this appeal should be dismissed.

LORD TOMLIN.—This is an appeal by H.M. Inspector of Taxes against an order of the Court of Appeal dated June 26, 1929, reversing a decision of ROWLATT, J. That learned judge had dismissed the respondents' appeal from a decision of the commissioners for the special purposes of the Income Tax Acts confirming assessments to income tax made upon the respondents under Sched. D for the four years ending April 5, 1928.

The respondents are a limited company formed in 1902 to acquire a large block of buildings known as Salisbury House and to let out as offices the rooms contained in the block. Since their incorporation the respondents have held, let and managed Salisbury House. They have not acquired managed or dealt in any other property. Salisbury House contains some 800 rooms let to 200 tenants or thereabouts. The lettings are all unfurnished lettings of single rooms or suites. The respondents maintain and operate the lifts in the building and for this purpose and for the purpose of keeping clean the halls, corridors and staircases provide a staff of some eighty to ninety persons under the supervision of a housekeeper. Under the respondents' standard form of lease certain sums are payable by the tenants by way of additional rents. These sums represent contributions by the tenants towards the cost of lighting the halls, corridors and staircases and like matters. Some of the tenants also pay to the respondents remuneration for certain cleaning and other services rendered to them.

The respondents have throughout in respect of Salisbury House been directly assessed to income tax on the whole building under Sched. A, No. VII, 8 (c), of the Income Tax Act, 1918. As the property is situate within the administrative County of London the annual value with respect to Sched. A is by s. 45 of the Metropolis (Valuation) Act, 1869, deemed to mean the gross value stated in the valuation list under that Act. By s. 4 of the same Act gross value means the annual rent which a tenant might reasonably be expected taking one year with another to pay for an hereditament. The rents actually received during the years of assessment exceeded by a substantial amount the assessed value for the purposes of Sched. A.

From the Case Stated it appears that at the hearing before the commissioners the respondents admitted that they were liable to be assessed under Sched. D on any profit which they derived from Salisbury House tenants outside the mere rents for the offices so far as such profits might be described as resulting from a trade. For the purpose, however, of the assessments appealed against, the profits of the respondents were computed by taking the total of their receipts from all sources, including the rents received by them from the lettings of rooms in Salisbury House and deducting therefrom their expenses and the amounts of the assessments under Sched. A made on the respondents in respect of the premises.

The Special Commissioners confirmed the assessments stating that they did so following a previous decision of the commissioners and in deference to opinions expressed in the Court of Session in *Rosyth Building and Estates Co.* v. *I.R. Comrs.* (1).

The sole question on which the opinion of the court was desired by the Special Commissioners was whether the rents received by the respondents on letting the offices in Salisbury House were properly to be included in the assessments as trade receipts of the respondents for the purposes of Case I of Sched. D of the Income Tax Act, 1918. Rowlatt, J., apparently took the view that the respondents were carrying on a trade in the nature of an hotel business and that the assessments were rightly made. The Court of Appeal, however, rejected this view of the case and in substance held that a landowner who happens to make taxable profits by rendering certain services to his tenants cannot for that reason be treated as carrying on a trade in respect of the receipt of rents so as to be chargeable with income tax under Sched. D on the excess of the actual rents over the annual assessments to tax under Sched. A.

The arguments presented to your Lordships' House on behalf of the appellant as I understand them may be stated as follows: (i) It is true that tax under Sched. A is necessarily charged in every case in respect of the property in all lands, tenements and hereditaments. (ii) Where, however, besides receiving his rents the landowner by means of rendering services to his tenants or otherwise in relation to the management of his land makes profits taxable under Sched. D there may come a point where his activities which earn profits and his perception of rents must be treated as a business concern in the nature of an indivisible trade taxable under Sched. D and this is inevitably the case if the landowner is a limited company formed to acquire and manage land. (iii) In the condition of affairs last supposed, the revenue authority has an option so far as the lands are concerned either to rely on the Sched. A assessments or to require the rents to be brought in as part of the gross trade receipts, a deduction of the Sched. A assessment being allowed where the rents exceed such assessment.

In my view the scheme of the Income Tax Act, 1918, properly understood does not afford support for these arguments but leads to an opposite conclusion. Section 1 of the Act provides

> "where any Act enacts that income tax shall be charged for any year at any rate, the tax at that rate shall be charged for that year in respect of all property, profits, or gains respectively described or comprised in the schedules marked A, B, C, D and E, contained in Sched. 1 to this Act and in accordance with the rules respectively applicable to those schedules."

Schedule A begins with the following words:

> "Tax under Sched. A shall be charged in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom for every 20s. of the annual value thereof."

The rules under Sched. A prescribe (No. VII, r. 4) that

> "Tax under this schedule shall be charged on all lands, tenements and hereditaments, whether occupied at the time of assessment or not."

For lands outside the administrative County of London, as for lands within that county, rent or rental value is the measure of annual value (see Sched. A, No. 1, and cf., s. 45 of the Metropolis (Valuation) Act, 1869).

Now income tax is one tax. There is not a separate tax under each schedule: (see *L.C.C.* v. *A.-G.* (5)). Further there is admittedly no double taxation. A subject-matter of taxation properly assessed to the tax under one schedule cannot be brought again into assessment under another schedule.

Land in regard to its property quality is assessable to tax under Sched. A and in regard to its occupation quality is assessable to tax under Sched. B. There may also be such utilisation of the land attributable neither to the property quality nor to the occupation quality producing profits assessable to tax under Sched. D (see *Coman* v. *Governors of Rotunda Hospital, Dublin* (2)). Putting aside the special cases dealt with in Sched. A, No. III, tax in respect of the property quality in land is exigible under Sched. A on the annual value measured by reference to rental value. The tax is a charge on the property and is inescapable. Neither the revenue authority nor the taxpayer can demand to exclude the subject-matter from the schedule. When once the annual value has been ascertained and fixed for the purposes of Sched. A it is irrelevant to consider whether the landlord in fact receives by way of rent more or less than or the same as the assessed annual value. The subject-matter, namely, land in respect of its property quality, being necessarily taxed under Sched. A cannot be brought again under any other schedule. To do so would offend the rule against double taxation.

The option which the revenue authority sets up here is in my judgment inconsistent with the scheme of the Act and in particular with the obligation of the authority to tax under Sched. A. If such an option existed it would be reasonable to expect machinery whereby on the exercise of the option in the direction of some schedule other than Sched. A allowance could be made in respect of the tax necessarily exigible under Sched. A. No such machinery is in fact provided by the statute and the revenue authority has been driven in this case to invent it to meet the objection of double taxation. It is noteworthy that where a land owner carries on a trade on his own property the computation of tax is to be made exclusive of the annual value of lands occupied for the purpose of the trade and separately assessed and charged under Sched. A (see Sched. D, Cases I and II, r. 5).

I am, therefore, of opinion that as between Sched. A and other schedules the revenue authority has no option to select the schedule to be applied, and in this respect I disagree with the reasoning on which the decision in the *Rosyth Building and Estates Co.* v. *I.R. Comrs.* (1) is based. Further in my view the perception of rents as land owner is not an operation of trade within the meaning of the Act. If this be so, I am unable to appreciate how the existence of ancillary activities which produce profits taxable under Sched. D can affect the nature of the operation or how the legal significance of the perception is altered for the purpose of income tax if the recipient is a limited company rather than an individual.

For the reasons which I have endeavoured to indicate I reach the conclusion that the decision of the Court of Appeal was correct, and I think that this appeal should be dismissed with costs.

LORD MACMILLAN.—The respondent company owns a large block of buildings in the city of London known as Salisbury House, containing some 800 rooms. These rooms the company lets unfurnished singly or in suites to tenants as business offices, and derives therefrom a large revenue in rents. Certain services are rendered by the servants of the company such as cleaning, watching and lighting for which charges are made to the tenants. The company has no other activities beyond acting as landlords of the premises and performing the services mentioned.

The broad question raised by the appeal now under your Lordships' consideration is as to the proper method of assessing the company to income tax, although the actual issue relates to the validity of assessments made upon the company under Sched. D for the four years ending April 5, 1928.

The first step taken by the Inland Revenue authorities in each of the years in question was to assess Salisbury House to income tax under Sched. A on the gross value as appearing in the valuation list in accordance with the Valuation (Metropolis) Act, 1869, s. 45. The assessments were made upon the company as landlords under Sched. A, No. VII, r. 8, which provides that

> "the assessment and charge shall be made upon the landlord in respect of . . . (c) any house or building let in different apartments or tenements and occupied by two or more persons severally. Any such house or building shall be assessed as one entire house or tenement."

The tax exigible on these assessments was duly demanded by the Crown and duly paid by the company.

The Inland Revenue authorities, taking the view that the company were not only landlords, but also traders, proceeded in addition to assess the company under Sched. D on the annual balance of its profits or gains claiming that on the credit side of the computation there should be entered the rents received and the receipts from services rendered while on the debit side it was conceded that the assessment under Sched. A should be entered as well as all expenses incurred by the company in earning their profits. The company challenged the validity of this assessment, but admitted that it was liable to be assessed under Sched. D on any profit apart from rents which it earned from rendering in connection with the premises the various services mentioned. The commissioners decided that the assessments under Sched. D were rightly made to include the amounts by which the total receipts of the company (including its rents from offices), less expenses, exceeded the Sched. A assessments. This decision was affirmed by Rowlatt, J., but was reversed by the Court of Appeal. The Crown now appeals to your Lordships' House and asks that the decision of the commissioners and Rowlatt, J., be restored. Important questions of principle not hitherto directly the subject of consideration in this House are involved in the determination of the case.

As I approach the problem the first question which presents itself is whether the revenue authorities were bound to assess the premises under Sched. A. They did so, but had they any option in the matter? In my opinion they had none and the assessments made under Sched. A were not only proper but obligatory. Section 1 of the Act of 1918 enacts that income tax is to be charged in respect of all property, profits, or gains respectively described or comprised in the schedules marked A, B, C, D, and E, contained in Sched. 1 to this Act and in accordance with the rules respectively applicable to those schedules." Turning to Sched. A, I find that it opens with the words

> "Tax under Sched. A shall be charged in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom for every 20s. of the annual value thereof."

The rules applicable to Sched. A provide (No. VII, r. 4) that "tax under this schedule shall be charged on all lands, tenements and hereditaments." I may refer also to s. 110 (1) which enacts that

> "the assessments under Scheds. A and B for any parish shall contain (a) the full and just annual value of all lands, tenements, hereditaments and heritages estimated in each particular case as directed by this Act; and (b) the names of the occupiers and proprietors thereof."

It is clear from these and other provisions of the income tax code, which it is unnecessary to refer to in detail, that it is obligatory to assess to income tax under

Sched. A all lands, tenements, hereditaments and heritages in the United Kingdom, and that the revenue authorities have no option in the matter. If they have an option as regards other sources of income in the matter of the schedule under which they may charge them, on which I do not consider it necessary for the present purpose to pronounce, it is at least certain that they must charge tax in respect of property in land under Sched. A. An examination of the Income Tax Acts past and present establishes that a clear distinction has always been drawn between income from land and income from all other sources.

The subject of tax is all property as well as all profits or gains, and indeed the tax under Sched. A is designated property tax not only colloquially but on official forms. Schedules A and B in combination contain, and in my view contain exhaustively and exclusively, the charge on landed property, the former containing the tax on the owners of land and houses in respect of the property in them, and the latter containing the tax on the benefit derived from the occupation of land. The consequences of this are far-reaching for the present purpose. If the revenue authorities must assess Salisbury House under Sched. A they must do so on the annual value thereof ascertained in the manner prescribed by the rules applicable to that schedule. The premises, being situated within the administrative County of London, the annual value with respect to Scheds. A and B is by s. 45 of the Valuation (Metropolis) Act, 1869, to be deemed to mean the gross value stated in the valuation list under that Act, and by s. 4 gross value means "the annual rent which a tenant might reasonably be expected taking one year with another to pay for an hereditament" on ordinary letting terms. Rent or rental value is thus the criterion of annual value for the purpose of the tax on property under Sched. A. Similar provisions apply to lands outside the metropolis under "No. I.—General rule for estimating the annual value of lands, tenements, hereditaments or heritages." Here also rent or rental value is the criterion of annual value for the purposes of taxation.

Once it is determined that the annual value of all lands and houses must be assessed to income tax under Sched. A it follows that this annual value cannot be assessed to income tax under any other schedule, for it is elementary that the same source of income cannot be twice taxed. Income tax is one tax, not several taxes (*L.C.C.* v. *A.-G.* (5)) and the annual value of a particular property having been once assessed to income tax cannot be re-assessed to the same tax.

The explanation of the assessments under appeal is obvious. If the rents received by the respondent company were the exact equivalent of the annual value of the property in the metropolitan valuation lists, the Crown would have no interest in seeking to assess the company under Sched. D because it would receive under Sched. A all the tax to which the rents were liable, while any profits from services rendered are admittedly assessable under Sched. D. Thus the whole income derived by the company in respect of its property would yield tax. But the company, in fact, lets out its rooms at rents which are in excess of the annual value of its premises, and consequently if the company is assessed only under Sched. A the excess of the rents received over the annual value escapes taxation. This circumstance in my opinion affords no justification for the attempt to treat the company as a trading concern whose profits are assessable under Sched. D. Land-owning, however profitable, is not a trade within the meaning of the income tax code. Property in land as a source of income is dealt with, and can only be dealt with under Sched. A, and the rules of that schedule prescribe how the income from landed property is to be ascertained and measured. If the measure is an imperfect one and when applied does not ascertain the actual income derived from the property, so much the worse for the revenue. Discrepancies one way or the other between actual income and statutory income for tax purposes are familiar features of income tax law. Theoretically, the annual value and the rental should correspond, for annual value is based on rent. If they part company one way or the other the fault lies with the imperfection of the statutory machinery for ascertaining the income from landed property and the Inland Revenue authorities are not entitled to resort to a different measure designed for a different source of income if the actual rents happen to exceed the annual value.

It is necessary, however, to make it quite clear that the income from property which is taxable under and only under Sched. A is income derived from the exercise of property rights properly so called.

Property is regarded as yielding income from the exercise by the proprietor of the right either of himself enjoying the possession or of parting with the possession by letting his property to tenants. The owner of property may make profit out of it in other ways and by doing so he may render himself liable to taxation under Sched. D. The case of *Coman* v. *Governors of Rotunda Hospital, Dublin* (2) is an excellent example. There, as Lord Birkenhead, L.C., pointed out ([1921] 1 A.C. at p. 8), the arrangements between the owners of the premises and the persons who paid for their use for the purpose of entertainments were not such as to constitute the relation of landlord and tenant, and the owners remained in possession and occupation of their property. The receipts derived from hiring out their premises along with various movable fittings and affording services in the way of heating, lighting and attendance, were receipts of an enterprise quite distinct from the ordinary receipts which a landlord derives from letting his property. Consequently the owners of the premises were rightly held to be engaged in the carrying on of a trade or business in their premises, "the trade or business," in Lord Shaw's language ([1921] 1 A.C. at p. 37), "of providing, or providing for, public entertainments." There is nothing to prevent a landlord who has been assessed under Sched. A in respect of his income as a property owner being also assessed under Sched. D in respect of a trade business or other enterprise carried on by him on his premises.

It is not without significance that in the case of certain kinds of property the annual value under Sched. A is directed to be ascertained in accordance with the rules applicable to Sched. D, that is to say on a profits basis. Under the Rules applicable to Sched. A, No. III (1) quarries, (2) mines, and (3) an enumerated series of undertakings mostly of a public utility character and "other concerns of the like nature" are directed to be assessed on an annual value based on profits not rental, and the profits are to be arrived at as if they were trading concerns. In the case of *The Edinburgh Southern Cemetery Co.* v. *Kinmont (Surveyor of Taxes)* (10), where it was held that a cemetery company should be assessed under Sched. A, No. III (3) as a "concern of the like nature" with the enumerated concerns, Lord M'Laren said (17 R. (Ct. of Sess.) at p. 165):

> "It is certainly not sufficient to bring a particular use of land within the scope of r. 3 that the proprietor of the land is using it in connection with his trade or for purposes of trade; because in such cases it is generally possible to separate the income into two parts, the one representing the rent or annual value of the heritable property, and the other representing the commercial profit. Where this can be done, the proper mode of assessing seems to me to assess under Sched. A in respect of annual value, and also under Sched. D for the commercial profits of the business or manufacture carried on within the heritable subjects. But there are cases where it is very difficult to separate the income of a proprietor into rental and commercial profits. Rule 3 appears to have been devised to meet such cases."

His Lordship proceeds to point out that the income of the company was "neither derived from the location nor from the occupation of land," but from "a trade which is carried on by the use of land," namely, the sale of perpetual rights of sepulture in specified portions of the company's land.

The present case does not fall within any of the classes of concerns where by the rules under No. III of Sched. A the annual value of property is to be determined on the basis of profits in conformity with the rules of Sched. D. The income of the company being derived from the location of land, or in other words in the normal manner in which property in land yields revenue, it is in my opinion

A inadmissible to characterise this income as the income of a trade. Where a trade is carried on by a proprietor in his own premises r. 5 of the Rules applicable to Cases I and II of Sched. D provide for the exclusion from the tax computation of the annual profits or gains of the property occupied for the purpose of the trade. This clearly contemplates a separation between the two characters of landowner and trader. A landowner may conduct a trade on his premises, but he cannot be B represented as carrying on a trade of owning land because he makes an income by letting it. The relatively insignificant service for which the company makes charges to its tenants are not in my opinion sufficient to convert the company from a landowner into a trader though the profits so made may quite properly be charged with tax under Sched. D. To hold otherwise would be to invert the rule that the principal follows the accessory.

C The circumstance that the Crown has proposed in assessing the company under Sched. D to deduct the assessments under Sched. A, affords, to my mind, strong evidence of the illogicality of the whole proceeding. I do not understand how an assessment to income tax can ever be a proper deduction from an assessment to income tax for the tax is one tax. It is nothing to the purpose to say that under Sched. D it is proposed to tax actual rents, while under Sched. A it is the annual D value which has been taxed. The source of the rents and of the annual value is one and the same, namely, the property in Salisbury House.

It follows from the views which I have above expressed that I do not agree with the reasoning on which the decision in *Rosyth Building and Estate Co.* v. *I.R. Comrs.* (1) is based. In my opinion the principles applicable to this case are accurately expounded in the judgments of the Court of Appeal and I concur in the E motion that the appeal be dismissed.

Appeal dismissed.

Solicitor: *Solicitor of Inland Revenue*; *Holmes, Son & Pott.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

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ALCANTARA (OWNERS) *v.* TOVARISCH (OWNERS)

[HOUSE OF LORDS (Lord Buckmaster, Lord Dunedin, Lord Blanesburgh, Lord Warrington and Lord Thankerton, assisted by Nautical Assessors), November 10, 27, 1930]

H [Reported [1931] A.C. 121; 100 L.J.P. 46; 144 L.T. 230; 47 T.L.R. 89; 18 Asp.M.L.C. 182]

Shipping—Collision—Lights—Green pyrotechnic flare—Sea Regulations, 1910, *arts.* 1, 12.

Article 1 of the Sea Regulations, 1910, provides that no lights which may I be mistaken for the prescribed lights shall be exhibited. Article 12 provides that a vessel may, if necessary, in order to attract attention, in addition to the lights which she is by the rules required to carry, show a flare-up light. In a collision action,

Held: article 12 did not prohibit the showing of a green pyrotechnic flare.

Per LORD BUCKMASTER: Article 12 permits any light excepting those that are specially referred to.

Notes. Article 12 of the Sea Regulations, 1910, has been replaced by r. 12 of the Collision Regulations, 1948, which is in substantially the same terms.

Considered: *Leopold L.D.S.S.* v. *Hochelaga S.S. Co.*, *Louis Dreyfus & Co.* v. *Hochelaga S.S.*, *Hochelaga S.S.* v. *Louis Dreyfus & Co.*, *Hochelaga S.S. Co.* v. *Leopold L.D.S.S.* (1931), 101 L.J.P.C. 65.

As to regulations as to lights, see 30 Halsbury's Laws (2nd Edn.) 683 et seq.; and for cases see 41 Digest 694, 713 et seq.

Appeal from an order of the Court of Appeal (Scrutton, Lawrence and Greer, L.JJ.) in an action in respect of a collision between the Russian sailing vessel *Tovarisch* and the appellants' steamship *Alcantara*, which took place in the English Channel on the night of Feb. 24, 1928, in consequence of which the *Alcantara* sank.

Digby, *K.C.*, and *Cyril Miller* for the appellants.

Dunlop, *K.C.*, *Harold Stranger*, and *Krougliakoff* for the respondents.

The House took time for consideration.

Nov. 27. The following opinions were read.

LORD BUCKMASTER.—This is an appeal by the owners of the Italian steamship *Alcantara* against the owners of a ship known as the *Tovarisch*, a training ship used for cadets by the merchant marine of the Soviet government, asking for damages consequent upon a collision that took place near to Dungeness on Feb. 24, 1928. It was a disaster which resulted in grave consequences, for the *Alcantara* was wholly sunk and her crew all but one were lost. The *Tovarisch* was damaged, but suffered no loss of life.

The *Tovarisch* is a four-masted sailing ship 284 ft. in length, and she was coming down channel on the night in question on a course S. 60 degrees W. at about 6½ knots. The *Alcantara*, a vessel 289 ft. in length, was proceeding up channel from Carloforte in Sardinia to Calais with a cargo of 2,700 tons of mineral ore, her course was N. 79 E. and she was making about 6½ knots. It is accepted by the learned judge that the *Tovarisch* was carrying the proper regulation lights, but they were not electric lights as were those of the *Alcantara*. None the less there is no evidence whatever to suggest that they were not visible at a sufficient distance to warn the *Alcantara*, were those on board keeping a proper look-out. It is, in fact, no longer alleged that those in charge of the *Tovarisch* were negligent in improperly failing to exhibit side lights. The two vessels approached starboard to starboard. The learned judge has held inferentially rather than by direct finding, that the green light of the *Tovarisch* was not seen by those on board the *Alcantara*, and if she did indeed see it, her conduct was certainly extraordinary, for she ported her helm with the result that a collision took place at an angle of about 45 degrees. Upon the evidence it appears to be impossible to hold that the green light of the *Tovarisch* was not visible to the *Alcantara*. The learned judge himself said on the evidence:

> "I find that the green light was burning. The lamp is a good type of lamp and I am unable to find that the green light, in fact, was not being exhibited according to the rules."

Did the matter rest there little ground would be afforded even for argument, but a further incident occurred in relation to which the greater part of the controversy arises. The *Tovarisch*, as she was drawing near, lit a green pyrotechnic flare from the starboard side of the bridge, which was about 72 ft. forward of the wheel, its object being, as was said, to show the length of the ship. It is suggested that this light may have obscured the green starboard light, but there was no evidence called to show that this would be its effect, and that it did so is a pure conjecture. But it is further urged that the exhibition of the light was in defiance of the regulation for preventing collisions at sea, and that its result was to make the *Alcantara* think that she must instantly take some action, whereas, in fact, if she had pursued her normal course the collision would have been avoided.

Article 12 of the regulations is in the following words:

> "Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light or use any detonating signal that cannot be mistaken for a distress signal."

A I agree with the judgment of the Court of Appeal in thinking that this does not prohibit the exhibition of a green light. It permits any light excepting those that are specially referred to, and I find myself unable to believe that these regulations, intended for the use of men at sea, have to be construed by working backwards and seeing what other regulations have provided on previous occasions. The light, under the rule, was to call attention. It was to do no more and there is no foundation B for the argument that it called upon the *Alcantara* to do anything except that which it was their duty to do when they saw a sailing vessel approaching with the lights green to green.

Finally, the appellants contend that the manœuvres of the *Tovarisch* contributed to the accident. They did, in fact, first starboard and then port their helm, but the result, according to the finding of the learned judge, did not materially alter C her course, and I cannot see that it in any way contributed to the accident. That lamentable event was due to the *Alcantara* attempting to cross the bows of the *Tovarisch*, and for this I cannot find any justification. I have throughout assumed that the *Alcantara* saw the green light of the *Tovarisch* before the flare was shown. I have stated my reasons for that conclusion. I also think that it follows that the *Tovarisch* was known to be a sailing ship, and these are, to my mind, the two D critical and material matters upon which responsibility for this disaster depends. In differing, as I do, from HILL, J., I think it right to say that the difference is due, first to the question of the exhibition of the flare, and, secondly, to the question of the visibility of the green starboard light of the *Tovarisch*. The learned judge nowhere holds that it was not in fact displayed or seen, but seems to conclude that the action of the *Alcantara* was so foolish that it can only be referable to the E fact that it had not been seen. I fear I cannot go with him to that conclusion. The reasons that may have led to the *Alcantara*'s action cannot now be accurately determined, but experience shows that it is not safe to assume that a thing cannot have been done because its commission would be an act of folly.

LORD DUNEDIN.—I concur. The whole argument of the *Alcantara* depended upon the assumption that the green flare was equivalent to an invitation or even F an injunction to the other vessel to change its course. Now that assumption is not based on any of the nautical rules which have become embedded in positive law, nor, according to the advice given to us by our assessors, is it founded on any well-recognised practice of seamanship.

LORD WARRINGTON.—I have had the opportunity of reading and considering G the opinion of the noble Lord on the Woolsack and concur in it.

LORD BUCKMASTER.—**LORD BLANESBURGH** desires me to say that he concurs.

LORD THANKERTON.—I concur.

Appeal dismissed.

H

Solicitors: *Richards, Butler & Co.*; *Middleton, Lewis & Clarke.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re PRINCE BLÜCHER. Ex parte DEBTOR

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), October 24, 1930]

[Reported [1931] 2 Ch. 70; 100 L.J.Ch. 292; 144 L.T. 152; 47 T.L.R. 19; 74 Sol. Jo. 735; [1931] B. & C.R. 1]

Bankruptcy—Scheme or composition—Signature of debtor—Inability of debtor to sign because of illness—Signature by debtor's solicitors on his behalf—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 16 (1).

By the Bankruptcy Act, 1914, s. 16 (1), where a debtor intends to make a proposal for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement of his affairs, he must lodge with the official receiver a proposal in writing, signed by him, embodying the terms of the composition or scheme.

A debtor, against whom a receiving order had been made, became too ill to swear to his statement of affairs and to sign any documents. His relatives and legal advisers, being desirous that a composition in satisfaction of his debts should be accepted by his creditors, submitted to the official receiver a proposal for a scheme or composition which was signed, not by the debtor, but by his solicitors on his behalf.

Held: the words "signed by him" in s. 16 (1) of the Bankruptcy Act, 1914, were explicit, and, therefore, the proposal not having been signed by the debtor himself and there being no provision in the Act for anyone to sign on his behalf, no proposal for a composition had been lodged by the debtor.

Re Whitley Partners, Ltd. (1) (1886), 32 Ch.D. 337 and *Hyde v. Johnson* (2) (1836), Bing. N.C. 776, applied.

Notes. As to composition or scheme of arrangement by a debtor before adjudication, see 2 HALSBURY'S LAWS (3rd Edn.) 341–345, paras. 662–670. For the Bankruptcy Act, 1914, s. 16, see 2 HALSBURY'S STATUTES (2nd Edn.) 341.

Cases referred to:

(1) *Re Whitley Partners, Ltd.* (1886), 32 Ch.D. 337; sub nom. *Re Whitley Partners, Callan's Case*, 55 L.J.Ch. 540; 54 L.T. 912; 34 W.R. 505; 2 T.L.R. 541, C.A.; 9 Digest (Repl.) 81, *335*.

(2) *Hyde* v. *Johnson* (1836), 2 Bing. N.C. 776; 2 Hodg. 94; 3 Scott, 289; 5 L.J.C.P. 291; 132 E.R. 299; 1 Digest 276, *86*.

(3) *Warburton* v. *Loveland* (1832), 6 Bli. N.S. 1; 2 Dow. & Cl. 480; 5 E.R. 499, H.L.; 42 Digest 633, *359*.

Appeal by the debtor from a decision of the registrar.

On Mar. 14, 1930, a receiving order was made against the debtor based on a petition presented on Oct. 19, 1928, by a moneylending concern. On Mar. 28, 1930, a creditors' first meeting was held when resolutions were passed that the debtor should be made bankrupt. The act of bankruptcy was that the debtor failed to comply before Oct. 16, 1928, with the requirements of a bankruptcy notice. The creditors' claim was for £2,765 19s. 5d. on two promissory notes and a judgment obtained for £850. The debtor was too ill, as a doctor certified, to swear to his statement of affairs and was unable to sign his name to the proposal to be put before his creditors for the satisfaction of their debts, but his friends and legal advisers desired that a composition should be accepted by the creditors and approved by the court. They, therefore, submitted to the official receiver a statement of affairs prepared by a chartered accountant, and also furnished a proposal for a composition which was signed by the solicitors acting for the debtor. Under those circumstances, the official receiver applied, under s. 18 of the Bankruptcy Act, 1914, to adjudge the debtor a bankrupt and that application came before the registrar on July 18, 1930. The registrar refused to hold that the proposal was within

s. 16 (1) of the Bankruptcy Act, and, therefore, held that the official receiver was under no obligation to hold a meeting of creditors as presented by s. 16 (2).

Tindale Davis for the debtor.

Roland Burrows (with him *the Attorney-General, Sir William Jowitt, K.C.*), for the official receiver, were not called on.

LORD HANWORTH, M.R.—The short point which we have to determine in this appeal is whether or not, for the purposes of s. 16 of the Bankruptcy Act, 1914, which deals with a composition or scheme of arrangement, it is possible to accept a scheme which has been signed on behalf of the debtor by solicitors.

What happened in this case was this. The debtor is unfortunately ill, and not only ill but has been for some time extremely ill, and we have before us a certificate properly sworn to by the affidavit of a solicitor that unhappily the debtor is in such a condition of health that he is quite unable to attend to any business, and certainly unable to sign any documents. Of course, we accept the certificate, which is signed by a very distinguished physician and identified by the solicitor acting for the debtor. In these circumstances, it was desired to put forward a proposal for the purposes of a scheme or composition and a well-known firm of solicitors signed that scheme. They put forward a proposal which says this: "I . . . the above-named debtor hereby submit the following proposal for a composition in satisfaction of my debts," and the scheme is set out and it is dated July 3, 1930, and signed by Burch & Co. of Bolton Street, Piccadilly, who are well-known solicitors, and whose signature, of course, would carry weight. But objection is taken that that scheme does not comply with the terms of s. 16 of the Bankruptcy Act, 1914. Section 16 (1) runs in this way:

> "Where a debtor intends to make a proposal for a composition in satisfaction of his debts, or a proposal for a scheme of arrangement of his affairs, he shall, within four days of submitting his statement of affairs, or within such time thereafter as the official receiver may fix, lodge with the official receiver a proposal in writing, signed by him, embodying the terms of the composition or scheme which he is desirous of submitting for the consideration of his creditors. . . ."

We have to determine whether or not those specific words "signed by him" cover and authorise a signature by his solicitor. It has been argued by counsel for the debtor with great lucidity that it ought to be so held, and particularly because, if the signature of the solicitor on behalf of the debtor is not accepted, the debtor is really debarred by his unfortunate and serious illness from taking advantage of s. 16. Attention is called to a provision which is made by s. 112. In the case of the death of a debtor, s. 112 says that the matter shall continue as if he were alive; and attention is also called to s. 149 which says:

> "For all or any of the purposes of this Act, a corporation may act by any of its officers authorised in that behalf under the seal of the corporation, a firm may act by any of its members, and a lunatic may act by his committee or curator bonis."

Counsel for the debtor put interrogatively this question: If provision is made for the case of a debtor who dies, if a committee may sign on behalf of a lunatic, if a firm may sign by any of its members, surely it cannot be intended that a debtor who lies on a sick bed is to be debarred by the terms of s. 16, strictly construed, from exercising rights which apparently would enure in favour of a lunatic or in the case of a dead man? All that may be very good matter for considering whether an amendment of the Act should be made. We have to consider the explicit and very simple terms of the statute. The words in the section are "signed by him." Where a statute intends that the authorisation may be by a person on behalf of a debtor the legislature knows how to provide for it. To go back to s. 4 of the Statute of Frauds, 1677, the words there require that a contract relating to the sale of lands shall be in writing and signed by the party who is to be charged therewith and the words used are: "and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised." Those additional words "or some other person thereunto by him lawfully authorised" are significantly absent from this statute. In *Hyde* v. *Johnson* (2) the question arose whether or not Lord Tenterden's Act (Statute of Frauds Amendment Act, 1828) applied in the case of a signature otherwise than by a person who gave the undertaking, and TINDAL, C.J., said (2 Bing.N.C. at p. 778): A B

> "The short question in this case is, whether a letter offering to pay a debt by instalments written by the defendant's wife to the plaintiff in her husband's name, and at his request, and afterwards sent by him to the plaintiff, is a sufficient acknowledgment or promise 'made or contained by or in some writing, signed by the party chargeable thereby,' within the meaning of 9 Geo. 4, c. 14, s. 1. The question turns entirely on the construction of the statute, and it amounts in other words to this, does Lord Tenterden's Act extend to a writing signed by an agent of the party, or is it confined to a writing signed by the party himself? Looking at the words of the statute, it is confined in terms to a 'writing signed by the party chargeable thereby.'" C

In *Re Whitley Partners, Ltd.* (1), BOWEN, L.J., affirmed and followed the decision in *Hyde* v. *Johnson* (2). He said this (32 Ch.D. at p. 341): D

> "*Hyde* v. *Johnson* (2) was decided on the ground that Lord Tenterden's Act was to be read along with the Statute of Frauds, which expressly refers to signature by an agent, and that a clause which contained no reference to an agent was therefore to be held to require personal signature. In the present statute there is nothing in the way in which the memorandum of association is dealt with to show that the legislature intended anything special as to the mode of signature." E

It is otherwise in the present statute. We have the specific words "signed by him," and, following the reasoning which is derived from a consideration of the Statute of Frauds, and the two cases to which I have referred, I think there is no ground for altering the words of the statute or giving a judicial interpretation to it which would, in effect, be an amendment or alteration of the plain words of the statute. It may or may not be unfortunate that a sick man cannot take advantage of s. 16; it may be, I do not say that it is, that he is, therefore, placed in a position less advantageous than that of a lunatic, but the legislature has not made provision for some person to act on his behalf, and we must adhere to what are the terms of the statute. F G

In these circumstances the decision of the registrar was right, and the appeal must be dismissed with costs.

SLESSER, L.J.—I agree. Counsel for the debtor's argument amounts to this, that some injustice or inconvenience would arise in the circumstances of the case if someone other than the debtor were prevented from signing on his behalf. But it was laid down many years ago, and was followed in *Warburton* v. *Loveland* (3) (2 Dow. & Cl. at p. 489): H

> "Where the language of the Act is clear and explicit, we must give effect to it, whatever may be the consequences; for in that case the words of the statute speak the intention of the legislature."

I find myself quite unable to think here that the words are other than explicit. The language of s. 16 of the Bankruptcy Act, 1914, is "signed by him," and, as my Lord has pointed out in considering very similar words in a writing or letter of acknowledgement under Lord Tenterden's Act, it was held by the court that the words "signed by him" could not be extended to signed by an agent or some other person on behalf of the required signatory. Other statutes than the Statute of Frauds also contain specific provisions where it is required that an agent may sign on behalf of a sick person. Under the Bills of Exchange Act, 1882, by s. 91 (1), it is provided specifically: I

> "Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person or by or under his authority."

In the present case, it is clear that no such permission is given directly or can be read into the language of the statute. I think that the words are clear and explicit and that the intention of the legislature is so expressed that the signing must be by the debtor, and, as the debtor here for some reason or other is unable to sign, it follows he is unable to avail himself of the benefits of the section.

I, therefore, agree that the appeal should be dismissed.

ROMER, L.J.—I agree.

Solicitors: *Burch & Co.*; *Solicitor to the Board of Trade.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

LEGH *v.* LEGH

[KING'S BENCH DIVISION (Mackinnon, J.), February 27, March 10, 1930]

[Reported 143 L.T. 151]

Limitation of Action—Postponement of limitation period—Right of action concealed by fraud—Subsequent discovery of cause of action—Date from which time runs—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3.

Where a plaintiff's delay in bringing an action is due, not to mere laches on his part, but to his ignorance of the existence of his cause of action, and that ignorance is due to the defendant's fraud, time only runs against the plaintiff under the Limitation Act from the date when he discovered the existence of the cause of action.

Notes. The Limitation Act, 1623, has been repealed and replaced by the Limitation Act, 1939, s. 26 of which now makes provisions similar to those formerly contained in s. 3 of the 1623 Act.

Followed: *Lynn* v. *Bamber*, [1930] 2 K.B. 72.

As to the effect of fraudulent concealment of a cause of action on the limitation period in respect thereof, see 24 HALSBURY'S LAWS (3rd Edn.) 230 et seq., para. 404 et seq.; and for cases on the subject, see 32 DIGEST 520 et seq. For the Limitation Act, 1939, s. 26, see 13 HALSBURY'S STATUTES (2nd Edn.) 1188.

Cases referred to:

(1) *Gibbs* v. *Guild* (1881), 8 Q.B.D. 296; 51 L.J.Q.B. 228; 46 L.T. 135; 30 W.R. 407, D.C.; affirmed (1882), 9 Q.B.D. 59; 51 L.J.Q.B. 313; 46 L.T. 248; 30 W.R. 591, C.A.; 32 Digest 526, *1819*.

(2) *Armstrong* v. *Milburn* (1885), 54 L.T. 247; 2 T.L.R. 222, D.C.; affirmed (1886), 54 L.T. 723; 2 T.L.R. 615, C.A.; 32 Digest 526, *1817*.

(3) *Oelkers* v. *Ellis*, [1914] 2 K.B. 139; 83 L.J.K.B. 658; 110 L.T. 332; 32 Digest 527, *1820*.

(4) *Osgood* v. *Sunderland* (1914), 111 L.T. 529; 30 T.L.R. 530; 32 Digest 526, *1818*.

(5) *Bulli Coal Mining Co.* v. *Osborne*, [1899] A.C. 351; 68 L.J.P.C. 49; 80 L.T. 430; 47 W.R. 545; 15 T.L.R. 257, P.C.; 32 Digest 524, *1798*.

Action tried by MACKINNON, J., without a jury.

Under a deed of separation dated Feb. 15, 1907, the defendant, a husband, agreed to pay his wife, the plaintiff, during their joint lives half his net annual income from all sources. The defendant paid £50 a quarter till 1918, when the amount was increased to £65 a quarter, and since that year the plaintiff had received not more than £260 a year. From 1911 to 1923 the plaintiff lived in British Columbia, and it was not till her return to England that she discovered that she was not getting half the defendant's income. She brought the present action for a declaration that she was entitled to half the defendant's income, and asked for an account from the year 1906. The defendant relied on the Statute of Limitations and pleaded that the period for account was six years. In reply the plaintiff averred that the Statute of Limitations did not apply by reason of the concealed fraud of the defendant in making her believe that the £260 represented half his income when in fact there had been a substantial increase in that income.

Phineas Quass for the plaintiff, the wife.
Sir Thomas Inskip, *K.C.*, and *Wilfred Lewis* for the defendant, the husband.

Cur. adv. vult.

Mar. 10. **MACKINNON, J.,** read the following judgment. This is a regrettable action between wife and husband. The question arises on an agreement for separation dated Feb. 15, 1907, under which the husband, the defendant, was to pay to his wife, the plaintiff, half his net annual income from all sources by monthly payments during their joint lives. The claim of the plaintiff was that since the date of the agreement the defendant had paid to her divers sums on account of moneys due, and that he now alleged that she was not entitled to half his annual income but to a fixed sum. She asked for a declaration that she was entitled to half the net annual income and for an account since 1906. The defence was that in accordance with the agreement he had paid the plaintiff £50 a quarter till 1918, when a house was sold and the amount increased to £65 a quarter. The defendant said that the plaintiff was not entitled to more than £260 a year by reason of an agreement entered into in 1918, and he relied on the Statute of Limitations. On Dec. 6, 1929, the defendant's solicitors wrote that they did not intend to rely on any defence except the Statute of Limitations, and were prepared to submit an account for the last six years and to give half the income for that period. It was tacitly admitted that the defendant had not paid half the income to the plaintiff, but he says he is not liable to give an account for more than six years. The plaintiff replied that the statute was not a bar by reason of the concealed fraud on the part of the defendant.

The only question was to what was the plaintiff entitled. She is clearly entitled to the declaration prayed, and she is also entitled to an account. The question is whether the account is to be limited to six years before issue of the writ or go back to an earlier date. The facts were that at the time of the agreement of 1907 defendant's income was paid to him from the Boon Property Trust, which had to do with real property. At that time the plaintiff's brother was one trustee and the Public Trustee the other. The brother ceased to be a trustee in 1910. At that time her share had not been paid by monthly payments, but by quarterly payments of £50, and at the end of the year there were supplementary payments. I am satisfied that about that time the defendant's income was £400. In 1918 there was a change: the Boon estate was sold and the trustees ceased to deal with the money. The money was paid into the plaintiff's bank. The Public Trustee and the defendant's solicitor wrote to the plaintiff in June that they had given instructions to the bank to pay £65 quarterly. That obviously was substituted for the previous arrangement, and it meant that if the defendant's income was more than £520 he would send any balance at the end of the year. Every year since then the plaintiff has received £260 and nothing additional. Since 1918 the defendant's income had been more than £520. The plaintiff had received £260 a year except for a sum which was deducted for costs in an unsuccessful action brought by her against her husband. She had never asked for more till this action. Since 1911 to 1923 she had lived in British Columbia. I accept her evidence that till recently, within six years of the action, she was never told the amount of her husband's income, but thought she was receiving half of it.

The question is whether on these facts the claim is not barred by the Statute of Limitations by reason of the fraudulent concealment by the defendant of the true amount of his annual income. Counsel for the defendant has urged that there was no fraud by the defendant, who had never said anything about his income. One has to consider that point. Under the agreement he had to pay half his income to his wife. Supposing he wrote and said: "I send £260, half my income." That would be a lie. If he sent £260 and said nothing, would that make any difference? I think it does not. It would be an implied statement that it was half his income, an untrue statement calculated to deceive the plaintiff, and I think it did deceive her. I find that she was under the belief for many years until she discovered the truth that she was receiving half her husband's income by this payment of £260 a year. In 1923 the plaintiff came to England and began proceedings against her husband. The defendant swore an affidavit in which he revealed to her the fact that she had not been getting her full share. Shortly after she was apprised of that fact she found out in November, 1924, that she was entitled to make her present claim. That was well within six years before the issue of the present writ. I think that she was by the fradulent misrepresentation of her husband deceived into the belief that she was getting half his income up to 1924.

Apart from the cases I think the legal position is as follows. Before the Judicature Acts the Statute of Limitations only applied to actions on the common law side, but not in terms to proceedings in the Court of Chancery which was not, therefore, bound to apply it. But the Court of Chancery had as one of its own equitable principles an objection to people bringing stale claims. What should be the exact measure of time was never fixed; it was governed by the circumstances of each case. But when the time came when Parliament prescribed six years as the proper limit in common law cases, the Chancery Courts adopted it as a useful measure to apply to their own doctrine of preventing stale demands, and therefore the rule arose applying six years' period as a finite measure of time in which actions could be brought. There was another equitable rule, imposed and added to that rule about stale claims. Where the plaintiff's delay was not his fault at all and was because he did not know that he had any cause of action, and where that ignorance was brought about by the fraud of the defendant, the Court of Chancery said to the defendant: "You must not take advantage of your own wrong in concealing from him the fact that he had a cause of action; therefore the plaintiff shall only be debarred from the time when he discovered the fraud." Then the result of the Judicature Act, 1873, s. 24 (sub-s. (4) in particular) was that the common law imported the equitable doctrine that where delay had been due not to mere laches on the part of the plaintiff but to the fact that he had been ignorant of the cause of action because of the fraud of the defendant, then the statute would only run against him from the time when he discovered the existence of the cause of action. That seems to have been the resulting position after 1873.

That seems to me to be the legal position. But when I turn to the cases they present the greatest possible difficulty. In *Gibbs* v. *Guild* (1), FIELD, J., held that the plaintiff's plea was good and his decision was confirmed by the Court of Appeal. The true result of that case was that the equitable principle was to be applied in all cases, whether common law or equity. Then there followed *Armstrong* v. *Milburn* (2), on which counsel for the defendant strongly relied. It was a case of a negligent solicitor and the question was whether there was concealment with or without fraud. The Divisional Court held that the reply of fraudulent concealment was no answer to the plea of the statute in a pure common law action. The difference between *Gibbs* v. *Guild* (1) and *Armstrong* v. *Milburn* (2) does not appear to have been cleared up in any subsequent case. In December, 1913, came *Oelkers* v. *Ellis* (3), where HORRIDGE, J., applied the doctrine that where the plaintiff was kept in ignorance of the existence of his cause of action through the fraud of the defendant, the plaintiff not being guilty of laches himself, he was entitled to recover.

That was a pure common law action to set aside the purchase of shares. Then in May, 1914, *Osgood* v. *Sunderland* (4) came before BAILHACHE, J., and the same question arose. That learned judge appears to have felt that he was governed by *Armstrong* v. *Milburn* (2), and that the plea of the Statute of Limitations could not be met by a reply of fraudulent concealment. Then there is also *Bulli Coal Mining Co.* v. *Osborne* (5), in the House of Lords, in which it was held that the Statute of Limitations was no answer. In this condition of authority I do not see why I am more bound to follow *Armstrong* v. *Milburn* (2) than to follow *Oelkers* v. *Ellis* (3), and *Bulli Coal Mining Co.* v. *Osborne* (5), having regard to my own view of the decision in *Gibbs* v. *Guild* (1). I do not think that *Gibbs* v. *Guild* (1) made a distinction between the effect of the statute in what is called a purely common law case and its effect in a case which could have been brought in a court of equity. As the authorities stand at present I am at liberty to apply the true position of the law as it was in reality stated to be in *Gibbs* v. *Guild* (1). The plaintiff is only barred from the time she discovered that she had been deceived as to the amount of the defendant's income. She is entitled to a declaration that she is entitled to half the income and for an account of moneys received by the defendant not merely from May, 1922, but from January, 1918, and for that relief there must be judgment for the plaintiff with costs.

Judgment for the plaintiff.

Solicitors: *E. Stoneham*; *Foss, Bilbrough, Plaskitt & Co.*, for *Piercy & Wood*, Bournemouth.

[*Reported by* R. A. YULE, ESQ., *Barrister-at-Law.*]

HOLE *v.* GARNSEY

[HOUSE OF LORDS (Lord Buckmaster, Lord Dunedin, Lord Sumner, Lord Atkin and Lord Tomlin), December 16, 17, 1929, and March 25, 1930]

[Reported [1930] A.C. 472; 99 L.J.Ch. 243; 143 L.T. 153; 46 T.L.R. 312; 74 Sol. Jo. 214]

Industrial and Provident Society—Rules—Alteration imposing liability on members to take additional shares.

Rule 64 of the rules of a registered industrial and provident society provided: "The rules may be amended by resolution of a three-fourths majority at a special general meeting." The rules prescribed the number of shares for which a member was required to subscribe.

Held (per LORD DUNEDIN, LORD SUMNER, LORD ATKIN and LORD TOMLIN, LORD BUCKMASTER dissenting): an amendment of the rules of the society requiring members to subscribe for additional shares and to incur extra liability was not binding on a member who had joined the society before the amendment was made unless he expressly assented thereto.

Biddulph and District Agricultural Society, Ltd. v. *Agricultural Wholesale Society, Ltd.* (1), [1927] A.C. 76, explained and distinguished.

Notes. The amendment in question in this case was made before Mar. 28, 1928. Amendments registered after that date are not binding on a member of an industrial and provident society who joined before such registration without his consent in writing, in so far as they require him to take or subscribe for additional shares or to subscribe additional capital: Industrial and Provident Societies (Amendment) Act, 1928, s. 1 (12 HALSBURY'S STATUTES (2nd Edn.) 921).

As to industrial and provident society rules, see 21 HALSBURY'S LAWS (3rd Edn.) 15–19; and as to increases in a member's liability, see ibid., 64; and for cases on the subject, see 28 DIGEST, 118–119, *9–16*, and ibid., 122–123, *35–45*, respectively.

Cases referred to:

(1) *Agricultural Wholesale Society* v. *Biddulph and District Agricultural Society*, [1925] Ch. 769; 94 L.J.Ch. 397; 133 L.T. 274; 41 T.L.R. 470; 69 Sol. Jo. 557, C.A.; affirmed, sub nom. *Biddulph and District Agricultural Society* v. *Agricultural Wholesale Society*, [1927] A.C. 76; 95 L.J.Ch. 576; 136 L.T. 163; 42 T.L.R. 761, H.L.; 9 Digest (Repl.) 100, *455*.

(2) *Dibble* v. *Wilts and Somerset Farmers, Ltd.*, [1923] 1 Ch. 342; 92 L.J.Ch. 168; 128 L.T. 643; 39 T.L.R. 174; 67 Sol. Jo. 297; 28 Digest 123, *44*.

(3) *Re Bangor and North Wales Mutual Marine Protection Association, Baird's Case*, [1899] 2 Ch. 593; 68 L.J.Ch. 521; 80 L.T. 870; 47 W.R. 695; 43 Sol. Jo. 605; 7 Mans. 160; 9 Digest (Repl.) 94, *420*.

(4) *Auld* v. *Glasgow Working Men's Building Society*, [1887] 12 App. Cas. 197; 56 L.J.P.C. 57; 56 L.T. 776; 35 W.R. 632; 3 T.L.R. 378, H.L.; 7 Digest 456, *13*.

(5) *Rosenberg* v. *Northumberland Building Society* (1889), 22 Q.B.D. 373; 60 L.T. 558; 37 W.R. 368; 5 T.L.R. 265, C.A.; 7 Digest 457, *20*.

(6) *Wilson* v. *Miles Platting Building Society* (1887), 22 Q.B.D. 381, n.; 60 L.T. 558, n.; 37 W.R. 369, n., C.A.; 7 Digest 457, *19*.

(7) *Strohmenger* v. *Finsbury Permanent Investment Building Society*, [1897] 2 Ch. 469; 66 L.J.Ch. 708; 77 L.T. 235; 46 W.R. 69; 13 T.L.R. 531; 41 Sol. Jo. 676, C.A.; 7 Digest 456, *14*.

(8) *Natusch* v. *Irving* (1824), 2 Coop. temp. Cott. 358; 47 E.R. 1196, L.C.; 36 Digest (Repl.) 531, *938*.

Appeal from the decision of the Court of Appeal (LORD HANWORTH, M.R., LAWRENCE and RUSSELL, L.JJ.), reported sub nom. *Re Wilts and Somerset Farmers, Ltd.* ([1929] 1 Ch. 321).

The facts are fully set out by LORD DUNEDIN in his opinion.

The Court of Appeal held, that the amendments were not ultra vires, but were valid and binding on members who became members before the rule was amended, and that in the liquidation of the society members were liable to contribute in accordance with the increased number of shares required to be held by them. H. being a member of the society appealed.

H. B. Vaisey, K.C., and *H. S. G. Buckmaster*, for the appellant, a member who joined before the amendment.

Wilfrid Greene, K.C., *Rowland Thomas* and *Renfield*, for the respondent, the liquidator of the society.

The House took time for consideration.

Mar. 25. The following opinions were read.

LORD BUCKMASTER.—The Wilts and Somerset Farmers, Ltd., was registered under the Industrial and Provident Societies Act, 1893; on Mar. 23, 1910, and on Jan. 30, 1923, it went into voluntary liquidation, the respondent being appointed liquidator. In the liquidation it was sought to place the appellant on the list of contributories under the following circumstances: The original rules fixed the shares at the nominal value of £1, and provided by r. 12 that individual members should hold at least one share for every twenty acres or fraction of twenty acres farmed by them up to 500 acres, and one share for every forty acres or fraction of forty acres above 500. There was also a provision fixing the shareholding of milk retailers, which is not relevant. Rule 13 provided that the total number of shares held by any member shall not exceed £200, and r. 64 provided that the rules might be amended by resolution of a three-fourths majority at a special general meeting. On Nov. 14, 1921, the rules were amended so as to provide that individual members should hold at least five shares for every twenty acres up to 500, and three shares for every forty acres or fraction of forty acres above 500 and that:

> "Milk producers shall hold shares on the above acreage basis or hold at least five shares for every dairy cow owned by them, whichever shall be the greater number of shares."

On Dec. 21, 1921, the rules were again amended in the following way:

> "Rule 6. Shares shall be transferable, but not withdrawable. They shall be of the nominal value of 6s. 8d., which shall be payable on application."

At the same time, the following new rule was added:

> "Rule 6A. The nominal value of each of the issued and fully paid shares of the society shall be reduced from the sum of £1 to the sum of 6s. 8d. by cancelling the sum of 13s. 4d. upon each share. Each of the shares of the society which have been issued and are not fully paid shall likewise be reduced to the nominal value of 6s. 8d., but so that the existing liability in respect of unpaid capital on such shares respectively shall not be extinguished or reduced.
>
> Each person who since the 1st day of June last has made to the society an application for shares in the society shall in the event of his application being accepted by the society receive an allotment of three shares in the society of the nominal value of 6s. 8d. each in respect of every share of the nominal value of £1 applied for."

On Mar. 25, 1922, r. 12 of the original rules as amended was further amended by substituting for the words "five shares" in the two places in which they occur the words "shares of the nominal value of £5." In May, 1922, the society issued to its members a letter calling up the appropriate amount from each of the 1,200 members to whom r. 12 as amended appeared to apply. These 1,200 members, of whom the appellant was one, disputed the demand to subscribe for further shares and alleged that the rules which had been passed were ultra vires. Proceedings were then taken against the society, which were heard by LAWRENCE, J. (*Dibble* v. *Wilts and Somerset Farmers, Ltd.* (2)), who decided that r. 12, both in its original form and as amended, was ultra vires, the main ground of his decision being that such rules interfered with the principle of limited liability and were, therefore, void by analogy with the Companies Act.

In 1925 a similar question arose in a case between the Biddulph District Agricultural Society, Ltd., and the Agricultural Wholesale Society, Ltd. This latter society was registered on Sept. 14, 1914, and the qualifying rule there was one which provided that each society or company which was a member of the Agricultural Wholesale Society should hold one share for fifty, or any fraction of fifty, of its members. The Biddulph Society became a member and, having between fifty and a hundred members, took up two shares of £1 each. At a later date, by a special resolution passed on May 1, and May 16, 1918, the Agricultural Society amended its rules and provided by a new r. 6 that every existing member should within three calendar months after June, 1918, take up such a number of shares as, together with the existing shares of such members, would make up the number which such society, if a new member, would have had to take up, and it also provided that every society should within six months after the end of each financial year apply for and take up such further shares as would represent an increase in membership and turnover over that on which its then present holding of shares should have been calculated. The effect of this alteration was that the Biddulph Society became bound forthwith to take up additional shares and also within six months after the end of each financial year to take up further shares representing its increase in membership and turnover. On Aug. 12, 1918, the Agricultural Society brought this alteration to the notice of the Biddulph Society, who thereupon asked for an estimate of the number of shares for which it was liable, and, on being informed that this was 472, they applied for these 472 additional shares. The shares were issued and the amounts paid. As membership and turnover of the Biddulph Company increased from year to year they became bound, if the rules were valid, to take up a further 2,211 shares, and this they refused to do. Proceedings were then taken to compel acceptance of the shares. The case came originally before Lawrence, J., who followed his own former case, and finally to the Court of Appeal, who reversed his judgment. From the judgment of the Court of Appeal an appeal was taken to this House and the proceedings are reported: (see *Biddulph and District Agricultural Society* v. *Agricultural Wholesale Society* (1)).

I have set out the facts in some detail because the first and, to my mind, the most difficult question in this case is whether the decision that this House then reached does not bind us on the present occasion. They dismissed the appeal and held that the Biddulph Company was liable to take the shares but, in order to ascertain exactly what was the foundation and effect of this decision, it is necessary to see what it was that had happened in the Court of Appeal. The Agricultural Society presented their case before the Court of Appeal upon two grounds: first, that an obligation to take the 2,211 shares arose under the rules and, alternatively, that there was a contract to take them which was to be implied from the circumstances in which the Biddulph Company had applied for the 472 shares. The Court of Appeal overruled *Dibble's Case* (2), and made a declaration in these words:

> "that under and by virtue of the agreement under r. 6, 1918, and in the events which have happened, the defendants became, and were at the date of the issue of the writ in this action, liable to take 2,211 shares of £1 each in the plaintiff society."

It is impossible to read this judgment and to follow what took place in the Court of Appeal without seeing that their conclusion was based entirely upon the view that the alteration of the rule was within the powers of the society. An agreement "under the rule" cannot mean an agreement outside the rule, and "the events which have happened" are the increase in the turnover and membership of the Biddulph Company. The alternative contention that there was a contract to take shares outside the rules was not dealt with. It is in the light of these facts that the opinions in the House of Lords need to be regarded. The Lord Chancellor treated the application for the 472 shares as effecting a contract, but a contract that was not independent of the rules, for he said that, in his view, the result of it was to compel the applicants, as by a covenant under seal, to take the further shares, a result which could only arise if the rules were valid. He, however, expressly left open the question as to whether the alteration would be binding on a member who had not assented. His view appears to be that assent bound the member to accept the full effect of the rule at all times in the future, and he treated this as leaving open the question of the validity of the rule. Lord Sumner regarded the evidence as establishing an actual agreement to take further shares contingently on the happening of the events mentioned in the amended rule or, in other words, an agreement made as between the two parties outside the rules that shares would be taken to the extent to which liability would be imposed if the rule were valid, thus avoiding altogether the question of deciding the validity of the rule and expressly warning the House against the danger in these circumstances of leaving the declaration made by the Court of Appeal unamended. This judgment leaves the ground quite clear for raising again the question as to the validity of the rule, and I think that the effect of the Lord Chancellor's opinion might fairly be so interpreted, but the judgments of the other learned Lords appear to me to prevent the possibility of accepting this view. Lord Shaw said that the reasonings of the Court of Appeal were entirely right. As those reasonings only affect the validity of the rule, it must mean that, in his view, the rule was valid and nothing in the remainder of his judgment affects that opinion. Lord Parmoor says ([1927] A.C. at p. 91):

> "Unless, therefore, it can be shown that the rule in question is one which the respondent society had no power to make, the appellant society would be bound to comply with its provisions as a contractual obligation undertaken by them on the validity of the rule."

LORD BLANESBURGH expresses his agreement with the Lord Chancellor, but says ([1927] A.C. at p. 93): A

> "I am much struck by the fact that a rule of the nature of that here under discussion seems to be in common use in these societies. I can well believe that regulations of the kind are essential to the successful working of such societies and it would be a serious thing lightly to cast doubt on their validity."

And he also thought that the appeal should be dismissed. B

The appeal was, accordingly, dismissed, and it is significant that the qualification which LORD SUMNER thought ought to be introduced into the order of this House was omitted. The order as found in the Journal of this House on July 29 is that the appeal should be dismissed, and that left untouched and indeed, in my opinion confirmed, the declaration of the Court of Appeal that the liability arose under and by virtue of the agreement under r. 6 of 1918. I find myself constrained in these C circumstances to the view that the decision of this House did involve that such an alteration of the rules was valid, and it is so regarded by LORD HANWORTH, M.R., in the present case; if that is so, it is unnecessary to examine in detail the further arguments on this appeal, presented to show the rules are invalid, because it cannot be disputed that in these circumstances the present rules would be good, subject only to the question as to whether they are void for uncertainty. It is no doubt D possible to show that some confusion and difficulty might arise in ascertaining the strict liability under these rules as they stand. That is not sufficient to render them void; I think the calculation could be effected with a reasonable and sufficient certainty and on that ground I think the rules cannot be challenged. The judgment of ROMER, L.J., who tried this case as a judge sitting in the court of first instance, has examined the whole question with such care and, in my opinion, such accuracy, E that I should be prepared to accept his judgment as the expression of my own opinion. For these reasons I think the appeal should fail.

LORD DUNEDIN.—The appellant in this case was a member of a society called the Wilts and Somerset Farmers, Ltd., which is a society registered under the Industrial and Provident Societies Act, 1893, and the respondent is the liquidator F of that society which is in liquidation.

The object of the society was to dispose of agricultural and dairy produce produced by its members. As originally constituted the shares were £1 shares. No member was allowed to hold more than £200 worth of shares in his own name, but a practice had grown up for members to take further shares in the name of some member of their family as nominee. The appellant held 200 shares of his own and seventy- G one in the name of his son as nominee. By the rules of the society as originally constituted, and as they stood when the appellant had acquired all the said shares, it was provided as follows:

> "Rule 12. Individual members shall hold at least one share for every twenty acres or fraction of twenty acres farmed by them up to 500 acres and at least one share for every forty acres or fraction of forty acres above 500. In H arriving at the acreage downland may be eliminated at the discretion of the committee. Milk retailers shall hold at least six shares for every churn of seventeen gallons retailed daily by them, societies or companies which are members shall hold at least five shares. . . .
>
> Rule 6. Shares shall be transferable, but not withdrawable. . . .
>
> Rule 18. No transfer of shares shall be valid unless the committee's consent I has been obtained thereto. . . .
>
> Rule 64. The rules may be amended by resolution of a three-fourths majority at a special general meeting. No amendment of rules shall be valid until registered."

On Nov. 14, 1921, the appellant being a member of the society and holding shares as aforesaid, r. 12 was rescinded and the following rule was substituted:

> "Individual members shall hold at least five shares for every twenty acres or fraction of twenty acres farmed by them up to 500 acres and at least three

> A shares for every forty acres or fraction of forty acres above 500. In arriving at the acreage downland may be eliminated at the discretion of the committee. Milk producers shall hold shares on the above acreage basis or shall hold at least five shares for every dairy cow owned by them, whichever shall be the greater number of shares."

On Dec. 21, 1921, r. 6 was amended to read as follows:

> B "Shares shall be transferable, but not withdrawable. They shall be of the nominal value of 6s. 8d., which shall be payable upon application."

At the same time an additional rule was made to follow r. 6.

> "The nominal value of each of the issued and fully paid shares of the society shall be reduced from the sum of £1 to the sum of 6s. 8d. by cancelling the C sum of 13s. 4d. upon each share."

On Mar. 25, 1922, r. 12 (as amended on Nov. 14, 1921) was further amended by substituting for the words "five shares" in the two places in which occurred the words "shares of the nominal value of £5."

All these various amendments were carried by a three-fourths majority of the shareholders, but the appellant was not one of the majority and never in any way D assented to these alterations. The result of the last amendment was, if it was valid, to impose on many members of the society an obligation to take many additional shares, nor could they get rid of their liability by transference. A shareholder named Dibble raised an action against the society on June 22, 1922, contesting the validity of the last amendment. The action was decided in his favour on Jan. 17, 1923, by LAWRENCE, J., and the society did not appeal, so that the E matter became res judicata with Dibble. On Jan. 30, 1923, the society went into liquidation and the respondent was appointed liquidator. The respondent so far acquiesced in the decision in Dibble's case that he took no steps to put the appellant and other shareholders in the same position as Dibble on the list of contributories.

On April 23, 1925, the Court of Appeal decided *Biddulph and District Agricultural Society* v. *Agricultural Wholesale Society* (1), in the course of which they held F that *Dibble* v. *Wilts and Somerset Farmers, Ltd.* (2) had been wrongly decided. *Biddulph's Case* (1) was taken to this House and on July 29, 1926, your Lordships' House affirmed the decision as between the parties on the merits. On hearing of this decision the respondent proceeded to put the appellant and others who were in the same situation on the list of contributories and so informed them by circular letter. As the appellant under the rules so amended needed to hold shares of the G nominal value of £200, i.e., 600 shares, and as he only with the addition of the shares held by his son held 271, he was put on the list for 329 shares with a liability of 6s. 8d. on each share. As the appellant denied liability the question was raised by the respondent by an originating summons and the question asked as to the liability of the appellant and others to be put on the list of contributories under the circumstances described.

H ROMER, J., in a careful judgment, came to the conclusion that at least so far as he was concerned the case was ruled by the *Biddulph Case* (1) and confirmed the decision of the respondent to put the appellant on the list of contributories. The Court of Appeal treated the matter as very obvious and without calling on the respondent affirmed the judgment. Against that judgment the present appeal is taken.

I The first question on the result of which the judgment of the courts below depend, is whether the present case is ruled by *Biddulph's Case* (1). It is therefore necessary to consider carefully what *Biddulph's Case* (1) really was, and to see whether the judgment of this House, which is binding on your Lordships, really entails the necessary consequences that the original judgment in *Dibble's Case* (2) was wrong in every particular. In *Biddulph's Case* (1) the respondents in this House were a society registered under the same Act as the Society here, namely, the Industrial Act, 1893, and the appellants were another society also registered under the same Act. I will call them respectively the A. and B. society. Now the A. Society in its rules contemplated and provided for the case of one of its shareholders being a society and not an individual, and r. 9 was as follows: A

> "Shares to be held by members. Each society or company which is a member shall hold at least one share for each fifty or fraction of fifty of its members."

The B. Company had between fifty and one hundred members, and in accordance with that rule took up two shares. There was as here a power of amending the rules. Rule 59 was: B

> "Mode of amending rules. The rules may be amended by resolution of a three-fourths majority at a special general meeting."

The rules were amended. It is not necessary to quote the amendments which are lengthy, but they may be summarised by saying that in the amended form, instead of the number of the shares of an admitted society being left as they were on the calculation of the number of members at the time of admission, the admitted society, in the case of its membership being increased, had to apply for such extra shares as would make up the number which would have been necessary if the society had then been admitted to membership for the first time, and, in addition, for certain extra shares calculated on the basis of the turnover of the admitted society. The result of the alteration was that the B. Society in the terms of the new rules, became bound to apply for 470 extra shares. The new rules were brought to the notice of the B. Society by a letter from the A. Society, and on receipt of that letter, and after certain correspondence, the B. Society applied for the extra shares which were necessary on the above calculation, and they were allotted to them and they accepted the shares and paid up the amounts due upon them. Three years later the membership and turnover of the B. Society having further increased, the A. Society called on the B. Society to apply for and take 2,211 more shares. This the B. Society refused to do and the A. Society raised action. C D E

Now it will be at once observed that there was an obvious difference between the facts of that case and this case. In that case the B. Society had accepted the situation of the altered rules by applying for shares and accepting them and paying for them. The shares were shares which they needed to apply for either because the new rule was valid or on the assumption that they accepted the alteration of the rule as valid; in the present case no such application, no such acceptance and no such payment was made. It was therefore possible in the *Biddulph Case* (1) for A. Society to put its argument on two separate grounds. (i) That the rule as it stood was binding on the B. Society, and (ii) that even if it was not the B. Society by application, acceptance and payment under it had contractually adopted the rule in question with the A. Society. Now this double ground was undoubtedly pleaded by the A. Society for on p. 772 of the report in the Court of Appeal ([1925] Ch. 769) I find this as the argument of the appellants. (The A. Society were appellants before the Court of Appeal because LAWRENCE, J.'s judgment in first instance had simply followed his own judgment in the *Dibble Case* (2).) F G H

> "The appellants' claim is based on two grounds: first, that an obligation to take the 2,211 shares in question arose under their rules, and secondly, that there was a contract to take them quite apart from the rules. If we succeed on the first claim, the other will not arise."

But when we come to the judgment of the learned judges in the Court of Appeal, the whole discussion turned on the first ground—on that they were with the appellants—and there is not a word about the second. The first two judges pass over it in silence, and the third only says he thinks it unnecessary to say anything about it so he hazards a doubt bearing on the fact of the application. Not a word is said as to the alleged second ground of liability, and not a word as to the possibility or impossibility of imposing a liability not by original or adopted rules, but by rules passed by a majority in virtue of mere power of amendment. The whole argument in the case turned on whether such a rule, i.e., a rule in certain events described imposing a liability to take further shares was or was not struck at by I the limitation of liability provisions. Lawrence, J., in *Dibble's Case* (2) had held that it was. And the whole gist of the judgment in the Court of Appeal was simply this, that the statutory limitation of liability only applies to the liability which arises on a share in respect of that share, and the doctrine has no application to a collateral contract to apply for extra shares in certain events, the liability on those shares being of course limited to the amount due on them. A very few quotations will make this clear.

Sir Ernest Pollock, M.R., quoting *Re Bangor and North Wales Mutual Marine Protection Association, Baird's Case* (3), says ([1925] Ch. at p. 781):

> " 'A member is only liable to be placed on the list of contributories in respect of the amount which by the memorandum of association he has undertaken to contribute in the event of the company being wound up' (it was a company limited by guarantee), 'although he may be sued for sums which he is only bound to pay under the articles of association.' There are two different liabilities; so far as he is a shareholder he is placed on the list of contributories in respect of the unpaid balance due upon his shares; in so far as he has undertaken an intrinsic liability, he can be sued in respect of that extrinsic liability."

Warrington, L.J., says ([1925] Ch. at p. 786):

> "The judgment of the court below and the arguments adduced, ignore the obvious distinction between the limitation of liability in respect of shares held, and an obligation collaterally imposed upon a member to take up further shares which will themselves when taken up, be entitled to a similar limitation of liability."

Sargant, L.J., says ([1925] Ch. at p. 794):

> "There may be some special collateral liabilities attaching to a share by special contract which are in no way touched or destroyed or affected by limitation of the liability of a member in respect of the general engagements of the company such as can be enforced in a winding-up of the company."

Now I do not doubt that as it left the Court of Appeal *Biddulph's Case* (1) ruled the point, for it disposed once and for all of the idea that limited liability had anything to do with the question, and it assumed that the rules, unless they were bad as infringing limited liability, were good and binding on the B. Company. But when *Biddulph's Case* (1) came to your Lordships' House all that was altered. Their Lordships undoubtedly affirmed the proposition that the doctrine of limited liability could not save the B. Company, but beyond that they did not go. They saw, or at least the majority of them saw, that the question of whether you could impose a liability such as this merely through a power of amendment of the rules, was a very serious question indeed. I have already noticed the arguments of the A. Company before the Court of Appeal when their counsel said that there were two questions (i) liability in respect of the rules per se; (ii) liability under contract apart from the rules, and added that if (i) were solved in his favour, (ii) did not arise. In the very first sentence of the judgment of Lord Cave, L.C., he puts the matter quite plainly as soon as he has stated the facts ([1927] A.C. at p. 84) in precisely the opposite order:

> "It is unnecessary for the purposes of this appeal to decide whether having regard to the terms of the Industrial and Provident Societies Act, 1893, an alteration of the rules of a registered society requiring members of the society to subscribe for additional shares would be binding on a member who had not assented to the alteration, for the case of the respondents rests not on any alteration of the rules after the appellants took up their shares, but on the rules of 1918 which were in force when the appellants subscribed for 470 shares. . . . The respondents' case rests on contract only. The appellants when they took the 470 shares on the basis of the rules of 1918—and the correspondence shows beyond any doubt that they did so [this quiets the hinted doubt of Sargant, L.J.] became, by virtue of s. 22 of the Act of 1893 bound as by covenant under seal to take further shares in accordance with the provisions

> of those rules, and there is nothing in the Act of 1893 or to be inferred from that enactment which invalidates such a covenant." A

And then at the end he does not say that *Dibble's Case* (2) is overruled, which is what the Court of Appeal said, but he says that, "so far as *Dibble's Case* (2) is inconsistent with the decision [not, observe, the reasons] of the Court of Appeal in this case, I think that it must be deemed to be overruled." In other words what the Lord Chancellor clearly held was this; the judgment below is right in so far as it B holds that a provision of this kind imposing liability in certain events to take further shares, is not inconsistent with limited liability, and is therefore a good provision in the original rules of any such society. And the question does not arise whether it could be introduced under cover of a mere right to amend because the appellant, having seen the rules altered, did not say they are not binding on him, but acquiesced and contractually bound himself on the altered rules just as he would C have been contractually bound under the original rules.

Lord Sumner held the same view. After setting forth what had taken place in 1918, he said:

> 'I think that the appellants impliedly accepted the amendment of 1918 and agreed to perform it as circumstances might arise from time to time, and that the obligation became contractually enforceable upon them by action." D
>
> Lord Blanesburgh:
>
> "I hold that the appeal should be dismissed and I am in entire agreement with the reasons of that conclusion which have just been given by the Lord Chancellor."

It is true that in one of the three observations which he permits himself to make E it looks as if he might have been content to rest his judgment on other grounds rather than those of the Lord Chancellor, which he had formally accepted, but that this is not so is, I think, shown by his very last remark. When alluding to the arguments that, in the case of a limited company, by means of an amendment in the articles of association the door would be open to get round limited liability in cases under the Companies Act, he says: F

> "I have no fear on that score. I cannot see that anything now decided by your Lordships is even remotely connected with these matters or any of them."

Now if the case had been left as the Court of Appeal left it, this would have been the inevitable result, and it is that which, to my mind, makes this case so very important. For if the idea of any alteration made under a power to alter, constituting a collateral contract which has nothing to do with the principle of limited G liability, is affirmed as it stands, then why should not a limited company having in its articles the power to increase its capital, pass another article which provided that in the case of, say, one-fourth of the capital being lost, it should be incumbent upon the shareholders to apply for such a number of shares as would make up their proportional share of the capital lost, and this operation might be repeated from time to time. H

Lord Shaw's judgment is, with deference, lacking in the usual precision of that learned judge. He begins by seeming to reserve the general question, but he goes on to affirm simpliciter, the judgment of the Court of Appeal.

Lord Parmoor clearly does the same, but these two are in a minority as regards their reasons.

My first point therefore is that the judgment of the Court of Appeal was wrong in I saying that this case was ruled by *Biddulph's Case* (1). That leaves it open to discuss the case on the merits, but first let me say what I think has been decided by *Biddulph's Case* (1) and the cases which were cited in it.

First it was decided that a rule of this kind, if it took place among the original rules, or was assented to as a new rule, was not bad in itself as being struck at by the provisions for limitation of liability; and, secondly, it was decided that such a rule was not bad because it prescribed an expanding liability to take extra shares, inasmuch as it gave a method by which that expanding liability could be accurately

A calculated. But when we come to the question of admitting a rule of that kind for the first time only by virtue of general power of amendment, all seems to me to be altered. You are then supposed to be under a contract to be bound by any extension of your liability which a three-fourths majority may enforce without any power of prescience as to what form that liability may take. Take the present case. If, instead of the £5 nominal value the rule had said £100, it would be all the same. B I, therefore, come most determinedly to the conclusion that a contract to take extra shares and incur extra liability, which is not set forth but only introduced through a general power of the amendment of the rules, is too vague to be enforced and is bad at common law. When the learned counsel for the respondents realised that it was not at all certain that your Lordships would take the same view of what was settled by *Biddulph's Case* (1) as the Court of Appeal had taken, he proceeded C with great ability and persistency to produce certain cases which he argued supported the judgment even upon the assumption that the matter was not concluded by *Biddulph's Case* (1), and it is right that I should deal with these authorities.

None of them, in my opinion, support what was here done. None of them are actually binding on me for they are not judgments of this House, but they are D judgments of very eminent judges. I would be loath, indeed, to say that such judges as LORD LINDLEY, LORD BOWEN and FRY, L.J., were wrong. At the same time I confess that I find it difficult to reconcile the cases I am going to quote with *Auld* v. *Glasgow Working Men's Building Society* (4) and the opinion of LORD HALSBURY therein. But I need not further inquire as to this as in my view they can be distinguished from this case. Some of them, such as the pigeon-shooting E case, are plainly inapplicable, for there is no question of changing the general nature of the society, so I go at once to what, on the face of it, seemed the best authority, namely, *Rosenberg* v. *Northumberland Building Society* (5), and the case therein cited of *Wilson* v. *Miles Platting Building Society* (6). But before I discuss that case I would mention a case, which though posterior in date, contains the principle on which, in my opinion, the other case is decided. I mean *Strohmenger* F v. *Finsbury Permanent Investment Building Society* (7). That was a case where a new rule simply reduced the capital of the company.

LINDLEY, L.J., says ([1897] 2 Ch. at p. 477):

> "The reason why that rule was passed is perfectly intelligible. The society had sustained a loss of about £30,000. . . . The money had gone. How was the loss to be dealt with? The members considered the matter and came to the G conclusion that the most expedient way of dealing with the case and the fairest way for everybody was to reduce the shares. There is nothing dishonest about that—no cheating of creditors."

It is apparent that this was merely doing at once what would have been automatically done had the society been wound up. Each member of the society is treated alike. The capital in the society was his capital and it was partly gone. H All that was done was to show at once, by re-stating the debt of the society to each member, that the capital had pro tanto been lost. Now that was to my mind just what was allowed in a more complicated form in *Rosenberg* (5) and *Wilson* (6). Both these cases dealt with the rights of advanced members in a building society. The scheme of a building society is that the contributions form the building up of the share capital which then becomes a debt to the member owning the shares. I An un-advanced member, if the matter is allowed to go on so to the end, gets back his share in the shape of money and interest, but the advanced member is one who gets an advance to build a house. The advance is finally to be repaid by the maturing of his share, but as security to the society he executes a mortgage on the house. These mortgages contain a covenant by the mortgagor to pay to the society all subscriptions, fines and other moneys which, according to the rules for the time being of the society, and from time to time become due and payable by him in respect of the security or the shares by virtue of which the advance was made to him. In the rules in force at the time of the execution of the mortgage, there was no provision that advanced members should bear their proportion of any losses which the society might sustain. This was altered by a rule duly carried and the question was whether the mortgagor could redeem without bearing his proportion of the loss. It was held he could not. Now it will be noted that the amount to be found in money in order to redeem the mortgage was the total sum due minus the value of the share at the moment of redemption. That value was liable to be reduced by a rule allocating losses against shareholders, and that is why I quoted the *Strohmenger Case* (7) first. The point of these cases was that the mortgagor had no right to be treated as an ordinary mortgagor, that is to say at arm's length from the mortgagee, and that he was primarily a shareholder and only secondly a mortgagor. Fry, L.J., says this definitely (22 Q.B.D. at p. 380):

> "It is obvious that the position of a mortgagor in the case of a mortgage to a building society is by no means the same as that of an ordinary mortgagor, and that his rights must be more or less affected by the contract of membership, as well as by the contract of mortgage. It is equally apparent, I think, that the contract of membership carries in gremio a right on the part of the society to alter the rules from time to time."

And that alteration being an alteration of the character which I have explained in the *Strohmenger Case* (7) was a good alteration. But that does not touch the general proposition which we have here of an alteration being made which did not simply affect the rights of the member in the capital of the society, but imposed a perfectly new and outside liability upon him.

For these reasons I am of opinion that this appeal should be allowed and I move accordingly.

LORD SUMNER (read by Lord Macmillan).—The importance of this case in its legal aspect consists in the question raised by the very able argument for the respondent, which was virtually a claim that an association registered under the Industrial and Provident Societies Acts can, by the exercise of its power to make regulations and to alter or rescind them, compel members to invest capital in its business against their will without, so far as I can see, any limit at all.

The effect of the alterations made in the present case was in substance (i) to write down the nominal value of the shares, which the appellant held and had paid up in full, to one-third of their original value and (ii) to require and oblige him, if possible, to take from the association and to pay for a number of further shares depending on the acreage of his holding or the number of dairy cows that he owned from time to time, whichever might be more favourable to the association. Such a drastic reduction of capital shows how severe and probably how irrecoverable the trading losses of the association had been in the past, and further writing down of old shares and requiring members to take up new ones were processes which, in case of need, might be repeated as often as might be necessary in the future. The formidable character of the power in question is manifest. Not only is it an express discrimination between members of a greater and members of a less apparent capacity to pay, but the association, faced with a declining business and pressing creditors, would be enabled to extract from members, who happened to be milk producers and whose herds and acreage were not declining, further and further sums until they were reduced to extremity. It is true that the regulations in question were all regularly and duly passed and that the majority which the rules required must therefore have been obtained; but in a society, many of whose members may have remained at least stationary in the size of their farms and herds or who may not have been milk producers at all, such a provision, applied to such conflicting interests, might be no protection to persons in the appellant's position.

To support a claim to such a power either clear judicial authority, clear legislation or clear principle and necessity would seem to be required. In my opinion none were forthcoming. Courts have naturally gone far to support the autonomy of social clubs and their power to affect members by rules and resolutions, passed regularly and in good faith, but no case was cited even approaching a financial power of this sort. Building society cases again were cited, of which I think it is enough to say that none went so far as the present case, precisely because none were characterised by the peculiar features to which I have drawn attention. Neither does the authority of cases as to mutual marine insurance associations apply, for these are cases of collateral undertakings ancillary to the regular business of the association and bearing equally upon all members. The present case is far otherwise. The scheme and structure of the Industrial and Provident Societies Act, 1893, were rightly stressed, for they are indeed important, and it may be truly said that they appear in general to be designed to authorise the formation of associations for the purposes described and thereafter largely to leave them to manage their own affairs as they might think fit, but even here s. 4 (a) and s. 60 (d) seem to show sufficiently that the Legislature did not intend members to be at risk in such a way as might result from these amended regulations. As to finding a foundation for the contention in principle or necessity, I think the matter is quite the other way. I throw no doubt on the good faith either of those who managed the association or of those who voted for these amended resolutions, but, speaking purely in a legal sense, I think the contention unprincipled.

It remains to refer to the decision in the *Biddulph Case* (1), by which, of course, your Lordships are bound. I concur in the opinion, which I understand to be that at which all your Lordships have arrived. Your Lordships dissented from the ground on which *Dibble's Case* (2) had been decided in the Court of First Instance and put that case aside, but in so doing did not decide that the actual rules there impugned and others like them must therefore be unexceptionable. It appears to have been the opinion of the majority that, even apart from an express bargain, evidenced in the correspondence and taking the form of an offer and an acceptance of the new shares, the rules then in question had received such a measure of assent from the complaining shareholder as prevented him from refusing to comply with them. To make this decision of use to the respondent in the present case, where it is clear that no assent was ever given by the appellant either originally or at all, it was contended that their Lordships' ratio decidendi was that the rules in question belonged to a class (not anywhere described or elsewhere even suggested), intermediate between rules ultra vires and rules intra vires simpliciter, which though valid in themselves were conditional, for their operation as rules, on some assent given by the individual shareholder. This condition, it was said, having been satisfied in fact, the rules, which in themselves were good throughout, became also operative and then stood on the same footing as all other valid rules. I have not been able to persuade myself that such was the real meaning of any of their Lordships. Nothing in the language of the rules in question suggested any such condition or indicated any such ambiguous category. On their face they were unconditional and stood or fell like all other rules by the extent of the association's power. If the ratio decidendi was that the respondent's present contention, which was then also advanced and on the same grounds, ought to be supported, not only would this have been said in clear terms but there would have been no need and no inducement to have said anything more. I do not think that the *Biddulph Case* (1) binds your Lordships in any degree to support the respondent's present argument; on the contrary, so far as it affects this case, it shows that no noble and learned lord then concerned could find it supportable.

For the other points raised I may say briefly that the rule attacked as uncertain and void seems to me to be clear enough, subject to proof of some simple facts in each case, though in its operation it may be arbitrary and unreasonable. It may be a bad rule but it is not a void one. As to the question whether the contention of the respondent should not have been raised in an action for damages against the appellant for not applying for shares to be allotted by the association, instead of on a liquidator's summons to place him on the list of contributories in respect of shares that he never held, I think, in the view I have already taken, that it is unnecessary that this point should be considered, all the more because it is not one that the respondent could have gained any advantage by urging in the first instance, or that interferes with a decision now on other grounds.

I think that the appeal should be allowed.

LORD ATKIN.—I have had the opportunity of reading the judgment just delivered by Lord Dunedin and that about to be delivered by Lord Tomlin, and I agree with the reasons contained in them. I content myself, therefore, with a statement of my principal ground for differing from the decisions below.

Apart from any decision which binds your Lordships to the contrary view, I should have thought on principle that the matter was fairly plain. If a man enters into association with others for a business venture he commits himself to be bound by the decision of the majority of his associates on matters within the contemplated scope of the venture. But outside that scope he remains dominus, and cannot be bound against his will. The principle is seen in its simplest form in connection with partnership. I quote from Lindley on Partnership (5th Edn.), at p. 315, Bk. III, c. 2, s. 3, published in 1888 before the Partnership Act:

> "Passing now to the second class of differences, namely, those which relate to matters with which the partnership was never intended to concern itself, it has been over and over again decided that no majority, however large, can lawfully engage the partnership in such matters against the will of even one dissentient partner. Each partner is entitled to say to the others, 'I became a partner in a concern formed for a definite purpose, and upon terms which were agreed upon by all of us, and you have no right, without my consent, to engage me in any other concern, nor to hold me to any other terms, nor to get rid of me, if I decline to assent to a variation in the agreement by which you are bound to me and I to you.' Nor is it at all material that the new business is extremely profitable. This principle is applicable to all partnerships and companies, whether great or small, and is evidently one which requires only to be stated to be at once assented to as just."

The author proceeds to cite *Natusch* v. *Irving* (8) from Gow on Partnership (3rd Edn.), App. 398. In that case a company formed for carrying on the business of fire and life insurance proposed on the withdrawal of a statutory prohibition to engage in marine insurance. The plaintiff held fifteen shares out of 50,000 and objected, and Lord Eldon granted him an injunction. With respect to the powers of a majority, Lord Eldon said:

> "If six persons joined in a partnership of life assurance, it seems clear that neither the majority, nor any select part of them, nor five out of the six, could engage that partnership in marine insurances, unless the contract of partnership expressly or impliedly gave that power; because if this was otherwise, an individual or individuals, by engaging in one specified concern, might be implicated in any other concern whatever, however different in its nature, against his consent."

He went on to say that if, however, the proposed change was made known to the others, and he acquiesced, he would be bound.

As to partnership the principle is now expressed in ss. 19 and 24 (8) of the Partnership Act, 1890. Amongst the matters in respect of which the individual does not agree to be bound in invitum appear to me to be the purposes of the association, and the amount of money which he will contribute to his associates for those purposes. I am not, of course, dealing with liability to third parties. These matters, generally speaking, I regard as fundamental. And unless there is reasonably clear indication, in contractual terms or statutory provisions, that the individual member is to be bound in these respects against his will, his right to remain unaffected will continue. There may, therefore, be important distinctions between the binding force of original stipulations to which the member has assented, and of purported alterations of the original stipulations to which alterations he has refused assent. I venture to think that the judgments of the Court of Appeal in *Biddulph's Case* (1) have not paid sufficient attention to this distinction, and have relied too much on authorities which, so far as they do support the decision, are instances of original stipulations to which the party in question had given his assent. No doubt need be thrown upon the proposition that a member of an association may undertake, in addition to his contribution to the joint venture, collateral obligations such as are involved in a mutual insurance of such of the members' chattels as they individually are allowed to bring into the scheme. The Master of the Rolls finds some analogy in the present case to such an obligation. With respect there is nothing here corresponding to such mutual obligations. The society no doubt buys from outside and sells to its members; buys produce from its members and sells outside; it may also buy from one member and sell to another; but all these transactions are different in principle from mutual insurance, and in any case involve no obligation on a member to buy or sell anything against his will, still less to apply and pay for a share which he does not desire.

The only relevant question in this case appears to me to be whether r. 64, giving the power to a three-fourths majority at a special general meeting to amend the rules, confers a power to amend those rules in respect of the fundamentals above mentioned so as to bind a dissenting member. I think that the consent of a member to such a rule as r. 64 is not an assent to have the purposes of the society or the amount of his share subscription altered against his will. Full effect is given to the rule by limiting its operation as against dissentients to matters which are within the scope of the administration of the venture as originally framed. I should myself regard as within this definition such matters as the annual subscription to a social or other club which may fairly be regarded as a matter of internal administration. But an increase in capital contribution is something quite different. I reserve the question whether an amended rule so passed is ultra vires the society so as to be entirely void and therefore not binding on even the assenting majority. It may well be that a society under this Act can only express in rules what I may call offers of fundamental change, and that such rules so far as they are assented to, but only so far, bind assenting members. This seems to be the view entertained by Lord Cave in *Biddulph's Case* (1). If such amendments are indeed enforceable to the full extent the present case shows the far-reaching consequences. So far as I can see it would be within the power of an optimistic majority to continue indefinitely to trade at a loss. Each time the society approaches insolvency it need only write down its shares to a nominal sum and by amending the rules impose obligation upon all the members to make further contributions of share capital. As long as the obligation did not exceed £200 per member this process in theory could continue without limit. I do not find it necessary to discuss similar problems arising under the Companies Acts or other statutory enactments regulating such association. It will, I think, be found that the fundamental matters I have referred to are carefully guarded by interposing the consent of the court or otherwise. Certainly I should be surprised to find that by amendment of the articles of association existing members could be compelled to subscribe to further issues of authorised capital. Such a simple device appears to have escaped the attention of company financiers. But it will only be necessary to consider such a proposal when, if ever, it is made.

The only remaining question is whether we are precluded by the decision of this House in *Biddulph's Case* (1) from giving effect to these conclusions. For the reasons given in the judgments to which I have referred, especially in that of Lord Dunedin, I am myself satisfied that the reason for the decision of the majority of the House in that case was that the appellants were bound by actual assent to the proposed alteration of the rule. I might add to what has been said that I can only construe a passage in Lord Shaw's judgment ([1927] A.C. at p. 86), in which he says that: "The appellant society stands bound since March, 1919 . . . to the rules of the society in force at that date" as an indication that he also rested on express contract, for the amendment in question had been made in May, 1918: and the date of March, 1919, is the date on which additional shares had been allotted to the appellants on their application made with notice of the amended rule. I am not pressed with the fact that the House did not alter the declaration made in that case by the Court of Appeal. I am inclined to think that the terms of the declaration support either view: but in any event I conceive that your Lordships are bound not by the precise form of a judgment which is indeed conclusive between parties: but by the reasons given declaring the law upon which the formal judgment is drawn up.

I desire to add that I share the doubts expressed by LORD TOMLIN as to the procedure adopted in this case, and as to the suggested measure of damages.

For these reasons, my Lords, I agree that the appeal should be allowed: and the order made in the form proposed by LORD TOMLIN.

LORD TOMLIN (read by LORD THANKERTON).—The question to be answered in this case is whether the appellant by reason of amendments in the rules of the society not assented to by him is liable to be placed upon the list of contributories in the winding-up of the society.

To answer the question it is necessary first to consider what is the bearing on the matter of (a) the decision of LAWRENCE, J., in *Dibble* v. *Wilts and Somerset Farmers, Ltd.* (2), and (b) the conclusion of your Lordships' House in *Biddulph and District Agricultural Society* v. *Agricultural Wholesale Society* (1).

Upon these topics there has been much debate before your Lordships and I desire only to say that my understanding of the latter case is that in it a majority of your Lordships' House reached a conclusion to the following effect, namely, (i) that the appellant in that case was bound by a contract personal to himself to take up additional shares so that the necessity for passing an opinion upon the validity of the amendments of the rules did not arise, and (ii) that *Dibble's Case* (2) was overruled so far only as it was therein held that an obligation under the rules to take up further shares is necessarily bad having regard to the statutory limitation of liability to contribute in a winding-up.

It follows in my view that it is open to your Lordships in the present case to consider how far the amended rules are valid and binding on the appellant.

The analogy which, in the course of the argument, was sought between a limited company under the Companies Acts and a society registered under the Industrial and Friendly Societies Act, 1893, is apt to be misleading.

A limited company is created and regulated by statute. Its capital is fixed and cannot be reduced except on special grounds and with the sanction of the court. Its powers are circumscribed by the terms of the memorandum of association. The memorandum cannot be altered except for certain purposes and then only with the sanction of the court which is bound to consider the interest of the members. Nor can any alteration of the articles of association be made so as to enlarge the powers conferred by the memorandum. The company's continuance on the register is necessary to its existence.

A society registered under the Act of 1893 is in a different position. The Act confers, subject to certain conditions and so long as registration lasts, corporate existence and other privileges upon a society formed for carrying on any industries, businesses, or trades specified in or authorised by its rules. The preamble to the earlier Act of 1852 indicates the kind of societies for which the Legislature was seeking to provide. The Act of 1893 does not require that the constitution of the society should on registration be regulated more closely than may be done by including in the registered rules provision for certain matters specified in that behalf in the Act. The specified matters do not contain any reference to the amount of capital or the manner in which the rules may be altered. They include "Determination of the amount of interest not exceeding £200 sterling in the shares of the society which any member other than a registered society may hold." The rules of a registered society bind the society and all members thereof as if each member had subscribed his name and affixed his seal thereto and there were contained in such rule a covenant on the part of such member to conform thereto subject to the provisions of the Act (see s. 22). The registration of a society may be cancelled or suspended. Such cancellation or suspension does not destroy the society, but only deprives it of and relieves it from the privileges and obligations which follow from registration. It can continue its existence so long as it does not infringe the provisions of s. 1 (2) of the Companies Act, 1908.

It results from these differences between a limited company and a registered society that the considerations which determine the question whether a member is bound by alterations in the constitution are not identical in the two cases, at any-rate where, as here, the matter does not depend on the element of fraud or bad faith. In the case of the limited company the answer will be found when it has been ascertained whether or not the limitations and formalities imposed and required by the Acts have been adhered to and complied with. In the case of a registered society, inasmuch as the operation of the statute is limited, it is necessary to consider first whether the amendments offend against any of the statutory provisions and secondly whether, having regard to the general principles governing contracts inter partes, the amendments are effective as against members who have not assented to them.

An examination of the relevant amendments in the present case does not in my opinion disclose anything obnoxious to the statute. If the amendments had stood as part of the original rules they could not have been impeached, and from the point of view of the statute that which would be innocent as an original rule cannot be invalidated merely because it is embodied in an amendment.

There is, however, the second consideration. Does a power enabling a majority to amend the rules justify as against a dissenting member any alteration whatever, where, as here, neither by the statute nor by the rules themselves is any one rule expressed to be more fundamental and unalterable than any other. The answer in my judgment must be in the negative. In construing such a power as this, it must, I think, be confined to such amendments as can reasonably be considered to have been within the contemplation of the parties when the contract was made having regard to the nature and circumstances of the contract. I do not base this conclusion upon any narrow construction of the word "amend" in r. 64 but upon a broad general principle applicable to all such powers. If no such principle existed I see no reason why a dairy society in Wiltshire should not by means of the exercise of such a power as the one under consideration find itself converted into a boot manufacturing society in Leicester with an obligation on the members to contribute funds to the new enterprise.

What changes then do the amendments in the present case effect? In the first place, they impose for the first time upon a new and limited category of members, namely, milk producers, a special liability to hold shares in the society. In the second place, their effect in substance if not in form is to compel the members within the first part of r. 12 to pay over again for two-thirds of the nominal value of their original shares and at the same time, while depriving them of their right to interest under r. 15 on their original payment of such two-thirds, to keep within the letter of r. 13 in the case of members whose original shares already amount to £200 in nominal value. It is also to be observed that the alteration made in r. 23 on Nov. 14, 1921, renders it impossible for any member without the consent of the committee of management to escape from the obligations imposed by the other amendments.

If the scheme embodied in these amendments for extracting money from the members is legitimate the potential liability of each member in a society registered under the Act of 1893 is without limit and has no relation to what was within his contemplation at the moment of joining the society. It is said that the society is free to reduce its capital and to increase its capital and that this is what it has done. It has in fact done much more. It has discriminated between members and has laid on members an obligation to hold more shares. It has no special statutory authority to do this. It can only do it if the power to amend the rule justifies it as a matter of contract. In my opinion the power does not justify it. I do not think that it is within the contemplation of the parties to a bargain of this kind that they should be made liable for a compulsory levy or expenditure over and above the contributions payable or to become payable under the original terms. On the contrary, I think the basis of such a bargain is that the extent of the member's liability is limited by the original terms and that it cannot be enlarged by any amendment of the rules.

I desire to add one further word by way of caution. As at present advised I am not prepared to accept the view that the amended rules as to holding further shares, even if binding upon the appellant, entitle the liquidator to place the appellant's name upon the list of contributories, or that if the society's remedy is by way of action for damages the measure of damages would necessarily be the nominal amount of the shares which ought to have been acquired. Having regard, however, to the view which I take of this case these questions do not call for answer.

For the reasons which I have endeavoured to indicate I think that the appeal should be allowed and that so far as they affect the appellant the orders of the Court of First Instance and of the Court of Appeal, except in respect of the costs in the Court of First Instance, should be discharged and that it should be declared that the amendments so far as they purport to impose upon the appellant an obligation to hold further shares of the society are not binding upon him and that he ought not to be placed upon the list of contributories. The appellant's costs here and in the Court of Appeal should be paid by the liquidator. The costs of the liquidator including any costs payable by him to the appellant should be provided for out of the assets of the society so far as they are sufficient for that purpose.

Appeal allowed.

Solicitors for the appellant, *Ernest Bevir & Son*, agents for *H. Bevir & Son*, Wootton Bassett.

Solicitors for the respondent, *Stephenson, Harwood & Tatham.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

JONES *v.* LEEMING

[HOUSE OF LORDS (Lord Buckmaster, Lord Dunedin, Lord Warrington, Lord Thankerton and Lord Macmillan), February 18, March 18, 1930]

[Reported [1930] A.C. 415; 99 L.J.K.B. 318; 143 L.T. 50; 40 T.L.R. 296; 74 Sol. Jo. 247; 15 Tax Cas. 333]

Income Tax—Income—Isolated transaction—Options acquired for purpose of sale—Liability to tax of profit realised—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sched. D, Case I, Case VI.*

The taxpayer combined with three persons in acquiring options to purchase two rubber estates, intending to sell them to a public company for profit. The options were transferred to O.I. Co., which re-sold them to a company promoted for the purpose of buying them. The total profit to the taxpayer from the transaction was £623, and he was assessed to income tax in respect of that sum under the Income Tax Act, 1918, Sched. D, Case I or Case VI. On the taxpayer's appeal, the commissioners found that the transaction was not a "concern in the nature of trade" (within the definition of "trade" in s. 237 of the Act of 1918). The transaction was an isolated one, not forming part of a series so as to constitute a business.

Held: the finding that the transaction was not a concern in the nature of trade excluded it from Case I of Sched. D of the Act of 1918, and the taxpayer's profit did not constitute "annual profits or gains" within Case VI of Sched. D, because it was in the nature of a capital gain and not income.

Cooper v. *Stubbs* (1), [1925] 2 K.B. 753, distinguished.

Decision of the Court of Appeal, [1930] 1 K.B. 279, affirmed.

Notes. The Income Tax Act, 1918, Sched. D, Case I and Case VI, were replaced by the Income Tax Act, 1952, s. 123. See also ss. 126–130 and s. 135 of the Act of 1952.

Considered: *Lowry* v. *Field*, *Lowry* v. *Williams*, *Titcomb* v. *Clancy*, *De Burgh Whyte* v. *Clancy*, [1936] 2 All E.R. 735; *Wilson* v. *Mannoch*, [1937] 3 All E.R. 120; *Leader* v. *Counsell*, *Benson* v. *Counsell*, [1942] 1 All E.R. 435; *Williams* v. *Davies*, *Williams* v. *Nesbet*, [1945] 1 All E.R. 304; *Rellim, Ltd.* v. *Vise* (1951), 32 Tax Cas. 254; *Edwards (Inspector of Taxes)* v. *Bairstow and Harrison* (1955), 36 Tax Cas. 207; *Edwards* v. *Bairstow*, [1955] 3 All E.R. 48. Referred to: *I.R. Comrs.* v. *Fraser* (1942), 24 Tax Cas. 498; *Reynolds and Gibson* v. *Crompton*, [1950] 2 All E.R. 502.

As to the scope of Case VI of Sched. D, see 20 HALSBURY'S LAWS (3rd Edn.) 281 et seq. For the Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.); and for cases on the subject, see 28 DIGEST 81 et seq.

Cases referred to:

(1) *Cooper* v. *Stubbs*, [1925] 2 K.B. 753; 94 L.J.K.B. 903; 133 L.T. 582; 41 T.L.R. 614; 69 Sol. Jo. 743, C.A.; 28 Digest 22, *113*.

(2) *Ryall* v. *Hoare*, *Ryall* v. *Honeywill*, [1923] 2 K.B. 447; 92 L.J.K.B. 1010; 129 L.T. 505; 39 T.L.R. 475; 67 Sol. Jo. 750; 8 Tax Cas. 521; 28 Digest 81, *453*.

(3) *Martin* v. *Lowry*, *Martin* v. *I.R. Comrs.* (1925), 42 T.L.R. 233, C.A.; 28 Digest 22, *114*.

(4) *Cape Brandy Syndicate* v. *I.R. Comrs.*, [1921] 2 K.B. 403; 90 L.J.K.B. 461; 125 L.T. 108; 37 T.L.R. 402; 65 Sol. Jo. 377; 12 Tax Cas. 358, C.A.; Digest Supp.

(5) *Californian Copper Syndicate, Ltd., and Reduced* v. *I.R. Comrs.* (1904), 6 F. (Ct. of Sess.) 894; 28 Digest 18, *92 ii*.

(6) *I.R. Comrs.* v. *Livingston*, 1927 S.C. 251; 11 Tax Cas. 538; Digest Supp.

(7) *Pearn* v. *Miller* (1927), 11 Tax Cas. 610; Digest Supp.

(8) *A.-G.* v. *Black* (1871), L.R. 6 Exch. 308; 40 L.J.Ex. 194; 25 L.T. 207; 19 W.R. 1114; 1 Tax Cas. 54, Ex. Ch.; 28 Digest 20, *100*.

(9) *L.C.C.* v. *A.-G.*, [1901] A.C. 26; 70 L.J.Q.B. 77; 83 L.T. 605; 65 J.P. 227; 49 W.R. 686; 17 T.L.R. 131; 4 Tax Cas. 265, H.L.; 28 Digest 73, *392*.

Appeal from the decision of the Court of Appeal (LORD HANWORTH, M.R., LAWRENCE and SLESSER, L.JJ.) (reported [1930] 1 K.B. 279) on a Case Stated by the Commissioners for the General Purposes of the Income Tax Acts for the Division of Leath Ward of the County of Cumberland under s. 149 of the Income Tax Act, 1918, for the opinion of the King's Bench Division of the High Court of Justice.

The Case Stated was as follows:

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the Division of Leath Ward of the County of Cumberland, held on April 12, 1927, the appeal of James Leeming (hereinafter called "the appellant") was heard against an assessment for the year ending April 5, 1926, to income tax under Sched. D in the sum of £623 10s. on the ground that there was no liability under Case I or under Case VI of Sched. D.

The following facts were admitted or proved:

In July, 1925, the appellant was invited to join a syndicate for the acquisition of an option over a rubber estate called Saskpow Estate, near Ipoh, in the Federated Malay States, on the basis of his paying one-fourth of the cost of securing the option, paying option money and the cost of reports on the property, and receiving one-fourth of the profit made on the re-sale. The appellant agreed by cablegram to join the proposed syndicate and to take one-fourth. The other three-fourths were held by Brown, Phillips, and Stewart, Ipoh, Macphail & Co., Ltd., Ipoh, and Mr.

David Carruthers, jun., solicitor, Kilmarnock. No formal agreement was entered into among the parties, and practically the whole of the correspondence was conducted by cablegram. The negotiations in the East were conducted by Brown, Phillips, and Stewart, and in the United Kingdom by Mr. Carruthers. Brown, Phillips, and Stewart obtained a report and valuation on the Saskpow Estate, and on Aug. 10, 1925, entered into an option agreement between the owner of the Saskpow Estate, Chin Ah Pow, of Ipoh, on the one part, and Mr. Carruthers on the other part. Although the option was taken in the name of Mr. Carruthers for convenience, and was executed in Ipoh by his attorney on his behalf, the agreement was entered into on behalf of the four participants on the footing above explained. This applies to all the subsequent negotiations, Mr. Carruthers acting throughout on his own behalf and as trustee for the other members of the syndicate.

As it was considered that the Saskpow Estate, which extends to 542 acres, was too small for re-sale to a company for public flotation it was agreed amongst those interested that Brown, Phillips, and Stewart should endeavour to acquire other properties with a view to combination, but as this had not been accomplished by the end of August the appellant himself proposed to acquire the estate, or alternatively to take a controlling interest in a private company formed to acquire the estate, and this question was under consideration when negotiations were commenced for the acquisition of an immediately adjoining estate called Dusun Bertam, an option to acquire which was obtained on Sept. 16, 1925. The option to secure the Saskpow Estate was at the price of 225,000 Straits dollars, equal to £26,250, and the option to acquire the Dusun Bertam Estate was at the price of £35,000. It was thereupon decided to resell the two estates to a public company to be formed to acquire them, and Mr. Carruthers undertook to find people to promote a public company for this purpose. Considerable negotiations took place with the owners of the Dusun Bertam estate with a view to their reducing their purchase price, and it was ultimately agreed that the vendors would give an abatement on the price of £1,750 (i.e., 5 per cent.), which was stated in the form of a commission for introducing a purchaser, but, it was claimed by the appellant, was in reality a deduction from the price.

On Oct. 9, 1925, Mr. Carruthers transferred the joint rights to the Oceanic Investment Co. for a sum of £1,250, retaining also on behalf of himself and the three others interested the 5 per cent. allowance made on the price of the Dusun Bertam Estate, and the Oceanic Investment Co. thereupon promoted a company called the Ipoh Rubber Estate, Ltd., to whom they resold the properties at the price paid by it, the Oceanic Investment Co. After deducting from the £1,250 and £1,750 (making together, £3,000) the expenses incurred in connection with the sale of the estates, and a fee to Brown, Phillips, and Stewart for carrying out the acquisition of the properties, the net profit was divided in four, and the appellant's fourth share of it amounted to £623 9s. 4d. The appellant was consulted for his interest from time to time by Mr. Carruthers, but took no active part in the negotiations for the purchase or sale of the rights.

For the appellant it was contended (a) that the sum in respect of which the assessment had been made was not a profit or gain within the meaning of the Income Tax Acts or an assessable profit at all; (b) that the mere fact that the appellant acquired the property or an interest in it for the purpose of its being resold at a profit did not bring the case within Case I, Sched. D, Income Tax Act, 1918; (c) that there was no liability to tax unless the sum in question was a profit or gain arising from the carrying on by the appellant of a trade or business, and there was no trade or business; (d) that the sum in question arose from a casual or isolated transaction, and not from any systematic course of dealing; (e) that there was in the transaction one sale only, and one sale does not constitute or make a trade; (f) that Case VI did not apply and, that an assessment made under it was invalid and erroneous; (g) that *Ryall* v. *Hoare* (2), *Cooper* v. *Stubbs* (1), *Martin* v. *Lowry* (3), *Cape Brandy Syndicate* v. *I.R. Comrs.* (4), *Californian Copper Syndicate, Ltd., and Reduced* v. *I.R. Comrs.* (5), and *I.R. Comrs.* v. *Livingston* (6) were all distinguishable and did not apply and that the sole question in this case was whether the transaction was carried out in the course of and as part of a trade or business.

On behalf of the Crown it was contended: (a) that the acquisition by the appellant of the interests was, on the evidence, with the sole object of combining them together and selling again in order to make a profit thereby; (b) that a profit was admittedly made by him; (c) that such profit was a revenue profit, and not a capital profit; (d) that the appellant was assessable in respect of the profit so made by him; (e) that the assessment was correctly made and should be confirmed (subject to any necessary adjustment of figures).

The commissioners were of opinion that the appellant acquired the property or interest in the property in question with the sole object of turning it over again at a profit, and that the appellant at no time had any intention of holding the property or interest in property as an investment, and reduced the assessment to £608 10s. to allow agreed deductions in respect of certain expenses incurred by the appellant himself in the course of the transactions. The appellant having expressed dissatisfaction with the determination of the appeal as being erroneous in point of law and having duly required the commissioners to state the case for the opinion of the King's Bench Division, this Case was stated and signed accordingly.

The Court of Appeal held, affirming the decision of ROWLATT, J., that as the transaction was found to be not a concern in the nature of a trade within the definition of "trade" in s. 237 of the Income Tax Act, 1918, and as the transaction was an isolated transaction, the profits resulting were not in the nature of income, but an accretion of capital value, and the case did not fall within the words of Case VI "annual profits or gains."

The Crown appealed.

The Attorney-General (*Sir William Jowitt, K.C.*) and *R. P. Hills* for the Crown.

A. M. Latter, K.C., and *A. M. Bremner* for the taxpayer.

The House took time for consideration.

March 18. The following opinions were read.

LORD BUCKMASTER.—To examine the question raised on this appeal it is necessary to follow closely its history before the commissioners and ROWLATT, J. The following is a summary of the facts as stated in the special Case. Mr. James Leeming, the taxpayer, joined with a limited company, a business firm, and a solicitor named Carruthers in acquiring two options to purchase certain rubber estates in Malay. The option on the first estate and presumably on both, though it is not so stated, was taken in the name of Mr. Carruthers, but on behalf of all four participants.

It appears, though again it is not definitely found, that the intention throughout was to acquire the rights for the purpose of resale "to a company for public flotation," and to carry this scheme into effect Mr. Carruthers transferred the joint rights to a company known as the Oceanic Investment Co., who thereupon promoted another company called Ipoh Rubber Estate, Ltd., to whom the properties were resold. The transaction resulted in a profit, of which taxpayer's share was £623, and in respect of this sum he was assessed to income tax. On appeal to the commissioners this assessment was reduced to £608 10s. and so reduced was confirmed. Upon appeal from the commissioners to ROWLATT, J., he was of opinion that the commissioners had not found sufficient facts to enable him to decide the question, and he ordered that the case be remitted to them to find whether there was or was not a concern in the nature of trade.

The learned judge was clearly right in the course he took. There were no findings whatever in the special Case to enable the court to know whether the taxpayer was a company promoter and whether this transaction stood alone, or was one of a series of transactions capable of being linked together so as to constitute a business or to produce income. Nor was the original purpose of the transaction ever set out—it was only to be inferred by the subsequent dealings. In obedience to the order of the learned judge the commissioners in a supplementary Case found that the transaction "was not a 'concern in the nature of trade'" and thereupon Rowlatt, J., following, as he stated, his own decision in *Pearn* v. *Miller* (7) allowed the appeal. His judgment was affirmed by the Court of Appeal from whom the Crown has brought the case before this House. The decision necessarily depends on the construction of certain sections in the Income Tax Act, 1918. These sections are few in number and short in terms, but none the less they are not easy to construe.

Section 1 of the Act is well known. It provides that income tax shall be charged

> "in respect of all profits, or gains described or comprised in the schedules marked A, B, C, D, and E, contained in Sched. I to this Act and in accordance with the rules respectively applicable to those schedules."

This, which is the governing section of the Act, needs no comment beyond that which has often been made before, viz., that the tax is an income tax and charged on income as distinct from capital.

Schedule D, the only one suggested as applicable to the present case, opens by saying the tax is charged on "the annual profits or gains arising or accruing" to certain named classes of persons "from any trade, profession, employment, or vocation" within the United Kingdom, and "all interest of money, annuities, and other annual profits or gains" not otherwise charged "and not specially exempted from tax." By cl. 2 it is provided that tax shall be charged under this schedule under the following cases:

Case I—Tax in respect of any trade not contained in any other schedule.

Case II—Tax in respect of any profession, employment, or vocation not contained in any other schedule.

Case III—Tax in respect of profits of an uncertain value and of other income described in the rules applicable to this case.

Case IV—Tax in respect of income arising from securities out of the United Kingdom, except such income as is charged under Sched. C.

Case V—Tax in respect of income arising from possessions out of the United Kingdom.

Case VI—Tax in respect of any annual profits or gains not falling under any of the following cases, and not charged by virtue of any other schedule;

and subject to and in accordance with the rules applicable to the said cases respectively.

Rules applicable to Case III state that the tax shall extend to any interest of money, whether yearly or otherwise, or other annual payment . . . and to "all discounts," while s. 237 declares that "trade" includes every trade, manufacture, adventure or concern in the nature of trade.

It is necessary to set out these familiar provisions in order to give full weight to the contention of the Crown. The supplementary finding of the commissioners excludes Case I, but that leaves open the possibility of the claim being included under Case VI, and it is under that case that it is sought to establish the appeal. The word "annual," it is said, must be either disregarded or so limited as to enable a solitary isolated transaction such as that in the present case to be within the phrase. It is unnecessary to consider what is the right interpretation of this word, but I am not prepared to disregard a word designed to qualify the burden of taxation and I cannot see how on any interpretation of its meaning it can cover the present case. The words of the rule relating to interest on which the Attorney-General relied as showing that any receipt under that head for any period was taxable do not seem to me to advance the argument; they apply to a totally different case. All interest is expressly taxed by the words of the rule, and discount is in reality only interest in another form and under another name. Further, Case III itself contemplates in accordance with the scheme of the Act that it is as "income" that the moneys are made liable.

This brings the argument back to the original position. Can the profits made

A in this case be described as income? Were the taxpayer a company promoter or was his business associated with purchase and sale of estates, wholly different considerations would apply, but this is negatived, the transaction in this case stands isolated and alone. It is to my mind, in the circumstances, purely an affair of capital. I can see no difference between it and what might have happened had the taxpayer bought shares in two companies which were going to be amalgamated, B and then sold equivalent shares in the amalgamated company at a profit; an accretion to capital does not become income merely because the original capital was invested in the hope and expectation that it would rise in value; if it does so rise, its realisation does not make it income. If the Crown's contention were sound the same result would have arisen had the taxpayer taken shares in the company instead of cash even though unrealised.

C No authority could be quoted in support of the appeal; the nearest was *Cooper* v. *Stubbs* (1), and its distance away, were such a computation possible, could be measured in miles. Although the commissioners there found that the man sought to be charged did not carry on a trade his profits were none the less held liable to tax under Case VI. The reasons for this conclusion are clearly stated by LORD WARRINGTON, who was then sitting in the Court of Appeal, in these words ([1925] D 2 K.B. at p. 769):

> "The question therefore is simply this, were these dealings and transactions entered into with a view to producing, in the result, income or revenue for the person who entered into them? If they were, then in my opinion profits arising from them were annual gains or profits within the meaning of para. 1 (b) of Sched. D. On the findings of the commissioners themselves they were con- E tracts entered into with a view to making a profit on a rise or fall, as the case might be, in the market price of the contracts. They extended over a considerable number of years. There were large numbers of transactions in each of those years, from which in some years the appellant derived considerable revenue; and for myself I cannot see what there is to exclude that revenue from the tax which is charged under Sched. D. It seems to me, therefore, that, in F this case, whatever may be the case under different facts, at all events the profits made by these transactions are annual profits or gains, and must be assessable to income tax."

Not one of the conditions there mentioned applies here.

LAWRENCE, L.J., appears to me to have accurately stated the difficulty in the Crown's way in the following words ([1930] 1 K.B. at p. 302):

> G "It seems to me that in the case of an isolated transaction of purchase and re-sale of property there is really no middle course open. It is either an adventure in the nature of trade, or else it is simply a case of sale and re-sale of property."

To that proposition I can see no adequate answer, and for that reason and those H I have given, I think this appeal must fail.

LORD DUNEDIN.—This case is a striking example of the class of appeal in income tax cases, which on a recent occasion I felt bound to deprecate. There is no new question of law involved in it, merely the application of old principles to the particular facts. There has been a unanimous judgment of the judge of the first instance, and of the three judges of the Court of Appeal against the Crown, and the I sum at stake is £130 12s. The case itself is one of the simplest. The taxpayer, with three other persons, went into a speculation of buying a piece of real property and re-selling it. It was, as far as he was concerned, an isolated transaction, and when I say isolated I mean that there was no evidence to show that the respondent had done anything like this before, or was likely to do it again. The commissioners had found generally that he must be taxed on the profit which arose to him out of the transaction, amounting to £630, but had not specified whether they thought the case fell under Case I or Case VI of Sched. D. ROWLATT, J., before whom the case came to defend, was particularly careful in the matter. He returned the case to

A the commissioners to specify whether they considered there was or was not a concern in the nature of trade. Doubtless he remembered his own dictum in *Ryall* v. *Hoare* (2) ([1923] 2 K.B. 454),

> "a casual profit made as an isolated purchase and sale, unless merged with similar transactions in the carrying on of a trade or business, is not liable to tax,"

B and thought there might have been circumstances within the knowledge of the commissioners which had not been stated in the case. They returned answer that there was not. That took the matter out of the provisions of Case I. The counsel for the Crown then said that the case fell within Case VI. Now, Case VI sweeps up all sorts of annual profits and gains which have not been included in the other five heads, but it has been settled again and again that that does not mean that anything C that is a profit or gain falls to be taxed. Case VI necessarily refers to the words of Sched. D, i.e., it must be a case of annual profits and gains and those words again are ruled by the first section of the Act, which says that when an Act enacts that income tax shall be charged for any year at any rate, the tax at that rate shall be charged in respect of the profits and gains according to the schedules.

D The limitations of the words "profits and gains" were pointed out by LORD BLACKBURN long ago in *A.-G.* v. *Black* (8) (L.R. 6 Exch. 308), when he said that profits and gains in Case VI must mean profits and gains ejusdem generis with the profits and gains specified in the preceding five cases. And then there came the memorable and often quoted words of LORD MACNAGHTEN in *L.C.C.* v. *A.-G.* (9) ([1901] A.C. 26), when he begged to remind people "that income tax was a tax on income." E The only question, therefore, here was—Was there in any sense income? It is quite true that, as the counsel for the Crown said, the word "annual" does not mean something that recurs every year, but none the less the receipt must be of the nature of income. LAWRENCE, L.J., put the matter very succinctly when he said:

> F "It seems to me that in the case of an isolated transaction of the purchase and re-sale of property, there is really no middle course open. It is either an adventure in the nature of trade, or else it is simply a case of sale and re-sale of property."

It was sought to assail this dictum by quoting *Cooper* v. *Stubbs* (1), where there was a finding, as here, that no trade had been carried on and yet the tax was imposed. G But the answer is simple, the whole point of *Cooper* v. *Stubbs* (1) was that the transaction was not an isolated transaction. WARRINGTON, L.J., says that the transactions extended over a considerable period of years, and ATKIN, L.J., says that an annual profit or gain must be something which is of the nature of revenue or income, and he points out that the transactions in that case had been going on for eight years running. The last argument of the counsel for the Crown was that H there was a finding that the respondent never meant to hold the land bought as an investment. The fact that a man does not mean to hold an investment may be an item of evidence tending to show whether he is carrying on trade or concern in the nature of trade in respect of his investments, but per se it leads to no conclusion whatever.

I, therefore, concur in the motion made and beg to add that it is an exceedingly simple case.

I **LORD WARRINGTON.**—This is an appeal by the Crown from an order of the Court of Appeal affirming an order of ROWLATT, J., whereby he discharged an assessment to income tax for the year ended April 5, 1926, made against the respondent in respect of a sum of £608 10s. The assessment was made under Sched. D, the Crown contending that the respondent was liable either under Case I or Case VI.

In August, 1925, the taxpayer and certain other persons acquired an option over a certain rubber estate at Ipoh with a view to the subsequent transfer thereof at a profit to a company to be formed for the purpose. In September of the same year

A the taxpayer and the same persons acquired an option over an adjoining estate with the object of enlarging the area of property at their disposal. They subsequently transferred their rights over both estates to a company called the Ipoh Rubber Estate, Ltd., making on the whole transaction a profit of which the share of the taxpayer was the sum of £623 10s. hereinbefore mentioned.

The material provisions of the Income Tax Act, 1918, are as follows:

B

> "Schedule D. 1. Tax under this schedule shall be charged in respect of: (a) The annual profits or gains arising or accruing (ii) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same respectively be carried on in the United Kingdom or elsewhere; (b) all interest of money annuities and other annual profits or gains not charged under Scheds. A, B, C, or E, and not specially exempted from tax. . . .
>
> C 2. Tax under this schedule shall be charged under the following cases respectively, that is to say: Case I: Tax in respect of any trade not contained in any other schedule . . . ; Case VI: tax in respect of any annual profits or gains not falling under any of the foregoing cases, and not charged by virtue of any other schedule. . . ."

D "Trade" is defined as including every trade, manufacture, adventure, or concern in the nature of trade.

The commissioners, being required to state a Case, did so on April 17, 1928, and expressed their conclusion in the following terms:

> "That the appellant (the present respondent) acquired the property or interest in property in question with the sole object of turning it over again at a profit, E and that the appellant at no time had any intention of holding the property or interest in property as an investment,"

and made the assessment above mentioned. The only finding of fact was that above stated.

On the matter coming before ROWLATT, J., he made an order that the Case be F remitted to the commissioners for them to find whether there was or not a concern in the nature of trade. By the supplementary Case stated in pursuance of the said order the commissioners found that the transaction in question was not a concern in the nature of trade, but they did not alter the assessment. On the supplementary Case coming before him, ROWLATT, J., discharged the assessment. The finding of the commissioners excluded the profit in question from Case I, and in the learned G judge's opinion it was a mere accretion to capital and was not an annual profit or gain under Case VI. On appeal to the Court of Appeal, consisting of the Master of the Rolls and LAWRENCE and SLESSER, L.JJ., the appeal was dismissed on substantially the same grounds.

In this House the Crown did not dispute that the findings of the commissioners on the issues of fact are binding, but insisted that the assessment was properly H made under Case VI. There have been a great many cases in which similar questions have arisen, but I think it is quite unnecessary to discuss them. I think it is settled that the mere fact that the profit arises in the course of one calendar year only and does not recur is not sufficient to exclude it from the category of annual profits. The nature of the profit must in each case be considered. If it arises from a trade within the definition in the Act no difficulty occurs. If it does not, I I know of no better criterion than that adopted by the majority of the Court of Appeal in *Cooper* v. *Stubbs* (1) and by LAWRENCE, L.J., in the present case. This is expressed by ATKIN, L.J., in *Cooper* v. *Stubbs* (1) as follows ([1925] 2 K.B. at p. 775):

> "'Annual profit or gain' to my mind must mean something which is of the nature of revenue or income."

Here we have a case of the acquisition of an item of property and a profit made by the transfer thereof to another. In this I can find nothing but a profit arising from an accretion in value of the item of property in question and the realisation of such enhanced value. There is in this nothing in the nature of revenue or income. The fact that the parties intended from the first to make a profit if they could does not in my opinion affect the question we have to determine.

The case seems to me to be a clear one against the Crown and I agree that the appeal fails and should be dismissed.

LORD THANKERTON.—The taxpayer was one of a syndicate of four who in August, 1925, secured an option of purchase—apparently without any payment for the option—of a rubber estate in the Federated Malay States at a price of £26,000; their object was the promotion of a company to whom the estate should be sold at a profit to the syndicate. Finding the estate too small for their purpose, they acquired in September, 1925, an option of purchase on a neighbouring estate, again apparently without any payment, at the price of £35,000. The company was thereafter formed and the options transferred to it. The result of the syndicate's operations was a nett profit, after deduction of expenses, of which the respondent's share was £623 10s., which is claimed by the Crown as chargeable to income tax as being profits or gains comprised in Sched. D of the Income Tax Act, 1918, that is to say either profits or gains from a trade, adventure or concern in the nature of trade within the category of Case I of Sched. D, or other profits or gains within the category of Case VI of Sched. D.

The General Commissioners upheld the assessment, but their finding was inconclusive as to whether the Case fell within Case I or Case VI of Sched. D, and Rowlatt, J., before whom the taxpayer's appeal came, remitted the Stated Case to the commissioners for them "to find whether there was or not a concern in the nature of trade." The commissioners then made a supplementary finding as follows, namely:

> "The commissioners having considered the evidence and arguments submitted as to what took place in the nature of organising the speculation, maturing the property and disposing of the property, and after due consideration of the facts and arguments submitted to them find that the transaction in question was not a concern in the nature of trade."

I agree with the view taken in both the courts below that that finding was a finding in fact which excludes the application of Case I of Sched. D.

There remains Case VI, which brings into charge "any annual profits or gains not falling under any of the foregoing cases and not charged by virtue of any other schedule."

It is now settled that annual profits and gains taxable under Sched. D may be satisfied by profits falling within the year of charge and accruing during a period of less than a year; (see *Martin* v. *Lowry*, *Martin* v. *I.R. Comrs.* (3), in which the opinion of Rowlatt, J., on this point in *Ryall* v. *Hoare*, *Ryall* v. *Honeywill* (2) was approved. In that case Rowlatt, J., said ([1923] 2 K.B. at p. 455):

> "The word 'annual' here can only mean 'calculated in any one year,' and 'annual profits or gains' mean profits or gains in any one year or in any year as the succession of years comes round."

While this is so, the isolated nature of a transaction, as opposed to a series of transactions of the same kind, will have a material bearing not only on the question as to whether it was a "trade, venture or concern in the nature of trade," but also as to whether the profit arising therefrom was an accretion of capital or "profits or gains" within the meaning of the Income Tax Act, which connotes the idea of revenue or income.

In the present case two options for the purchase of real estate were acquired and disposed of within two months; the estates themselves were not taken up or dealt with in any way. This was a simple case of purchase and sale, once the commissioners had decided that the transaction was not a concern in the nature of trade. I agree with Lawrence, L.J., when he says ([1930] 1 K.B. at p. 301):

> "I have the greatest difficulty in seeing how an isolated transaction of this kind, if it be not an adventure in the nature of trade, can be a transaction ejusdem

> A generis with such an adventure and therefore fall within Case VI. All the elements which would go to make such a transaction an adventure in the nature of trade, in my opinion, would be required to make it a transaction ejusdem generis with such an adventure. It seems to me that in the case of an isolated transaction of purchase and re-sale of property there is really no middle course open. It is either an adventure in the nature of trade, or else it is simply a case B of sale and re-sale of property."

I further think that the law is correctly stated by LORD SANDS in his judgment in the recent Scottish case of *I.R. Comrs.* v. *Livingston* (6), where he says (1927 S.C. at p. 256):

> "According to understanding, practice, and, I think, authority, ever since the C income tax was introduced, it has been recognised that the profit of an isolated transaction by way of purchase and re-sale at a profit, not within the ambit or trade of the party making the profit, is not assessable to income tax as 'profits or gains arising or accruing' to any person residing in the United Kingdom from any trade."

He goes on to point out that a transaction may be treated as of the nature of trade D where, although there may have been only one initial purchase there has been a series of sub-sales of an ordinary market nature, and that, even if there is an isolated purchase and an isolated re-sale, the subject of purchase and sale may be so treated in the interval as to bring the transaction within the category of carrying on a trade. In that case a cargo steamer was purchased and converted and refitted as a steam-drifter and re-sold within four months at a profit, and the court held such profit E assessable under Case I of Sched. D, on the ground that the operations on the ship were in the nature of trade. That case affords a useful contrast to the present case.

Cooper v. *Stubbs* (1) was relied on by the Crown, but that was not the case of an isolated purchase and re-sale of property. The appellant in that case was a member of a firm of cotton brokers, but, in accordance with a practice common to persons F engaged in that trade, he had dealings on his own account and independently of his firm in future delivery contracts, which, at all events so far as he was concerned, were simply speculations in future differences. The assessments in question were in respect of such transactions over three income tax years, the average number of transactions per annum being about fifty. Further the appellant had been entering into such transactions in every year from 1915 to 1922. The com- G missioners held that the appellant did not deal in future delivery contracts so habitually and systematically as to constitute those dealings the carrying on of a trade and that the profits were therefore not assessable under Case I. They further held that the dealings were gambling transactions and were not assessable under Case VI. ROWLATT, J., reversed the decision of the commissioners, and his decision was affirmed by the Court of Appeal. LORD HANWORTH, M.R., held that the com- H missioners had misdirected themselves and that these transactions were such as to constitute a trade adventure or concern in the nature of trade under Case I, which had been the ground of the decision of ROWLATT, J. On the other hand, WARRINGTON, L.J., and ATKIN, L.J., held that the commissioners' finding under Case I raised no question of law with which the court could deal, but that they were wrong in holding that they were wagering transactions, and held that the profits arising I from them were chargeable under Case VI. WARRINGTON, L.J., says ([1925] 2 K.B. at p. 769):

> "The question therefore is simply this, were these dealings and transactions entered into with a view to producing, in the result, income or revenue for the person who entered into them? If they were, then in my opinion profits arising from them were annual gains or profits within the meaning of para. 1 (b) of Sched. D. On the findings of the commissioners themselves they were contracts entered into with a view to making a profit on a rise or fall, as the case might be, in the market price of the contracts. They extended over a consider-

> able number of years. There were large numbers of transactions in each of those years, from which in some years the appellant derived considerable revenue; and for myself I cannot see what there is to exclude that revenue from the tax which is charged under Sched. D. It seems to me, therefore, that in this case, whatever may be the case under different facts, at all events the profits made by these transactions are annual profits or gains, and must be assessable to income tax.''

In my opinion, that case also affords a contrast to the present case, where the transaction was an isolated one, for the fact that there were two options acquired does not appear to me to deprive the transaction of that character.

Accordingly I am of opinion that the profit here in question was in the nature of a capital accretion and was not ''profits or gains'' chargeable to income tax under Case VI and I concur in the motion proposed.

LORD MACMILLAN.—The commissioners, having had their attention specially directed to the point by a remit from Rowlatt, J., have found that ''the transaction in question was not a concern in the nature of trade.'' This finding has not been challenged at your Lordships' bar. The learned Attorney-General indeed submitted that in strict logic it did not exhaustively exclude from Case I of Sched. D the profits or gains arising from the transaction, inasmuch as under Case I tax is chargeable in respect of any trade not contained in any other schedule and ''trade'' by the Income Tax Act, 1918, s. 237, ''includes every trade, manufacture, adventure or concern in the nature of trade.'' Therefore, he argued, a finding that the transaction was not ''a concern in the nature of trade'' still left it open to him to maintain that it was an ''adventure.'' But the commissioners have not found that it was an ''adventure.'' On the contrary, inasmuch as an ''adventure'' in this context must plainly be a trading adventure, their general finding that the transaction was ''not a concern in the nature of trade'' is sufficient to negative the suggestion that it was a trading adventure.

The transaction being thus excluded from charge under Case I, it was maintained that it fell within Case VI which subjects to tax any annual profits or gains not falling under any of the preceding cases and not charged by virtue of any other Schedule. The difficulty which here confronts the Crown is that the profit made by the respondent was the result of an isolated transaction of sale but not of a transaction of sale by way of trade and it is not easy to see how the profit on an isolated sale which is not a trading transaction can be other than a capital accretion and so outside the category of annual profits or gains. *Cooper* v. *Stubbs* (1), on which the Attorney-General relied, differs widely in its facts from the present case. The court was there dealing with the profits of transactions in cotton ''futures'' extending over a considerable number of years, and involving numerous transactions in each year but which the commissioners had found not to be profits resulting from the carrying on of a trade. As both Warrington, L.J., and Atkin, L.J. (as they then were), pointed out, the profits made were plainly ''annual profits'' or ''gains.'' Consequently if they were not otherwise charged they necessarily fell under Case VI.

I am content to hold that the profits of the particular transaction here in question were not annual profits or gains within the meaning of Case VI. The result is that in my opinion the appeal of the Crown fails and should be dismissed with costs.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue*; *Wansey, Stammers & Co.*, for *D. & D. Carruthers*, writers, Kilmarnock.

[*Reported by* Edward J. M. Chaplin, Esq., *Barrister-at-Law.*]

BROTEX CELLULOSE FIBRES, LTD. *v.* INLAND REVENUE COMMISSIONERS

[KING'S BENCH DIVISION (Rowlatt, J.), December 17, 1930]

[Reported [1933] 1 K.B. 158; 102 L.J.K.B. 211; 148 L.T. 116]

Company—Stamp duty—Exemption—Reconstruction of company—Issue of shares in transferee company to holders of shares in existing company or their nominees—Shares issued to purchasers from, or nominees of, shareholders exceeding 10 *per cent. of consideration—Stamp Act*, 1891 (54 *&* 55 *Vict., c.* 39), *s.* 1, *s.* 59, *Sched. I—Finance Act*, 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 55 (1).

A company having been formed for the purpose of acquiring from the B. company its property and assets, an agreement for sale was entered into on Oct. 22, 1928, by which the B. company agreed to sell and the new company agreed to purchase all the undertaking and assets of B. company. The consideration for the sale was, inter alia, the allotment to the liquidator of B. company or his nominees of 600,000 preference shares in the new company of £1 each and 3,600,000 ordinary shares of 1s. each. The number of shares in B. company was 120,000. Shares in the new company were allotted to the holders of 11,200 shares in B. company in respect of those shares. The holders of the remaining 108,800 shares in B. company requested the liquidator of B. company to allot the shares in the new company to which they were entitled to persons other than themselves, and the shares were so allotted by the new company. In the case of a considerable number of shares, exceeding 10 per cent. of the total consideration for the sale to the new company under the agreement for sale, they were allotted to persons who had agreed to purchase either shares of B. company or shares of the new company to which the registered holders of B. company shares were entitled. Therefore, the first registered holders of shares in the new company were to an extent far exceeding 10 per cent. of such shares, and far exceeding 10 per cent. of the total consideration for the sale, persons who were not holders of shares in B. company. The new company claimed exemption of the agreement for sale from ad valorem duty under the Finance Act, 1927, s. 55. The Commissioners of Inland Revenue determined that the agreement for sale was liable to ad valorem duty under the Stamp Act, 1891, s. 59.

Held: the issue of shares to purchasers from, or other nominees of, holders of shares in B. company was not the issue of shares to holders of shares in B. company within the meaning of the Finance Act, 1927, s. 55 (1), and, therefore, the new company was not entitled to exemption from stamp duty on the agreement for sale under that section.

Notes. The Finance Act, 1927, s. 55, has been amended by the Finance Act, 1928, and the Finance Act, 1930.

Referred to: *Murex, Ltd.* v. *I.R. Comrs.*, [1933] 1 K.B. 173; *Re Walkers Settlement Trust, Royal Exchange Assurance Corpn.* v. *Walker and Others*, [1935] All E.R.Rep. 790.

As to relief from stamp duty in carrying out a scheme for the reconstruction or amalgamation of a company, see 6 HALSBURY'S LAWS (3rd Edn.) 782–787, paras. 1576–1585; and for cases on the subject, see 10 DIGEST (Repl.) 1101–1102, *7610–7613*. For the Finance Act, 1927, s. 55, see 21 HALSBURY'S STATUTES (2nd Edn.) 935.

Case Stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891.

On Nov. 19, 1928, an instrument was presented on behalf of Brotex Cellulose Fibres, Ltd. (hereinafter called "the company") by their solicitors to the Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the commissioners as to the stamp duty with which the instrument was chargeable. The instrument in question (hereinafter called the "agreement for sale") was an agreement under seal dated Oct. 22, 1928, and made between Brotex, Ltd., of the first part, the company of the second part, and Leonard Browning of the third part, and was an agreement for sale to the company by Brotex, Ltd., of all its undertaking and assets for the consideration therein mentioned.

The question for the consideration of the court was whether the agreement for sale was liable to ad valorem stamp duty under or by reference to the heading "Conveyance or transfer on sale" in Sched. I to the Stamp Act, 1891, and s. 1 and s. 59 of that Act, and other relevant statutory provisions, or whether the agreement for sale was exempt from such stamp duty by reason of s. 55 of the Finance Act, 1927.

Brotex, Ltd., was incorporated under the Companies Acts, 1908 to 1917, on June 27, 1927, with a nominal capital of £6,000 divided into 120,000 shares of 1s. each. The company was incorporated under the Companies Acts, 1908 to 1917, on Sept. 13, 1928, with a nominal capital of £1,000 divided into 20,000 shares of 1s. each. By cl. 3 of its articles of association, it was provided that the company was formed for the purpose of acquiring from Brotex, Ltd., its property and assets on the terms set forth in the draft agreement therein mentioned, being a draft of the agreement for sale.

On Oct. 22, 1928, the agreement for sale was entered into, and by that agreement, after reciting that it was intended that the capital of the company should be forthwith increased to £1,000,000, divided into 750,000 preferred shares of £1 each and 5,000,000 ordinary shares of 1s. each, and that the company had been formed with a view (inter alia) of acquiring the whole of the undertaking and assets of Brotex, Ltd. Brotex, Ltd., agreed to sell, and the company agreed to purchase all the undertaking and assets of Brotex, Ltd., as therein mentioned as from Oct. 1, 1928. The consideration for the sale was to be: (a) The sum of £780,000, payable as to £600,000 by the allotment to the liquidator of Brotex, Ltd., or his nominees of 600,000 preferred shares of the company of £1 each, fully paid, and as to £180,000 by the allotment to the liquidator of Brotex, Ltd., or his nominees of 3,600,000 ordinary shares of 1s. each in the company fully paid, such preferred and ordinary shares to be distributable amongst the members of Brotex, Ltd., subject to the provisions thereinafter contained, in the proportion of five preferred shares and thirty ordinary shares for each share in Brotex, Ltd., held by them respectively; and (b) the payment by the company to Brotex, Ltd., of such a sum of cash as would enable Brotex, Ltd., to satisfy its debts and liabilities outstanding on Oct. 1, 1928, as therein mentioned; and (c) such further sum of cash as would be necessary to enable the liquidator of Brotex, Ltd., to pay the costs and expenses of and incidental to the liquidation of Brotex, Ltd., and to satisfy dissentient members.

The agreement for sale was conditional on certain resolutions of Brotex, Ltd., being passed and confirmed to the effect: (i) That Brotex, Ltd., be wound up voluntarily, and (ii) that the agreement for sale be approved, confirmed and adopted, and that the liquidator appointed in such voluntary winding-up be authorised and directed to carry the same into effect; and was also conditional on the company passing the necessary resolution for the increase of the company's capital in the manner aforesaid.

On Nov. 7, 1928, the company passed the following resolution in general meeting:

> "That for the purpose of acquiring the undertaking of Brotex, Ltd., the directors be and they are hereby authorised to increase the capital of the company to £1,000,000 by the creation of 750,000 preferred shares of £1 each and 4,980,000 ordinary shares of 1s. each ranking pari passu with the existing shares in the company. The said preferred shares shall carry the following rights, namely, (a) as regards dividend the right to a fixed non-cumulative preferential dividend at the rate of 7½ per cent. per annum upon the capital for the time being paid up or credited as paid up thereon payable as regards each financial

year exclusively out of the profits determined to be distributed in respect of such financial year and to 30 per cent. of the surplus profits which it shall be determined to distribute by way of dividend in respect of each financial year after payment of the said non-cumulative preferential dividend at the rate of 7½ per cent. per annum in respect of such year; (b) as regards capital the right in a liquidation to repayment of capital paid up or credited as paid up thereon in priority to the ordinary shares and to 30 per cent. of the surplus assets remaining after repayment of the capital paid up on the ordinary shares but not to any further participation in profits or assets."

On Nov. 7, 1928, the following resolutions of Brotex, Ltd., were passed, and subsequently, on Nov. 22, 1928, confirmed as special resolutions of Brotex, Ltd.

> "(i) That the company be wound-up voluntarily and that John Claude Jardine Lonsdale of 10/11, New Burlington Street, London, W.1, be and he is hereby appointed liquidator for the purposes of such winding-up.
>
> "(ii) That the provisional agreement dated the 22nd day of Oct., 1928, and made between the company of the first part, Brotex Cellulose Fibres, Ltd., of the second part, and Leonard Browning of the third part be and is hereby approved, adopted and confirmed and that the liquidator of the company be and he is hereby authorised and directed to adopt the same and to carry the said agreement into effect pursuant to s. 192 of the Companies (Consolidation) Act, 1908, with such modification (if any) as he may deem necessary or expedient in the circumstances of the case."

On Nov. 22, 1928, a resolution of the directors of the company was passed whereby (in pursuance of the authority given to the directors by the resolution of the company of Nov. 7, 1928, hereinbefore referred to) it was resolved that the capital of the company be increased by £999,000, namely, 750,000 preferred shares of £1 each and 4,980,000 ordinary shares of 1s. each.

The agreement for sale was by an endorsed agreement dated Nov. 22, 1928, and made between Brotex, Ltd., of the first part, John Claude Jardine Lonsdale of the second part, the company of the third part, and Leonard Browning of the fourth part, adopted by the said John Claude Jardine Lonsdale as liquidator of Brotex, Ltd., and confirmed by the parties.

The following statement shows the names of the persons who held shares of Brotex, Ltd. (i) at the date of the agreement for sale, namely, Oct. 22, 1928; (ii) at the date of the appointment of a liquidator, and the execution of the adopting agreement, namely, Nov. 22, 1928:

SHAREHOLDERS IN BROTEX, LTD.

	On Oct. 22 1928	On Nov. 22 1928
Elia Ventura, 227 Graham Road, Hackney, E.8	3,000	—
Leonard Browning, 31, Ainger Road, Hampstead, N.W.	14,000	2,000
William Henry White, 107, Prospect Street, Waterbury, Conn., U.S.A.	2,000	—
Helen Seymour Eaton, Jules Hotel, Jermyn Street, London, W.	3,000	3,000
Mary Elizabeth Hargreaves, 61, Evelyn Gardens, S.W.7	600	—
Herbert Buchanan Yuille, 31, Fenchurch Street, London, E.C.3	4,100	—
George Cursons, "Herne Brow," Herne Bay, Kent ..	700	700
Martha Dye Appleton, Claridge's Hotel, Brook Street, London, W.	24,500	14,500
Mervyn Brown, 110, St. Martin's Lane, London, W.C.2 ..	2,000	2,000
Doris Webb, 334/5, Moorgate Station Chambers, E.C.2 ..	22,000	—

(*continued on next page*)

	On Oct. 22 1928	On Nov. 22 1928
William Herbert Appleton, Claridge's Hotel, Brook Street, W.1	3,800	—
Formation Trust, 334/5, Moorgate Station Chambers, E.C.2	1,000	1,000
Thomas Graham, 11, Windsor Mansions, Northumberland Street, W.1	200	—
Cuthbert Frederick Hargreaves, 2, Chesham Street, S.W.1	2,000	2,000
Mabel Francis Black, Wallangra, Inverell, N.S.W.	1,000	1,000
William James Bridger, 60, Chelverton Road, Putney, S.W.15	400	—
Charles James Moore Suckling, The Forge, Golders Green, N.W.11	200	—
Katherine Elizabeth Brown, 16, Northumberland Avenue, W.C.2	18,350	—
John Claude Jardine Lonsdale, 42, Queen's Gardens, London, W.C.2	50	—
Ruby Howard Hargreaves, 2, Chesham Street, S.W.1	4,400	4,400
John William Woodfield, 41, South Audley Street, London, W.1	8,000	—
John Byng Paget, Ibstock Place, Clarence Lane, Roehampton	2,000	—
John Graham Dixon, 14, Langton Avenue, Oakleigh Park, N.	100	100
William Balfour Anderson, Pinner's Hall, Austin Friars, E.C.2	100	100
Colonel Allen Soames, "Vernons," Chappel, Essex	2,000	—
Stella Mary Honor Cursons, "Herne Brow," Herne Bay, Kent	500	500
Maurice E. Turner, Robert R. J. Turner, William T. Cave, 115, Leadenhall Street, E.C.3	—	88,100
Evelyn Charles Stanley, 29, Cornhill, London, E.C.3	—	200
Captain John Alexander Holder, "Keeping," Beaulieu, Hants	—	400
	120,000	120,000

The differences in personnel between the holders of shares of Brotex, Ltd., at the respective dates referred to above were accounted for by the following facts:

(a) Between Oct. 22, 1928, and Nov. 7, 1928 (the date of the first meeting of Brotex, Ltd., at which the resolution for the approval and confirmation of the agreement for sale was submitted to the shareholders), 45,600 shares of Brotex, Ltd., were transferred to M. E. Turner, R. R. J. Turner and W. T. Cave to hold as bare trustees for the respective transferors, with instructions to vote for the resolution. They were so transferred in pursuance of an arrangement evidenced by letters in similar forms signed by the respective holders of the shares in question.

Particulars of the shares so transferred were as follows:

Transferors	Number of Shares	Transferors	Number of Shares
E. Ventura	3,000	J. C. J. Lonsdale	50
L. Browning	12,000	J. W. Woodfield	8,000
M. E. Hargreaves	600	J. B. Paget	2,000
K. E. Brown	17,950	A. Soames	2,000
		Total	45,600

(b) On Oct. 27, 1928, 42,500 shares of Brotex, Ltd., were transferred to M. E. Turner, R. R. J. Turner and W. T. Cave on the instructions of M. A. Brown to be held as bare trustees for M. A. Brown, with instructions to vote for the said resolution.

Particulars of the shares so transferred were as follows:

Transferors	Number of Shares
W. H. White	2,000
H. B. Yuille	4,100
M. D. Appleton	10,000
D. Webb	22,000
W. H. Appleton	3,800
W. J. Bridger	400
J. M. Suckling	200
	42,500

These 42,500 shares were so transferred on the completion of the purchase thereof by M. A. Brown under an agreement made July 27, 1928. The transfers were stamped with ad valorem "Conveyance or transfer on sale" duty on the price paid by M. A. Brown, and appearing on the transfers, amounting in all to £110,500.

In the case of the 45,600 shares of Brotex, Ltd., mentioned above on the instructions given by the registered holders as at Nov. 22, 1928 (i.e., the nominees), the shares of the company were allotted as set out hereunder in accordance with instructions to the nominees given by the respective transferors.

Allotted to respective transferors:

	Preferred	Ordinary
E. Ventura	15,000	70,000
L. Browning	40,000	240,000
M. E. Hargreaves	3,000	18,000
K. E. Brown	89,750	538,500
J. C. J. Lonsdale	250	1,500
J. W. Woodfield	40,000	240,000
J. B. Paget	10,000	60,000
A. Soames	10,000	53,000
	208,000	1,221,000
Allotted to others	20,000	147,000
	228,000	1,368,000

The balance of the L. Browning shares (namely, 20,000 preferred and 120,000 ordinary) was allotted to his wife on his instructions, and the other balances were duly allotted to strangers in circumstances not known either to the company or to the commissioners.

Each of the following persons who, on Nov. 22, 1928, held shares of Brotex, Ltd., requested the liquidator of Brotex, Ltd., to nominate himself or herself as the allottee of the shares of the company which were attributable to the number of shares in Brotex, Ltd., held by him or her under the scheme of reconstruction embodied in the agreement for sale and the agreement endorsed thereon, and shares of the company were at the request of the liquidator allotted by the company to such shareholders as in the following table [printed at p. 600, post]:

Another of the holders of shares of Brotex, Ltd., on Nov. 22, 1928, namely, Ruby Howard Hargreaves, who held 4,400 shares of Brotex, Ltd., and was accordingly entitled under the scheme to 22,000 preferred shares and 132,000 ordinary shares of the company, requested the liquidator of Brotex, Ltd., to allot to J. W. Turland 5,000 preferred shares and 30,000 ordinary shares of the company, and the balance of the shares to which she was entitled, namely, 17,000 preferred shares and 102,000 ordinary shares of the company to herself. Another of the holders of shares

Shareholder in Brotex, Ltd.	Number of Shares held in Brotex, Ltd.	Shares of Appellant Company allotted under scheme	
		Preferred	Ordinary
Leonard Browning	2,000	10,000	60,000
George Cursons	700	3,500	21,000
Mabel Francis Black	1,000	5,000	30,000
Stella M. H. Cursons	500	2,500	15,000
Evelyn Charles Stanley	200	1,000	6,000
John Alexander Holder	400	2,000	12,000
	4,800	24,000	144,000

of Brotex, Ltd., on Nov. 22, 1928, namely, Cuthbert Frederick Hargreaves, who held 2,000 shares of Brotex, Ltd., and was accordingly entitled under the scheme to 10,000 preferred shares and 60,000 ordinary shares of the company, requested the liquidator of Brotex, Ltd., to allot to Ruby Hargreaves 5,000 preferred shares and 30,000 ordinary shares of the company, and the balance of the shares to which he was entitled, namely, 5,000 preferred shares and 30,000 ordinary shares of the company, to himself. All these shares were so allotted by the company at the request of the liquidator accordingly, and the allottees' names were put on the register of members of the company accordingly. The reasons for the instructions given to the liquidator by these two registered holders of shares of Brotex, Ltd., to procure the allotment of some of the shares in the company to which they were entitled to persons other than themselves were not known by the company nor by the commissioners.

The facts above mentioned accounted for the allotment of shares of the company under the instructions to the liquidator of the registered holders (as at Nov. 22, 1928) of 11,200 shares of Brotex, Ltd. The holders (as at Nov. 22, 1928) of the remaining 108,800 shares of Brotex, Ltd., requested the liquidator to procure the allotment of the shares of the company to which they were severally entitled, namely, 544,000 preferred shares and 3,264,000 ordinary shares, to persons other than themselves, and they were so allotted by the company at the request of the liquidator of Brotex, Ltd., accordingly, and the allottees' names were put on the register of members of the company. The reasons for the instructions given to the liquidator to procure the allotment of the shares in question to persons other than the registered holders of shares of Brotex, Ltd., were not fully known by the company or the commissioners in all cases. In the case of a considerable number of the shares (the exact number of which was not known, but which exceeded 10 per cent. of the total consideration for the sale to the company under the agreement for sale) they were allotted to persons who had agreed to purchase either shares of Brotex, Ltd., or shares of the company to which under the scheme registered holders of shares of Brotex, Ltd., were entitled. Of the shares of the company directed to be allotted to sundry nominees of M. A. Brown, 100,000 preferred shares and 500,000 ordinary shares had been sold by him prior to Nov. 22, 1928, the date of liquidation, and in the instructions given by him to M. E. Turner, R. R. J. Turner and W. T. Cave, the registered holders of certain shares of Brotex, Ltd., in which he held the beneficial interest, the purchasers of such shares were included for nomination to the extent of the shares thus sold and such shares were allotted to them accordingly, and their names were entered on the register of members of the company.

By reason of the facts hereinbefore mentioned, the first registered holders in the books of the company of the shares of the company which formed part of the consideration for the sale to the company under the agreement for sale were to an extent far exceeding 10 per cent. of such shares, and far exceeding 10 per cent. of the total consideration for the sale persons who were not holders of shares in Brotex, Ltd.

The commissioners were of opinion that the agreement for sale was liable to ad valorem duty under s. 59 of the Stamp Act, 1891. The total amount or value of the consideration for the sale was agreed between the company and the commissioners at the sum of £826,648 arrived at as follows:

Consideration in shares	£786,000
Consideration in cash	£40,648
	£826,648

which was apportioned as to £14,374—part thereof—to the consideration for assets of the vendor company excepted from the scope of s. 59 of the Stamp Act, and as to the balance, namely, £812,274, to the consideration for assets of the vendor company not excepted from the scope of that section. The agreement was, accordingly, assessed by the commissioners under that section with the ad valorem duty of £8,123 and with the fixed duty of 10s.

It was contended by the company that all the conditions necessary for exemption of the agreement for sale from ad valorem duty under s. 55 of the Finance Act, 1927, were applicable in the present case, and that the agreement for sale was not chargeable with such duty accordingly. The commissioners were of opinion that the issue of shares to purchasers from or other nominees of holders of shares in Brotex, Ltd., was not the issue of shares to holders of shares in Brotex, Ltd., within the meaning of the said section, and they maintained the assessment to ad valorem duty accordingly.

Whereupon the company, being dissatisfied with the assessment made, and having paid the duty in accordance therewith, called on the commissioners to sign and state a Case under s. 13 of the Stamp Act, 1891.

The question for the opinion of the court was whether the agreement for sale was liable to ad valorem duty as assessed by the commissioners, or whether it was exempt from such duty.

The Finance Act, 1927, s. 55, provides:

> "(1) If in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any companies it is shown to the satisfaction of the Commissioners of Inland Revenue that there exist the following conditions, that is to say—
>
> (a) that a company with limited liability is to be registered, or that since the commencement of this Act a company has been incorporated by letters patent or Act of Parliament, or the nominal share capital of a company has been increased;
>
> (b) that the company (in this section referred to as 'the transferee company') is to be registered or has been incorporated or has increased its capital with a view to the acquisition either of the undertaking of, or of not less than ninety per cent. of the issued share capital of, any particular existing company;
>
> (c) that the consideration for the acquisition (except such part thereof as consists in the transfer to or discharge by the transferee company of liabilities of the existing company) consists as to not less than ninety per cent. thereof—
>
> (i) where an undertaking is to be acquired, in the issue of shares in the transferee company to the existing company or to holders of shares in the existing company; or
>
> (ii) where shares are to be acquired, in the issue of shares in the transferee company to the holders of shares in the existing company in exchange for the shares held by them in the existing company;
>
> then, subject to the provisions of this section, . . .
>
> (B) Stamp duty under the heading 'Conveyance or Transfer on Sale' in

Sched. I to the Stamp Act, 1891, shall not be chargeable on any instrument A made for the purpose of or in connection with the transfer of the undertaking or shares, nor shall any such duty be chargeable under s. 12 of the Finance Act, 1895, on a copy of any Act of Parliament, or on any instrument vesting, or relating to the vesting of, the undertaking or shares in the transferee company; . . .

(2) For the purpose of a claim for exemption under para. (B) of sub-s. (1) B of this section, a company which has, in connection with a scheme of reconstruction or amalgamation, issued any unissued share capital shall be treated as if it has increased its nominal share capital.

(3) A company shall not be deemed to be a particular existing company within the meaning of this section unless it is provided by the memorandum of association of, or the letters patent or Act incorporating, the transferee company C that one of the objects for which the company is established is the acquisition of the undertaking of, or shares in, the existing company, or unless it appears from the resolution, Act or other authority for the increase of the capital of the transferee company that the increase is authorised for the purpose of acquiring the undertaking of, or shares in, the existing company. . . ."

A. M. Latter, *K.C.*, and *Cyril King* for the company. D

The Attorney-General (*Sir William Jowitt*, *K.C.*), and *J. H. Stamp* for the Commissioners of Inland Revenue.

ROWLATT, J.—In this case the question is whether the company have complied with s. 55 (1) (c) of the Finance Act, 1927. The commissioners have held that they have not. Now I think one approaches this sort of question with the idea E —I do not say it is to guide one too far—that when a company has been reconstructed or amalgamated, in substance you expect to find the property in the old hands but under the domination of the new company. But there is another overriding consideration which, I think, is very important, and that is that the scheme of the section is to give relief from stamp duty in respect of a certain document on the commissioners being satisfied of the existence of certain facts, and some of the facts are stated in sub-s. (1) (c) in defining what the consideration of the F acquisition is to be. It seems to me, therefore, that the commissioners were certainly right to this extent, that they ought not to take a document like this and look at it and grant or not grant the exemption by seeing what the consideration in the document was expressed to be. I think they were entitled to see and were bound to see what the facts were as regards everything mentioned in the section.

If you look only at the document and ask what the consideration in the docu- G ment is, you are, of course, opening the door to this argument which I think counsel for the company really put as the basis of his case (he did not say it, but it is there, I think): The consideration may be executory; it may be in the sense of incurring an obligation to issue, it may be only for a moment. But it seems to me that the right construction has been put on the facts by the commissioners. What does the section say? I am not referring to sub-s. (6) (b), I think that throws H very little light on it; but what does sub-s. (1) (c) say? It says that the consideration for the acquisition consists, where an undertaking is to be acquired, in the issue of shares in the transferee company to the existing company or to holders of shares in the existing company.

Now I am bound to say that if one gets away from the technicalities on the face of the section, it seems to me that it does not include the issue of shares to the I existing company or its nominees, or to the holders of such shares in the existing company or its nominees at all. I think what the section says, and what it means is, that the existing company to this extent have to take the shares of the new company in exchange for its property, and that all the shareholders, if that is the way it is done, are to take the shares of the new company, and I think that to hold that what was done here was a compliance with the section would not be carrying out the subsection at all. This subsection is not to enable a vendor company to transfer its shares into rights, or something of that sort, into shares of the new company which can be dealt with freely. I think what is intended is that they must exchange their shares into new shares. That is a straightforward way of reading the section, in my judgment, and I think it stands to reason, because anything of this sort would not further amalgamation or reconstruction but would allow any colour of it or change in the interest to take place, which is exactly what I think the subsection is not intended to admit.

I think the commissioners came to a right decision, and, therefore, the appeal must be dismissed with costs.

Solicitors: *E. F. Turner & Sons*; *Solicitor of Inland Revenue.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

MARTIN (OTHERWISE CRAWLEY) *v.* MARTIN

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hill, J.), February 17, 1930]
[Reported 142 L.T. 560; 46 T.L.R. 257; 74 Sol. Jo. 216]

Nullity—Custody—Maintenance—Education—Adopted child—Power of court to make order—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 193 (1).

The power of the Divorce Court (under s. 193 (1) of the Supreme Court of Judicature Act, 1925 [now s. 26 (1) of the Matrimonial Causes Act, 1950]) to make orders as to the custody, maintenance, and education of children the marriage of whose parents is the subject of the proceedings extends to a child who has been adopted by the parties in accordance with the provisions of the Adoption Acts.

Notes. The dictum of HILL, J., that he would have had no jurisdiction to make a custody order in respect of an illegitimate child of the parties has been held to be incorrect: *Galloway* v. *Galloway*, [1955] 3 All E.R. 429. The Adoption of Children Act, 1926, has been repealed and replaced by the Adoption Act, 1950, s. 10 (2) of which contains a provision similar to the proviso to s. 5 (1) of the former Act. See also the Matrimonial Proceedings (Children) Act, 1958, and the Children Act, 1958.

As to the children to whom the jurisdiction of the Divorce Court extends, see 12 HALSBURY'S LAWS (3rd Edn.) 354; and for cases see 27 DIGEST (Repl.) 663–664. For Adoption Act, 1950, and the Matrimonial Causes Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 466 and 388 respectively.

Case referred to:

(1) *Jackson* (*otherwise Macfarlane*) v. *Jackson*, [1909] P. 308; 77 L.J.P. 147; 24 T.L.R. 674; 52 Sol. Jo. 535; 27 Digest (Repl.) 577, *5352.*

Application for custody in an undefended nullity suit brought by Mrs. Martin, otherwise Crawley, on the ground of the respondent's impotence.

The ceremony of marriage took place in 1926. The petitioner was granted a decree nisi. The parties had adopted an infant child in September, 1927, under the Adoption of Children Act, 1926. The petitioner asked for an order for custody.

On Feb. 18, 1928, an Isle of Wight magistrate made an adoption order in the following terms:

> "Application has been made by ——— [the respondent] and his wife ——— [the petitioner] of ——— [address] and domiciled in England and not under the age of twenty-five years, hereinafter called the applicants, that they are desirous of being authorised under the Adoption of Children Act, 1926, to adopt ——— an infant of the male sex, aged seven months, the child of ———.

A And the applicants being respectively not less than twenty-one years older than the infant, and all the consents required by the Act being obtained or dispensed with, it is adjudged that the application is true, and it is ordered that the applicants be authorised to adopt the infant, and it is directed that the Registrar-General shall make an entry recording the adoption in the Adopted Children Register." [Then were set out the name and date of birth and birthplace of the infant, and the direction that the original entry in the birth register should B be marked "Adopted" and the adoption be recorded as required by the Act.]

The Adoption of Children Act, 1926, s. 5 (1) provided:

> "Upon an adoption order being made, all rights, duties, obligations, and liabilities of the parent or parents, guardian or guardians of the adopted child, in relation to the future custody, maintenance, and education of the adopted C child, including all rights to appoint a guardian or to consent or give notice of dissent to marriage, shall be extinguished, and all such rights, duties, obligations, and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock, and in respect of the same matters and in respect of the liability of a child to maintain its parents the adopted child shall stand to the adopter D exclusively in the position of a child born to the adopter in lawful wedlock:
>
> Provided that in any case where two spouses are the adopters, such spouses shall in respect of the matters aforesaid, and for the purpose of the jurisdiction of the court to make orders as to the custody and maintenance of, and right of access to, children, stand to each other and to the adopted child in the same relation as they would have stood if they had been the lawful father and mother E of the adopted child, and the adopted child shall stand to them respectively in the same relation as a child would have stood to a lawful father and mother respectively."

The Supreme Court of Judicature (Consolidation) Act, 1925, s. 193 (1) provided:

> "In any proceedings for divorce or nullity of marriage or judicial separation the Court may from time to time, either before or after the final decree, make F such provision as appears just with respect to the custody, maintenance, and education of the children the marriage of whose parents is the subject of the proceedings. . . ."

Clifford Mortimer for the petitioner.—Proper steps having been taken to record the adoption, the child is placed in exactly the same position as if he were the lawful child of the parties. An order for custody would enable the petitioner here- G after to make a claim for the maintenance of the child.

Counsel then referred to *Jackson* (*otherwise Macfarlane*) v. *Jackson* (1).

HILL, J.—It is somewhat singular that if the present parties had been the actual parents of the child, no decree of nullity would have been possible. I make the order for custody. H

Order that the petitioner have custody of the child.

Solicitors: *W. J. Lake & Son*, for *Roach, Pitts & Co.*, Newport, I.W.

[*Reported by* WILLIAM LATEY, ESQ., *Barrister-at-Law.*]

Re BUSH. B. LIPTON, LTD. *v.* MACKINTOSH

[CHANCERY DIVISION (Luxmoore, J.), March 25, April 16, 1930]

[Reported [1930] 2 Ch. 202; 99 L.J.Ch. 503; 143 L.T. 700;
[1929] B. & C.R. 216]

Administration of Estates—Insolvent estate—Debt including interest—Rate of interest—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 66 (1)—*Administration of Estates Act*, 1925 (15 *Geo.* 5, *c.* 23), *s.* 34 (1), *Sched. I*, *Part I*, *r.* 1, *r.* 2.

The Bankruptcy Act, 1914, s. 66 (1), applies in the administration of an insolvent estate by the Chancery Division, so that creditors are only entitled to be paid interest at a rate not exceeding 5 per cent. per annum until all the debts proved in the estate have been paid in full.

Re Whitaker (1), [1901] 4 Ch. 9, applied.

Re Agricultural Wholesale Society, Ltd. (2), [1929] 2 Ch. 261, and *Re Wells* (3), [1929] 2 Ch. 269, not followed.

Notes. Not followed: *Re Bailey, Duchess Mill, Ltd.* v. *Bailey* (1932), 76 Sol. Jo. 560; *Re Parent Trust and Finance Co., Ltd.*, [1936] 1 All E.R. 641.

As to the application of bankruptcy rules to the administration of insolvent estates, see 16 HALSBURY'S LAWS (3rd Edn.) 311–314, paras. 600–605; and for cases on the subject, see 24 DIGEST (Repl.) 881–882, *8799–8809*. For the Bankruptcy Act, 1914, s. 66, see 2 HALSBURY'S STATUTES (2nd Edn.) 398; and for the Administration of Estates Act, 1925, s. 34 and Sched. I, see 9 HALSBURY'S STATUTES (2nd Edn.) 737, 766.

Cases referred to:

(1) *Re Whitaker, Whitaker* v. *Palmer*, [1900] 2 Ch. 676; 69 L.J.Ch. 774; 83 L.T. 342; 49 W.R. 56; 16 T.L.R. 531; 44 Sol. Jo. 658; affirmed, [1901] 1 Ch. 9; 70 L.J.Ch. 6; 83 L.T. 449; 49 W.R. 106; 17 T.L.R. 24; 45 Sol. Jo. 43, C.A.; 24 Digest (Repl.) 880, *8793*.

(2) *Re Agricultural Wholesale Society, Ltd.*, [1929] 2 Ch. 261; 98 L.J.Ch. 396; 141 L.T. 551; 45 T.L.R. 467; [1929] B. & C.R. 54; 10 Digest (Repl.) 981. *6753*.

(3) *Re Wells*, [1929] 2 Ch. 269; 98 L.J.Ch. 407; 141 L.T. 323; [1929] B. & C.R. 119; 24 Digest (Repl.) 882, *8806*.

(4) *Smith* v. *Morgan* (1880), 5 C.P.D. 337; 49 L.J.Q.B. 410; 24 Digest (Repl.) 880, *8789*.

(5) *Re Maggi, Winehouse* v. *Winehouse* (1882), 20 Ch.D. 545; 51 L.J.Ch. 560; 46 L.T. 362; 30 W.R. 729; 24 Digest (Repl.) 880, *8791*.

Procedure Summons.

In an administration action by creditors for a debt of £1,600 on a promissory note with interest at 1s. per £1 per month, the estate was found to be insolvent. This summons was issued by direction of the master, asking whether the debt was to be admitted with interest as on contract, or as might be adjudged reasonable, or at 5 per cent. only, according to the Bankruptcy Act, 1914, s. 66 (1), until other creditors had been paid in full.

Beaumont, K.C., for the plaintiffs, referred to *Re Agricultural Wholesale Society, Ltd.* (2), *Re Wells* (3), and *Re Whitaker* (1).

Stable, for the defendant, referred to *Re Whitaker* (1).

Cur. adv. vult.

April 16. **LUXMOORE, J.**, read the following judgment: This is a procedure summons taken out by the direction of the master to determine a question of principle, so that he may proceed to make his certificate. The action is a creditors' action for administration, the applicants being the plaintiffs. The order for administration was made as long ago as July 14, 1924. The estate is insolvent, and the question that has arisen and falls to be determined is whether s. 66 of the

Bankruptcy Act, 1914, ought to be applied or not. Subsection (1) of that section provides:

> "Where a debt has been proved, and the debt includes interest, or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding 5 per centum per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full."

The question whether the section applies or not depends on the construction to be placed on s. 34 of the Administration of Estates Act, 1925. That section provides, by sub-s. (1), that:

> "Where the estate of a deceased person is insolvent, his real and personal estate shall be administered in accordance with the rules set out in Part I of Sched. I to this Act."

Part I of Sched. I contains, among other things, rules as to payment of debts where the estate is insolvent.

Rule 1 provides that funeral, testamentary, and administration expenses are to have priority. Rule 2 provides that:

> "Subject as aforesaid, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, and as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt."

Section 34, to which I have just referred, and r. 2 are substantially in the same words as s. 10 of the Supreme Court of Judicature, 1875, the only material difference being, so far as the administration of an insolvent estate is concerned, the addition in r. 2 of the words "and as to the priorities of debts and liabilities." Section 10 of the Judicature Act, 1875, was construed by Cozens-Hardy, J., in *Re Whitaker* (1), and his decision was affirmed by the Court of Appeal. The question for determination in that case was whether voluntary creditors were to be paid in the administration by the court of an insolvent estate pari passu with or after the creditors for value. Before the passing of the Judicature Act, 1875, it was a well-recognised rule of the Court of Chancery that, in the administration of an insolvent estate by that court, creditors for valuable consideration took precedence over those whose debts were not founded on a valuable consideration. It was argued in *Re Whitaker* (1) that s. 10 of the Judicature Act, 1875, had not altered this rule, and that, although in bankruptcy a different rule prevails—that is, that creditors, whether for valuable consideration or not, ranked pari passu—the bankruptcy rule was not introduced into the administration of an insolvent estate. The argument, in effect, was that the words "as to debts and liabilities provable" should be construed as meaning "the debts and liabilities which could be proved" and not as referring to the order in which such debts and liabilities were to be paid. Cozens-Hardy, J., and the Court of Appeal in affirming him, declined to accept this argument, and Rigby, L.J., said ([1901] 1 Ch. at p. 12):

> "Section 10 provides (among other things) that the rules for the time being in force in bankruptcy as to debts provable shall apply in the administration by the High Court of the estate of a deceased insolvent. Upon the true construction of the words, I think they do not simply deal with the proof of debts. The same rules are to prevail 'as to debts and liabilities provable.' I cannot read those words as meaning simply 'as to the proof of debts and liabilities.' I think they mean that whatever general rules are in force in the Court of Bankruptcy for the time being with regard to debts and liabilities provable shall apply in the administration of insolvent estates in Chancery. Now undoubtedly in bankruptcy (it does not matter how it came about) the rule as to

> debts and liabilities provable is that all those debts and liabilities, whether contracted for value or not, shall rank pari passu. I think we should be cutting down unduly the plain words of s. 10 if we were to allow the old rule of the Court of Chancery to override in the present case the existing rule in regard to bankruptcy. If ever that rule should be altered, it would of course be a different matter. I do not suggest that it ought to be altered; but it is now a fixed rule that voluntary debts shall be on an equality with debts for value. If this view conflicts with the decisions in *Smith* v. *Morgan* (4) and *Re Maggi* (5), I can only say that we are not bound by those decisions, and if and so far as it is necessary (which probably means altogether), we must overrule them."

VAUGHAN WILLIAMS, L.J., said ([1901] 1 Ch. at p. 12):

> "One thing is quite clear, namely, that the section does not mean that in all respects the results of a bankruptcy, and the consequent administration of the estate, and the results of the death of an insolvent and the consequent administration of his estate are to be absolutely identical. It was long ago decided that, notwithstanding s. 10, you must still apply only in bankruptcy those bankruptcy rules, whether statutory or otherwise, which go to augment the bankrupt's assets as against third persons. So far it is plain that there is intended to be a distinction between bankruptcy and the consequent administration and death followed by administration of the insolvent estate of the deceased. The section itself seems to me to point to an intention that the uniformity (if I may use the expression) shall be limited to some particular subjects, because it says
>
> > 'the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively.'
>
> The section specifies four heads as to which uniformity is for the future to prevail. And, in my view, we have in construing the section to determine what are the limits of the four heads there specified, and then to see whether this rule of administration in Chancery, whereby voluntary creditors were postponed to creditors for value, is still to prevail. It seems to me that this rule of Chancery administration comes under the first of the four heads—namely, the rule in bankruptcy, 'as to the respective rights of secured and unsecured creditors.' In my opinion, if those words are properly read, they do not mean, as FRY, J., in *Re Maggi* (5) assumed that they do, only the respective rights of the two classes of creditors, secured and unsecured, as against each other, but they mean also the respective rights of those two classes inter se, and there can be no doubt that as regards the rights of the creditors inter se, the rule in bankruptcy differed from the rule in Chancery."

ROMER, L.J., said ([1901] 1 Ch. at p. 14):

> "The important words in s. 10 for the purposes of this appeal are, I think, those which provide that the bankruptcy rules 'as to the debts and liabilities provable' shall prevail in the administration of an insolvent estate by the High Court. The section does not say that only the rules as to what debts and liabilities shall be provable are to prevail; it speaks of all rules 'as to debts and liabilities provable.' It appears to me that, if there be a rule in bankruptcy that a debt shall be provable, but only in an inferior position to ordinary debts, that would be a rule 'as to' that provable debt within the meaning of the section. And so if there be a rule in bankruptcy that certain debts shall be provable, but in a superior position. And equally, to my mind, if the rule in bankruptcy be that certain debts and liabilities are provable in no superior or inferior position to ordinary debts, but pari passu with them, that would be a rule 'as to' those debts."

Section 34 and the rules under it add—as I have already pointed out—to the words of s. 10 the words "and as to the priorities of debts and liabilities." These words apparently add a fifth head to the four heads referred to by VAUGHAN WILLIAMS, L.J., and to which there was to be uniformity between bankruptcy administration and administration by the court of insolvent estates, if and so far as the words as to debts and liabilities do not by implication include the provision as to priorities. The rule as to the rate of interest to be allowed in respect of a provable debt is one of the rules "as to" such a debt, and the provision that such rate of interest is to be limited to 5 per cent. until other debts proved have been paid in full is not only a rule "as to" the debts provable on the principle of construction laid down by the Court of Appeal, but also a rule "as to" the priorities of the debts proved and provable.

In my opinion, the principle of the decision in *Re Whitaker* (1) governs the present case, and I should have had no hesitation in so deciding were it not for the fact that there are two recent decisions which do not appear to be in accordance with that principle. I refer to the decisions of MAUGHAM, J., in *Re Agricultural Wholesale Society, Ltd.* (2), and of ROMER, J., in *Re Wells* (3). Before dealing with these decisions I should state that I have been informed—and the information is in accordance with my own experience as to the practice—that ever since the decision in *Re Whitaker* (1), it has been the practice in the Chancery Division in the administration of insolvent estates to apply the rule as to the limitation of interest contained in s. 66 of the Bankruptcy Act, 1914, and the section of the earlier Act replaced by it, that is, s. 23 of the Bankruptcy Act, 1890. *Re Agricultural Wholesale Society, Ltd.* (2), relates to the rules applicable to the winding-up of an insolvent company under the Companies (Consolidation) Act, 1908. There were two questions. The first question related to the date from which interest was to be computed on a debt bearing interest, and the second question to the rate at which such computation was to be made. The second question is the one material for consideration in this case. Section 207 of the Companies (Consolidation) Act, 1908, provides that in the winding-up of an insolvent company registered in England or Ireland the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy in England or Ireland, as the case may be, with respect to the estates of person adjudged bankrupt. The words are for all practical purposes identical with the words of s. 10 of the Judicature Act, 1875, and also with the words of s. 34 of the Administration of Estates Act, 1925, and r. 2 of Sched. I thereunder, except that in the last-mentioned section and r. 2 you find the additional words "and as to the priorities of debts and liabilities."

It may be that there is some distinction to be found between the present case and the case before MAUGHAM, J., on the actual facts, as was suggested by counsel for the defendant in argument, but I am personally unable to see such distinction. The attention of MAUGHAM, J., was not called to the decision of the Court of Appeal in *Re Whitaker* (1), nor was he reminded of the practice which has been followed in the Chancery Division limiting the rate of interest payable in respect of a proved debt to 5 per cent. until all other proved debts have been paid in full. I cannot help thinking that, if such had been the case, MAUGHAM, J.'s decision would have been different. With all possible respect to him, I do not think that his judgment and that of the Court of Appeal in *Re Whitaker* (1) can be reconciled. In my view, I am bound to follow the judgment of the Court of Appeal in preference to that of MAUGHAM, J.

The other case to which I was referred was *Re Wells* (3). In that case, ROMER, J., decided the precise point which is now before me, and held that s. 66 of the Bankruptcy Act, 1914, was not incorporated by s. 34 of the Administration of Estates Act, 1925, and the rules thereunder, so as to apply in the administration of an insolvent estate. In deciding as he did, the learned judge's attention—as in the case of MAUGHAM, J.—was not called to the decision of the Court of Appeal in *Re Whitaker* (1), nor was he reminded of the practice of the Chancery Division on the point. Indeed, so far as I can see, there was no argument of any kind, for counsel for the administratrix appears to have submitted to the court that the case was governed by the decision in *Re Agricultural Wholesale Society, Ltd.* (2), although it was his duty as representing the administratrix to have argued to the contrary, and to have called the learned judge's attention to the relevant authorities.

In these circumstances, and without any disrespect to the learned judge, I conceive it to be my duty to refuse to follow his decision, and to follow that of the Court of Appeal in *Re Whitaker* (1), more especially in view of the fact that to follow the decision in *Re Wells* (3) would, of necessity, result in a departure from what has been the settled practice of the court for, at any rate, nearly thirty years.

I will, therefore, answer the question asked by the summons by declaring that the provisions of s. 66 of the Bankruptcy Act, 1914, are applicable to the present case.

Solicitors: *Woolfe & Woolfe*; *Stephenson, Harwood & Tatham.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

BLAY *v.* POLLARD AND MORRIS

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), March 14, 17, 28, 1930]

[Reported [1930] 1 K.B. 628; 99 L.J.K.B. 421; 143 L.T. 92;
74 Sol. Jo. 284]

Mistake—Mistake as to contents of document—Belief that provisions limited to previous oral agreement—Plea of non est factum—No allegation of fraud—Rectification.

P. and M., who had carried on the business of garage proprietors, orally agreed to dissolve the partnership as from Mar. 4, 1929, on the terms that M. should take over the liabilities of the partnership as from that date. P. notified his father, who was a solicitor, of the dissolution of the partnership, and the latter then prepared a written agreement to carry it into effect. By that agreement M. undertook to indemnify P. in respect of past rent. The agreement was presented to M. for signature. M. said that he could not understand it, and he then signed it. Judgment in respect of arrears of rent having been obtained against P. and M., P. claimed to be indemnified against M. in respect of rent due before the dissolution of partnership. By his defence M. pleaded that the written agreement was signed by him in the belief that it embodied the previous oral agreement, and that it was drawn up and signed under a "mutual mistake of fact," and that he never agreed to indemnify P. for rent before the dissolution. There was no allegation of fraud, nor was rectification claimed in the pleadings. At the trial it was found that M. signed the document with practically no consideration of its terms, or that new liabilities had been imposed which M. had not orally agreed to, and the judge, accordingly, rectified the agreement signed by limiting the liability to rent accruing after Mar. 4. On appeal by P.,

Held: the appeal must be allowed, because, (i) it was not open to M. to raise the plea of non est factum in the absence of fraud or misrepresentation since he knew that the agreement he signed was for the dissolution of the partnership; (ii) there was no allegation of fraud or conduct amounting to fraud and no claim for rectification, and, therefore, it was not open to the judge to rectify the written agreement; (iii) there was no evidence of mutual mistake.

Notes. As to the plea of non est factum, see 11 Halsbury's Laws (3rd Edn.) 360–364, paras. 586–590; and for cases on the subject, see 17 Digest (Repl.) 247–248, *508–511*. As to rectification of a written instrument, see 23 Halsbury's Laws (2nd Edn.) 150–156, paras. 214–224; and for cases on the subject, see 35 Digest 127–132, *282–327*.

Cases referred to:

(1) *Foster* v. *Mackinnon* (1869), L.R. 4 C.P. 704; 38 L.J.C.P. 310; 20 L.T. 887; 17 W.R. 1105; 17 Digest (Repl.) 242, *457*.

(2) *Carlisle and Cumberland Banking Co., Ltd.* v. *Bragg*, [1911] 1 K.B. 489; 80 L.J.K.B. 472; 104 L.T. 121, C.A.; 35 Digest 12, *52*.

(3) *Howatson* v. *Webb*, [1908] 1 Ch. 1; 77 L.J.Ch. 32; 97 L.T. 730; 52 Sol. Jo. 11, C.A.; 35 Digest 71, *686*.

(4) *Hunter* v. *Walters*, *Curling* v. *Walters*, *Darnell* v. *Hunter* (1871), 7 Ch. App. 75; 41 L.J.Ch. 175; 25 L.T. 765; 20 W.R. 218, L.C. & L.JJ.; 35 Digest 71, *682*.

(5) *Powell* v. *Smith* (1872), L.R. 14 Eq. 85; 41 L.J.Ch. 734; 26 L.T. 754; 20 W.R. 602; 35 Digest 94, *31*.

(6) *May* v. *Platt*, [1900] 1 Ch. 616; 69 L.J.Ch. 357; 83 L.T. 123; 48 W.R. 617; 35 Digest 101, *85*.

(7) *Smith* v. *Hughes* (1871), L.R. 6 Q.B. 597; 40 L.J.Q.B. 221; 25 L.T. 329; 19 W.R. 1059; 35 Digest 107, *125*.

(8) *Murray* v. *Parker* (1854), 19 Beav. 305; 52 E.R. 367; 35 Digest 130, *308*.

(9) *Davy Bros., Ltd.* v. *Garrett* (1878), 7 Ch.D. 473; 47 L.J.Ch. 218; 38 L.T. 77; 26 W.R. 225, C.A.; Digest Practice 22, *181*.

(10) *Jervis* v. *Berridge* (1873), 8 Ch. App. 351; 42 L.J.Ch. 518; 28 L.T. 481; 21 W.R. 395, L.C. & L.JJ.; 12 Digest (Repl.) 182, *1243*.

Appeal from the decision of MacKinnon, J.

The defendants Pollard and Morris on Dec. 24, 1927, jointly took a lease of certain lock-up garages at Raynes Park, Surrey, from the plaintiff Blay at a rent of £275 per annum. The business did not prove to be a success, with the result that in March, 1929, they owed the plaintiff two quarters' rent. On Mar. 4, the two defendants orally agreed to end the partnership as from that date on the terms as found by the judge that the defendant Pollard should be paid the sum of £50, and that the defendant Morris should take over the liabilities of the partnership as from that date, including the liability to perform the obligations of the lease after that date. On April 17, the plaintiff sent a statement of account to the two defendants showing £206 5s. rent due to June 30, next. On April 18, the defendant Pollard informed his father, S. Pollard, who was a solicitor, that he had dissolved partnership with the defendant Morris, and the father then proceeded to prepare an agreement in writing, dated April 20, 1929, under which the defendant Morris undertook to indemnify the defendant Pollard against all liabilities in any wise arising out of the lease. The agreement was then handed to the defendant Morris, who was asked to read it through. The judge found that the defendant Morris, who was totally unversed in business, made a pretence of reading it through and then signed with practically no consideration of its terms. The plaintiff having obtained judgment against the two defendants for arrears of rent due, the defendant Pollard in third-party proceedings which he brought against the defendant Morris claimed to be indemnified under the agreement of April 20, against payment of rent which had been adjudged in the action to be due from the two defendants to the plaintiff. In his defence, the defendant Morris pleaded that the agreement sued on was intended to embody the oral agreement of Mar. 4 which was the only agreement made between the partners, that it was signed by them in the belief that it embodied the said agreement, that it was drawn up and signed under a "mutual mistake of fact," namely, that neither the defendant Pollard nor the defendant

Morris at the time of the signature of the alleged agreement knew that the rent was or might be alleged to be owing to the plaintiff.

MacKinnon, J., found that there was no oral agreement on Mar. 4, or at any other time, that the defendant Morris should assume the whole liability for the rent already due and unpaid to the plaintiff up to Mar. 4. He held that the case fell within the principle that where one party reduced to written terms a bargain that had been made and inserted therein a stipulation which he knew the other party did not intend to promise, he was not entitled to take advantage of that mistake of the other party. The judge accordingly rectified the written contract by limiting the liability to rent accruing from Mar. 4.

The defendant Pollard appealed.

S. O. Henn Collins for the appellant, the defendant Pollard.

Tristram Beresford for the respondent, the defendant Morris.

Cur. adv. vult.

Mar. 28. The following judgments were read.

SCRUTTON, L.J.—A landlord sued two young men, the defendant Pollard and the defendant Morris, who were carrying on a garage as partners on insufficient capital, for three quarters' rent in arrear, and obtained judgment against them both. The defendant Pollard then claimed by third-party procedure indemnity against the defendant Morris. The indemnity was claimed under an agreement for dissolution of partnership dated April 20, 1929. While this agreement was couched in language which a young man with little knowledge of business might not understand, it was not seriously disputed that, unless the agreement could in some way be invalidated, the defendant Morris was bound by it to indemnify the defendant Pollard against claims for rent accrued before the partnership was dissolved.

Three ways of escaping the agreement were suggested. First, it was said that it was not the defendant Morris's agreement: non est factum. The defendant Morris said it was presented to him by the defendant Pollard's father, a solicitor, as an agreement dissolving the partnership, that he tried to read it, but could not make head or tail of it, and he never had agreed to indemnify the defendant Pollard for rent before the dissolution. The trial judge is not satisfied that the past rent was mentioned specifically in the oral agreement between the defendant Pollard and the defendant Morris, but finds that the oral agreement between them only related to future rent. But the defendant Morris did sign an agreement making himself liable for past rent. He knew it was an agreement for dissolution of partnership, and took the benefit of some of the terms contained in it, though, after reading it, he did not appreciate all its effect. The principle of *Foster* v. *Mackinnon* (1) as to the defence of non est factum is thus stated by Byles, J. (L.R. 4 C.P. at p. 711):

> "It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended."

See also *Carlisle and Cumberland Banking Co., Ltd.* v. *Bragg* (2). But where the signer knows the class of document he is signing a dissolution agreement—though he does not understand or even read its exact terms, Farwell, L.J., in *Howatson* v. *Webb* (3) ([1908] 1 Ch. at p. 3), states the law thus:

"WARRINGTON, J., has expressed my view of the law thus: A

> 'If a man knows that the deed is one purporting to deal with his property and he executes it, it will not be sufficient for him, in order to support a plea of non est factum, to show that a misrepresentation was made to him as to the contents of the deed. The deed in the present case is not of a character so wholly different from that which it was represented to be as to come within the principle within which LORD HATHERLEY held that the case before him'— B *Hunter* v. *Walters* (4)—'did not fall.'"

As a general rule, mistake as to the legal effect of what one is signing, when one has read the document, does not avail: see per LORD ROMILLY, M.R., in *Powell* v. *Smith* (5). It would be very dangerous to allow a man over the age of legal infancy to escape from the legal effect of a document he has, after reading it, signed, in the C absence of an express misrepresentation by the other party of that legal effect. For these reasons, in my opinion, the defence of non est factum, if pleaded, cannot succeed.

The second defence is that acted on by the trial judge, based on s. 792 of FRY ON SPECIFIC PERFORMANCE. That section reads thus:

> "It equally follows that the mistake of one party to a contract can never be a D ground for compulsory rectification, so as to impose on the second party the erroneous conception of the first. The error of the plaintiff alone may, however, where (but, it is conceived, only where) there has been fraud or conduct equivalent to fraud on the part of the defendant, be a ground for putting the defendant to elect between having the transaction annulled altogether or submitting to the rectification of the deed in accordance with the plaintiff's intention." E

See also per FARWELL, J., in *May* v. *Platt* (6) ([1900] 1 Ch. at p. 623). This rests on unilateral mistake in one party, fraud or conduct equivalent to fraud in the other party. But no fraud is alleged in the pleadings; no application to amend has been made; and I cannot think a judge should find fraud or conduct amounting to fraud when it has never been pleaded. Further, I cannot see any evidence to justify F the judge's finding that Pollard senior knew that there was no agreement as to past rent. The judge also rectified the agreement signed, although rectification was not claimed on the pleadings. This defence also fails.

Lastly, mutual mistake was alleged, not as a ground for rectification, but as a defence. But (i) I see no evidence of any mutual mistake, and (ii) the mutual mistake pleaded was never proved, and if proved, was quite irrelevant. Cases must G be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case, the issue on which the judge decided was raised by himself without amending the pleadings, and, in my opinion, he was not entitled to take such a course.

All the defences to the agreement therefore fail, and judgment must be entered for Pollard against the third party for the indemnity claimed.

H

I regret that Mr. Pollard the elder did not insist on the defendant Morris taking the agreement to his solicitor. I hope Mr. Pollard himself now regrets it. I have considered whether this should make any difference to the costs, but I do not think it is sufficient to influence them. The judgment against the defendant Morris must be with costs here and below. As, however, neither the defendant Pollard nor the defendant Morris appears to have any money, neither the judgment for rent I nor the judgment for indemnity and costs appears to be of much practical value.

GREER, L.J.—This appeal raises the question whether MACKINNON, J., was right in deciding that the defendant Pollard was not entitled, in third-party proceedings which he brought against his co-defendant Morris, to be indemnified against payment of the rent of certain premises which had been adjudged in the action to be due from the two defendants to the plaintiff, their landlord. Without question both defendants were liable on the judgment obtained by the landlord, but, in the third-party proceedings, the question had to be determined whether, under an agreement of dissolution signed by both parties, the defendant Morris was liable to indemnify the defendant Pollard.

The facts as found by the learned judge, who heard the witnesses and by whose opinion as to the credit to be attached to their evidence we ought to hold ourselves bound, are as follows. The learned judge held that, on Mar. 4, 1929, the two defendants, who had been in partnership as garage proprietors, agreed to dissolve partnership. The evidence of the two defendants as to the terms differed. The learned judge accepted the evidence of the defendant Morris and refused to accept the evidence of the defendant Pollard. He held that the only agreement arrived at between the two partners was that the partnership should be dissolved on the terms that the defendant Pollard should be paid the sum of £50 and that the other defendant Morris should take over the liabilities as from Mar. 4, including the liability to perform the obligations of the lease after that date, but that there was no agreement that the defendant Morris alone should accept the existing liabilities to the landlord for rent already accrued due. The defendant Pollard asked his father, who was a solicitor, to draw up the agreement. This gentleman either inadvertently without knowledge of all the verbal terms which had been arranged, or intentionally, notwithstanding such knowledge, drew up the written agreement of April 20, 1929, under which the defendant Morris undertook to indemnify the defendant Pollard against all liabilities in any wise arising out of the said lease.

The judgment of MacKinnon, J., for the defendant Morris was based on the rule that any party to an agreement knowing that the other party is only signing it on the assumption that it is in accordance with a previous agreement, and knowing that it is not in accordance therewith, cannot take advantage of the document so signed by the other party. There were in this case three possible arguments for the defendant Morris to put forward for consideration—first, that the agreement was not binding, as it was not his agreement, that is to say, he might raise the defence of non est factum; secondly, it was open to him to raise a defence similar to that which is referred to in Anson on Contract (16th Edn.), p. 173, an instance of which is provided by *Smith* v. *Hughes* (7); and thirdly, it was open to him to contend that, by reason of a common mistake of the two parties to the agreement, the agreement was drawn up in a manner inconsistent with their common intention, and ought, therefore, to be rectified and treated as rectified on the principle mentioned in s. 787 of Fry on Specific Performance, and acted on in *Murray* v. *Parker* (8) and other cases.

In my judgment, the defendant Morris was unable to establish any one of these contentions. As regards the first, it seems to me quite plain that the facts did not establish any defence such as is covered by the plea of non est factum. The defendant Morris executed the document knowing that it was an agreement for the purpose of dealing with the rights of the two partners on a dissolution of partnership, and it is not open to him to say that it was not his deed merely because, if he had read it and understood it, he would have objected to one of its terms as not in accordance with the verbal agreement which it was intended to carry out: see *Howatson* v. *Webb* (3).

As regards the second contention, I think the learned judge was not entitled to consider this, as it involved, if the facts raised it at all, a charge of fraud against one of the parties, and it is absolutely essential that, where a charge of fraud is made by one of the parties to litigation against the other, it should be raised with particularity. No amendment of the pleadings was asked for, and no amendment was, in fact, made. On the pleadings as they stand, I think the learned judge was not entitled to consider the application of what I may call the principle of *Smith* v. *Hughes* (7) to the present case.

I think, also, that the third point fails. It is true that the learned judge did not definitely decide that the defendant Pollard was aware of the mistake, but only said that, in his judgment, it was highly doubtful whether he was. It seems to me, however, quite impossible to suppose that, if the defendant Pollard had been asked whether the presence of the obnoxious clause in the deed carried out his intention, he would have been bound to say yes, because he had given evidence that the oral agreement was to the same effect. Therefore, it does not seem to be right that this court should hold that the agreement was drawn up in a form inconsistent with the common intention of both parties. I think it was a case of unilateral mistake, which, by reason of the state of the pleadings, cannot be relied on for the purposes of rectification or rescission.

For these reasons, I think the appeal must be allowed.

SLESSER, L.J.—This is an appeal in an action in which there were originally two issues.

In this first issue George Blay, the landlord of certain property on which garages have been erected, called the Cannon Hill Garages, at Raynes Park, Surrey, obtained a judgment against two defendants, Basil Sydney Pollard and Norman Gascoigne Morris, who were joint tenants, for rent due.

The second issue between the two defendants, raised under a third-party order of July 10, 1929, from the result of which this appeal is brought, was determined by MacKinnon, J., in a judgment that the defendant Morris, the third party, was liable to indemnify the defendant Pollard against so much of the sum due as represented rent from Mar. 4, 1929, to June 30, 1929, but that as to so much of the sum due as represented rent before Mar. 4, 1929, the period for which liability is now in dispute, the defendant Pollard and the defendant Morris were liable in equal shares.

The defendant Pollard asks that the judgment as between him and the defendant Morris be set aside, and that judgment be entered for him for the relief claimed by him in the third-party proceedings—namely, for a complete indemnification for the whole period during which rent is due and for judgment for the amount which may be found due from him to the plaintiff.

The history of the relations between the defendant Morris and the defendant Pollard, so far as it is material to the determination of this case, is as follows: The learned judge has found that both the defendant Pollard and the defendant Morris are very young men without any business experience. On Dec. 24, 1927, they jointly took a lease of certain lock-up garages from the plaintiff at a rent of £275 per annum. Their combined capital, at the time of their taking possession of the property, was £70, and, by March, 1929, they owed the plaintiff two quarters' rent and another quarter would fall due on Lady Day. They had £40 in the bank and some tools of slight value. On Mar. 14, 1929, the defendant Morris and the defendant Pollard orally agreed to end the partnership as from that date. The learned judge has found that the agreement was that the defendant Morris should take over the liabilities of the partnership as from that date, and that he alone, for the future, would be responsible to the plaintiff for the rent, and that the defendant Pollard should retire from the business, and that the defendant Morris should pay him £50 by instalments at such times as he could manage. On the matter really now in dispute—the liability for rent before Mar. 4, 1929—the learned judge has come to the conclusion that there was no oral agreement on Mar. 4, or at any other time that the defendant Morris should assume the whole liability for the rent already due and unpaid to the plaintiff up to Mar. 4. It is not necessary, on this appeal, more closely to consider the evidence on which the learned judge came to hold that no oral agreement to pay the rent due up to Mar. 4 was come to at that date. I content myself by saying that, in my opinion, there was evidence on which the learned judge could properly arrive at that conclusion.

On April 17, the plaintiff sent a statement of account to the defendants Pollard and Morris showing £206 5s. rent due to June 30 next, the then present quarter being payable in advance, and on April 2, the defendant Morris wrote to the plaintiff in the name of the firm that it was utterly impossible for them to discharge the balance of rent due. He proceeded to make certain alternative suggestions. On April 18, it appears that the defendant Pollard had informed his father, Mr. Sydney Pollard, that he had dissolved partnership with the defendant Morris, and Mr. Pollard senior proceeded to prepare an agreement in writing, which, at the trial, he suggested was based on what his son had told him had been arranged on Mar. 4, A and took it to the garage, where the defendant Pollard and the defendant Morris were present. On the finding of the learned judge that the agreement of Mar. 4 contained no terms as to liability for rent up to Mar. 4, it is impossible, in my view, to hold that the agreement which Mr. Pollard senior drew up did, in fact, represent the oral agreement come to on Mar. 4. The written agreement, which is dated April 20, signed by the defendant Pollard and by the defendant Morris, and B witnessed by Mr. Pollard senior, contains, among other things, the following terms:

> "The lease . . . of the garage situate and being at First Way Raynes Park in the county of Surrey shall be taken over by [the defendant Morris] (to whom [the defendant Pollard] shall release his interest therein) as from Mar. 4, 1929, in consideration of his undertaking all liabilities thereunder and indemnifying the [defendant Pollard] therefrom."

C This written agreement would, if it stood alone, make the defendant Morris liable to indemnify his partner, the defendant Pollard, for the arrears of rent, and, consequently, entitle the defendant Pollard to succeed in this appeal. The real question to be decided is whether, having regard to this finding of the learned judge that the term of the agreement for dissolution of partnership as to arrears of D rent which is in the written agreement of April 20, 1929, was not in the oral agreement of Mar. 4, and to other circumstances to which I shall refer, the court should hold that the defendant Morris is not bound by the written agreement of April 20, 1929, which he undoubtedly signed. The statement of claim against the third party relies on the agreement of April 20, and the defence, after stating that the oral agreement did not include an indemnity for past rent (a fact found in favour E of the defendant), goes on to allege, in para. 4, that

> "the agreement sued upon was prepared by the [defendant Pollard's] father and was intended to embody the said oral agreement—which was the only agreement—and was signed by the defendants Pollard and Morris in the belief that it embodied the said agreement,"

and that it was drawn up and signed, so far as any indemnity was given by the F terms of it, under a "mutual mistake of fact." The mutual mistake of fact, particulars of which were subsequently given, was that

> "neither the defendant Pollard nor the defendant Morris, at the time of the signature of the alleged agreement, knew that the rent was or might be alleged to be owing to the plaintiff."

G Before considering the grounds on which the learned judge has found in favour of the third party, the defendant Morris, as to the indemnity for arrears of rent, I would say that I am quite unable to understand, in the circumstances, how a mutual mistake as to possible liability for rent could vitiate or call for a rectification of the written agreement. In fact, no evidence of such a mutual mistake was adduced, nor does the learned judge base his judgment on any such mutual mistake. No other allegation of mistake was relied on in the pleadings. But the defence, H as I read it, has another limb, in which it is further stated that "the third party never agreed to indemnify the defendant [Pollard] in respect of the matters alleged." It is on this latter defence that the learned judge appears to have founded his judgment. The learned judge has found that Mr. Pollard senior, who was a solicitor, approached the defendant Morris with this formal legal document knowing that he, Morris, was totally unversed in business and not a very clever I young man; that Mr. Pollard did not suggest to Morris that he should go and see Mr. de Fonblanque, Morris's solicitor, and have his assistance, and that, when the document was handed to Morris, he was asked to read it through, and made a pretence of doing so, but that, in fact, he signed the document with practically no consideration of its terms.

The learned judge has then proceeded to treat the written contract as rectified by limiting the liability to that accruing from Mar. 4 which, in effect, is a decision in favour of the defendant Morris on the third-party issue. He appears, however, without authority, as I think, to rectify on the ground of misrepresentation or fraud.

A He says that he does not wish to use the disagreeable word "fraud," but finds that Mr. Pollard senior knew that the written document was imposing new liabilities though he also knew that, in March, the parties had not orally agreed to such liabilities, and that Mr. Pollard senior drew the document of April 20, with the intention that the new liabilities should be added. I do not think that the ground on which he comes to his conclusion—namely, to quote his words,

> B "that the case falls within the principle that where one party reduces to written terms a bargain that has been made, and inserts in those terms a stipulation which he knows the other party did not intend to promise that he is not entitled to take advantage of that mistake of the other party"

can be supported, for such a finding that Mr. Pollard senior inserted into the written terms a stipulation which he knew the defendant Morris did not intend to promise C amounts, if such a finding is to result in rectification or avoidance on the ground of unilateral mistake, to a finding of misrepresentation as to the effect of the document or of fraud, although such a finding is not stated in terms, and, in any event, was made not by the defendant Pollard, the signatory, but by Mr. Pollard senior without any finding of connivance or knowledge of the defendant Pollard. Under R.S.C., Ord. 19, r. 6, in all cases in which the party pleading relies on any misrepresentation of fraud, D particulars shall be stated in the pleadings. Fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts: per THESIGER, L.J., in *Davy Bros., Ltd.* v. *Garrett* (9) (7 Ch.D. at p. 489). A charge of fraud or misrepresentation must be pleaded with the utmost particularity.

It was further attempted in this appeal to set up a defence of non est factum, E though the learned judge does not appear to have relied on any such plea. This defence may be raised where the deed signed is of a nature different from what it is represented to be, so that it was of an entirely different legal category, in which case, in contemplation of law, it may be said that the signatory never did sign it. In the old plea the pleader said "that the alleged deed is not his deed": see BULLEN AND LEAKE (3rd Edn.), p. 467. In this case, the agreement is admittedly known F to be one of dissolution of partnership; at most one term differs from the signatory's intention; there is no misunderstanding as to the nature of the document itself. In such a case, non est factum cannot be pleaded. In *Jervis* v. *Berridge* (10), LORD SELBORNE, L.C., makes the distinction clear. He says (L.R. 8 Ch. at p. 359):

> "The written document signed by the plaintiffs . . . was not . . . a contract valid and operative between the parties, but omitting (designedly or otherwise) some G particular term which had been verbally agreed upon [here we have the converse] but was a mere piece of machinery . . . as subsidiary to and for the purposes of the verbal and only real agreement":

see also *Howatson* v. *Webb* (3) and cases there cited.

The case, therefore, rests in this way: the agreement, on the face of it, to pay the arrears is binding on the defendant Morris; the defence of mistake (as pleaded), H fraud and non est factum alike fail; and in the result this appeal must be allowed.

Appeal allowed.

Solicitors: *Sydney R. Pollard*; *John B. de Fonblanque.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re NEWMAN. SLATER *v.* NEWMAN

[CHANCERY DIVISION (Farwell, J.), July 10, 1930]
[Reported [1930] 2 Ch. 409; 99 L.J.Ch. 427; 143 L.T. 676]

Will—Ademption—Gift of undivided shares in land—Will made in 1919*—Statutory trusts imposed in* 1926*—Conversion of realty into personalty—No confirmation of will—Effect of language wide enough to cover any interest testator might have in realty.*

If a testator in a will made before 1926 used language which must be construed as a devise of real estate, and did not alter or confirm his will after the Law of Property Act, 1925, came into force, then, as the real estate was converted into personalty under the provisions of the Act, the devise fails, but, if the testator used language wide enough to cover any interest he might have in the real estate, the conversion is immaterial, and the devise will take effect.

Re Kempthorne, Charles v. *Kempthorne* (1), [1930] 1 Ch. 268, applied.

Notes. Distinguished: *Re Warren, Warren* v. *Warren*, [1932] All E.R.Rep. 702; *Re Harvey, Public Trustee* v. *Hoskin*, [1947] 1 All E.R. 349. Referred to: *Re Oakes' Will Trusts, Lloyds Bank* v. *Barter* (1948), 92 Sol. Jo. 167.

As to ademption, see 34 HALSBURY'S LAWS (2nd Edn.) 126 et seq.; and for cases see 44 DIGEST 403 et seq. For Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427.

Cases referred to:

(1) *Re Kempthorne, Charles* v. *Kempthorne*, [1930] 1 Ch. 268; 99 L.J.Ch. 177; 142 L.T. 111; 46 T.L.R. 15, C.A.; Digest Supp.

(2) *Re Glassington, Glassington* v. *Follett*, [1906] 2 Ch. 305; 75 L.J.Ch. 670; 95 L.T. 100; 44 Digest 734, *5889*.

(3) *Re Lowman, Devenish* v. *Pester*, [1895] 2 Ch. 348; 64 L.J.Ch. 567; 72 L.T 816; 11 T.L.R. 396; 12 R. 362, C.A.; 44 Digest 428, *2575*.

(4) *Re Mellish, Clark* v. *Buchanan* (1927), cited in, [1929] 2 K.B. at p. 82, n.; Digest Supp.

(5) *Re Wheeler, Jameson* v. *Cotter*, [1929] 2 K.B. 81, n.; 141 L.T. 322; Digest Supp.

Originating Summons.

Francis Ebenezer Newman, by his will dated May 15, 1922, after appointing executors and trustees and giving certain legacies, made the following devise:

> "I devise unto and to the use of my said brother John Vincent Newman his heirs and assigns all my moiety or equal half part or share and all other my share in the factory and hereditaments situate at Rose Alley and Bear Gardens aforesaid upon part of which my firm of E. Newman and Sons carry on business and the other part of which is now in the occupation of Hayes Wharf, Ltd., as underlessees thereof To hold the same for his own beneficial and absolute use subject however to the condition that my said brother John Vincent Newman shall pay to my brother Charles Stanley Newman during his life one-fourth part of the rental which may from time to time accrue or be obtained from the said freehold premises in Rose Alley and Bear Gardens aforesaid such one-fourth part to commence from my death and to be paid quarterly as and when received by the said John Vincent Newman. Should my said brother Charles Stanley Newman predecease me or should he survive me and predecease his present wife then and in either of those events the said John Vincent Newman shall pay to the present wife of the said Charles Stanley Newman during her life one-eighth part of the rental which may from time to time accrue or be obtained from the freehold premises in Rose Alley and Bear Gardens aforesaid such one-eighth part to commence from my death if the said Charles Stanley Newman predeceases me or from the death of the said Charles Stanley Newman if he

> survives me but predeceases his said wife and to be paid quarterly as and when received. On the death of the survivor of them the said Charles Stanley Newman and his present wife my said moiety or equal half part in the said freehold premises at Rose Alley and Bear Gardens shall belong absolutely and unconditionally to the said John Vincent Newman. The condition above as to the payment to the said Charles Stanley Newman or his present wife of the amounts before mentioned is in no way to prevent the said John Vincent Newman from selling the said freehold premises at any time and at such price as he may deem right but in the event of a sale he shall pay to the said Charles Stanley Newman or his present wife as the case may be such a sum as will be equal to the one-fourth or one-eighth share of rent as the case may be based on the average yearly rents for the period between the date of my death and the day of sale."

The testator devised all his real and personal estate whatsoever except what he otherwise disposed of by his will or any codicil thereto to his trustees, their heirs, executors and administrators respectively, according to the nature and tenure thereof respectively, upon trust for sale and conversion, and after payment of his funeral and testamentary expenses and debts and legacies, to stand possessed of the residue upon trust to pay the same to his four sisters or the survivors or survivor of them living at his death, and if more than one in equal shares. The testator and his brother John Vincent Newman were entitled to the freehold property in Rose Alley and Bear Gardens in equal shares as tenants in common. On Jan. 1, 1926, during the testator's lifetime, the Law of Property Act, 1925, came into force, and by s. 35 and Sched. I, Part IV, para. 1 (2), of the Act, the freehold property in Rose Alley and Bear Gardens, being held by the testator and his brother in equal moieties, became vested in them upon the statutory trusts to sell the property and to hold the proceeds upon trust for themselves in equal shares. In March, 1928, the testator and John Vincent Newman sold the Bear Gardens property, but the Rose Alley property remained unsold at the death of the testator. The testator died on Dec. 29, 1929, leaving his brothers John Vincent Newman and Charles Stanley Newman and the wife of Charles Stanley Newman and the testator's four sisters him surviving. Questions arose whether, in consequence of the operation of the Law of Property Act, 1925, the devise of the testator's one moiety of the Rose Alley property to John Vincent Newman took effect, or whether the devise of the property had been adeemed by its conversion through the creation of the statutory trusts, and the present summons was issued by the trustees for the decision (inter alia) of this question.

Pattisson for the trustees.

Sir Thomas Hughes, *K.C.*, and *Watmough*, for John Vincent Newman, Charles Stanley Newman and his wife, referred to *Re Glassington* (2) and *Re Lowman* (3).

Vaisey, *K.C.*, and *Droop* for the four sisters.

FARWELL, J., after stating the facts, said: I have to consider the effect of the will, having regard to what has happened since it was made. By the Law of Property Act, 1925, the property in Rose Alley, being held in undivided shares, became vested in the two brothers upon the statutory trusts to sell, and it is not open to dispute that the effect of the Act was to convert the freehold property into personalty. Where a testator has by his will made before the Act devised realty, and that realty between the date of the will and his death was converted into personalty, there would be ademption, and the devise would not take effect. Was there anything here in the language of the will to prevent ademption, or is there anything in the cases decided since the Act which affects the position?

As to the language of the will, the testator devised "all his moiety or equal half part or share and all other my share" in real estate. As a matter of construction that was a devise of real estate and nothing more. The subject-matter has ceased to exist, as the real estate has been converted into personal estate, and, therefore, A the devise has no effect. Three cases decided since the Act have been cited. *Re Mellish* (4), decided by EVE, J., is not reported, but the case is considered and the effect given in *Re Wheeler* (5), decided by TOMLIN, J. In *Re Mellish* (4), EVE, J., decided that the devise had not been adeemed. It is noticeable that there the devise was of "my share and interest," and EVE, J., felt able to hold that the "interest" in the property passed the proceeds of sale. In *Re Wheeler* (5), B TOMLIN, J., without expressing any opinion, followed *Re Mellish* (4). But one important factor there was that after the Act of 1925 came into force the testator had made a codicil, and in it had confirmed his will. It may be that that fact had some weight with TOMLIN, J. In my opinion, *Re Wheeler* (5) and *Re Mellish* (4) are distinguishable from the present case. I do not suggest that either EVE, J., or TOMLIN, J., did not come to the right conclusion, but both cases have been con- C sidered by the Court of Appeal in *Re Kempthorne, Charles* v. *Kempthorne* (1).

That case is not on all fours with the present case, but there the Court of Appeal affirmed the decision of MAUGHAM, J., that the Act of 1925 had converted real and copyhold estate into personalty, and the remarks of the learned judges have considerable bearing on the present case, though the decision does not bind me here. As I understand the decision, great stress was laid on the use in the will of the D word "interest." RUSSELL, L.J., says ([1930] 1 Ch. at p. 283): "The appellant's difficulty is that the trust for sale operated as a conversion, and that there is nothing in the statute to cause a reconversion." LORD HANWORTH, M.R., deals with *Re Wheeler* (5) and *Re Mellish* (4) and says ([1930] 1 Ch. at p. 289):

> E "Those two cases are to my mind based upon the interpretation given to the gifts in the two wills which the two learned judges found to be specific bequests. We, however, have to deal with a devise in general terms of 'all my freehold and copyhold property.' Those general words must be construed in accordance with the direction of the legislature in the new statutes. Inasmuch as the land in which the testator owned undivided shares is subjected to a trust for sale the general devise is not adequate to cover the proceeds of sale."

F LAWRENCE, L.J., in his judgment, does not deal with the two cases. RUSSELL, L.J., says ([1930] 1 Ch. at p. 293):

> G "The next question which arises is what is the effect of the Act upon the disposition made by this testator in his will? That has been called the ademption point; but I am not sure that that is a strictly accurate description. The position is this. The testator has died leaving a will in which he makes a disposition in general terms of 'all my freehold property, and also makes a general disposition of all his personal estate. The question is which of those two dispositions carries this particular interest of the testator? When once the conclusion is reached that the effect of the Act is to turn his freehold property, so far as it consisted of undivided shares, into personal estate, there can be H only one answer to the question, namely, that the property passes under the general gift of the testator's personal estate."

After dealing with *Re Mellish* (4) and *Re Wheeler* (5), and pointing out that in *Re Mellish* (4) the word "interest" was used, and that in *Re Wheeler* (5) the testator had confirmed his will by codicil, he says:

> I "These two cases are, in my opinion, distinguishable; but if they do by any chance conflict with the decision of MAUGHAM, J., in the present case, I prefer his views to any views inconsistent with them, which may be involved in the decisions in the other two cases."

It appears to me that the result of the authorities is this. If a testator uses language which must be construed as a devise of real estate and does not alter or confirm his will after the Act of 1925 came into force, then, as the real estate has been converted, this devise fails and there is ademption. But if the testator uses language wide enough to cover any interest which he may have in the property, then the conversion is immaterial and the devise takes effect. Here, in my opinion, the language of the will is not apt to pass anything except one moiety of real estate and, there being now no real estate, there is nothing left on which the devise to his brother John can operate. I can only decide the strict legal effect and am not concerned with what the testator would have thought right to do if he had appreciated the effect of the Act of 1925.

Solicitors: *Stock & Slater*; *J. Tickle & Co.*, for *D. W. Harrison*, Bexhill-on-Sea.

[*Reported by* E. K. CORRIE, ESQ., *Barrister-at-Law*.]

Re HAGGER. FREEMAN *v.* ARSCOTT

[CHANCERY DIVISION (Clauson, J.), April 30, 1930]

[Reported [1930] 2 Ch. 190; 99 L.J.Ch. 492; 143 L.T. 610]

Will—Joint will—Surviving testator trustee to carry will into effect—Vested interest acquired by remainderman on death of first testator to die.

A husband and his wife made a joint will whereby the survivor was to take a life interest in their joint property with certain absolute remainders over. They agreed that neither was to revoke the will without the consent of the other. The wife died before the husband died. After the death of the wife, but before the death of the husband, E. P., one of the remaindermen, died.

Held: (i) the husband, having taken a benefit conferred on him by the joint will, was to be treated as holding the property on trust to apply it so as to carry into effect the provisions of the will; (ii) by the will the testators had made a provision which was inconsistent with the survivor taking by survivorship, and when, on the wife's death, the property came within the ambit of the will, it ceased to be held by the testators jointly and the husband had no title to the wife's interest save in so far as he took a life interest under the will; (iii) on the wife's death the property was held on trust for the husband for life with a vested interest in remainder in E.P.

Dufour v. *Pereira* (1) (1769), 1 Dick. 419, applied.

Notes. As to joint wills, see 34 HALSBURY'S LAWS (2nd Edn.) 17–19; and for cases see 44 DIGEST 180–182.

Cases referred to:

(1) *Dufour* v. *Pereira* (1769), 1 Dick. 419; 21 E.R. 332, L.C.; 44 Digest 181, *105*.
(2) *Stone* v. *Hoskins*, [1905] P. 194; 74 L.J.P. 110; 93 L.T. 441; 54 W.R. 64; 21 T.L.R. 528; 44 Digest 181, *107*.
(3) *Re Oldham, Hadwen* v. *Myles*, [1925] Ch. 75; 94 L.J.Ch. 148; 132 L.T. 658; 69 Sol. Jo. 193; 44 Digest 182, *109*.
(4) *Gray* v. *Perpetual Trustee Co., Ltd.*, [1928] A.C. 391; 97 L.J.P.C. 85; 139 L.T. 469; 44 T.L.R. 654, P.C.; 44 Digest 182, *108*.
(5) *In the Estate of Heys, Walker* v. *Gaskill*, [1914] P. 192; 83 L.J.P. 152; 111 L.T. 941; 30 T.L.R. 637; 59 Sol. Jo. 45; 44 Digest 182, *111*.
(6) *In the Goods of Piazzi-Smyth*, [1898] P. 7; 77 L.T. 375; 46 W.R. 426; sub nom. *In the Goods of Smyth*, 67 L.J.P. 4; 44 Digest 181, *98*.

Originating Summons.

On Sept. 19, 1902, John Hagger and his wife, Emma Hagger, made a joint will whereby they declared that certain property was their joint property and that they had agreed to dispose of the said property by the said will. They then gave everything that they possessed at the time of the death of such one of them as should die first to their trustees to pay their debts, funeral and testamentary expenses and certain legacies and to pay the income of the whole of their residuary estate to the survivor of them during his or her life, and as to certain freehold and leasehold property to pay the residue of the proceeds of sale thereof after the death of the survivor of the husband and wife to eight named persons in certain shares, but as regards three of such persons it was provided that the respective shares should go to them should they be living at the death of the survivor of the husband and wife. There was no such conditions made with reference to the respective shares which were to go to the other five persons. The wife died on Feb. 2, 1904. One of the said five persons died on July 15, 1905, another of the said five persons died on April 30, 1923, and another of them died on Oct. 20, 1926. By his will made on Dec. 3, 1921, the husband gave all his property to executors on trust to divide the residue of the proceeds of sale thereof equally between certain persons some of whom were not mentioned in the joint will. He died on Mar. 12, 1928, and his will was referred to in the probate as a codicil to the joint will.

This summons was taken out by the plaintiff, who had an interest under the joint will, to determine inter alia the following questions:

(i) (a) Whether upon the true construction of the joint will and in the events which had happened the whole of the moneys representing the sale of the real and personal property existing at the death of the wife, Emma Hagger, and held by her and the husband, John Hagger, ought to be treated as subject to the trusts of the said joint will and distributed accordingly, or (b) whether the said moneys or any or what part thereof ought to be treated as part of the residuary estate of the said John Hagger. (ii) Whether upon the true construction of the joint will and in the events which had happened the several legacies and shares bequeathed by the said joint will to such of the beneficiaries therein named as survived the wife, Emma Hagger, but predeceased the husband, John Hagger, were payable to the respective legal personal representatives of such beneficiaries or whether such legacies or shares or any or what part thereof respectively were payable to any, and if so what other person or persons.

G. P. Slade for the plaintiff.

Riviere, for the legal personal representatives of Eleanor Palmer, one of the deceased persons entitled in remainder, referred to *Dufour* v. *Pereira* (1), *Stone* v. *Hoskins* (2), *Re Oldham* (3), *Gray* v. *Perpetual Trustee Co., Ltd.* (4), *In the Estate of Heys* (5).

Garsia, for the legal representatives of Ellen Adams, one of those interested in the residuary estate.

Swords, K.C., and *Belsham*, for a surviving residuary legatee under the joint will, referred to *In the Goods of Piazzi-Smyth* (6).

Underhay, for one of the surviving residuary legatees under John Hagger's will, referred to *Dufour* v. *Pereira* (1).

CLAUSON, J., stated the facts and continued: As a matter of construction it is clear that at the moment this document came into operation its effect was to confer a life interest on the survivor of the husband and the wife, and a vested interest in remainder, as to one-sixth of the Wandsworth property, on Eleanor Palmer.

The wife died in 1904, and the joint will was proved as her will. The husband survived her, and during his lifetime Eleanor Palmer died. It has been argued that because of E. Palmer's death in the lifetime of the husband she took no interest in the Wandsworth property. It is admitted, however, that so far as that property could be shown to be the property of the wife, E. Palmer obtained a vested interest on the death of the wife, and there would be no lapse; but it was said that so far as the property could be shown to have belonged to the husband, E. Palmer took no interest, because as regards his part of the property this document only became effective on his death, and that those administering it as the husband's will would have to look round to see who then took an interest in the property, and they would then find that E. Palmer's share had lapsed. It is perfectly clear that when the husband and wife made this joint will they contemplated that the property which they were pooling would all go to the same beneficiaries, whether in its inception it was the property of the husband or the property of the wife, and that, if I fail to give effect to this, in so far as E. Palmer's share is concerned, I shall be departing from the intention of the parties. I am satisfied that the law does not compel me to depart from that intention, and I reach that conclusion on reading the judgment of Lord Camden in *Dufour* v. *Pereira* (1), where he says (2 Hargr. Jurid. Arg. at p. 310):

> "The instrument itself is the evidence of the agreement; and he, that dies first, does by his death carry the agreement on his part into execution. If the other then refuses, he is guilty of a fraud, can never unbind himself, and becomes a trustee of course. For no man shall deceive another to his prejudice. By engaging to do something that is in his power, he is made a trustee for the performance, and transmits that trust to those that claim under him."

To my mind, *Dufour* v. *Pereira* (1) decides that where there is a joint will such as this, on the death of the testator who first dies the position as regards that part of the property which belongs to the survivor is that the survivor will be treated in this court as holding the property on trust to apply it so as to carry into effect the provisions of the joint will. As I read Lord Camden's judgment in *Dufour* v. *Pereira* (1), that would be so even though the survivor did not signify his election to give effect to the will by taking benefits under it. But, in any case, it is clear that Lord Camden has decided that if the survivor takes a benefit conferred on him by the joint will he will be treated as a trustee in this court, and he will not be allowed to do anything inconsistent with the provisions of the joint will. It is not necessary for me to consider the reasons on which Lord Camden based his judgment. Therefore, I am bound to hold, that from the death of the wife the husband held the property, according to the tenor of the will, subject to the trusts thereby imposed upon it, at all events if he took advantage of the provisions of the will. In my view, he did take advantage of those provisions.

The effect of the will was that the husband and the wife agreed that the property should, on the death of the first of them to die, pass to trustees to hold on trusts inconsistent with the right of survivorship, and therefore, the will effected a severance of the joint interest of the husband and wife. By the will they made a provision which was inconsistent with the survivor taking by survivorship. Therefore, the property at the moment when, on the wife's death, it came within the ambit on the will, ceased to be held by the two jointly, and the husband had no title to the wife's interest on her dying in his lifetime, save in so far as he took a life interest under the joint will. From the moment of the wife's death the Wandsworth property was held on trust for the husband for life with a vested interest in remainder as to one-sixth in E. Palmer. So far as the husband's interest in the property is concerned, the will operated as a trust from the date of the wife's death. There is, accordingly, no lapse by reason of Eleanor Palmer's death in the husband's lifetime, but after the wife's death.

Solicitors: *Geo. Reader & Co.*; *Robert A. Kendrick*; *Arnold Carter*, for *Dunn & Baker*, Okehampton.

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law.*]

WINTER *v.* WOOLFE

[KING'S BENCH DIVISION (Avory, Swift and Acton, JJ.), December 1, 1930]

[Reported [1931] 1 K.B. 549; 100 L.J.K.B. 92; 144 L.T. 311;
95 J.P. 20; 47 T.L.R. 145; 29 L.G.R. 89; 29 Cox, C.C., 214]

Criminal Law—Brothel—Occupier permitting premises to be used as brothel—Permitting illicit sexual intercourse—Women resorting to premises not known by police as prostitutes—No payment received by them—Criminal Law Amendment Act, 1885 (48 *&* 49 *Vict.*, *c.* 69), *s.* 13 (2).

To establish that premises are used as a brothel it is sufficient to prove that persons of opposite sexes have come there and had illicit sexual intercourse on the premises. It is not necessary to prove that the women resorting to the premises were known prostitutes or that they received payment. On a prosecution under sub-s. (2) of s. 13 of the Criminal Law Amendment Act, 1885, of the occupier of premises for unlawfully and knowingly permitting them to be used as a brothel, evidence was given that the premises were used for acts of gross indecency and for acts of fornication between men and women resorting there, but it was not shown that the women who resorted to the premises were prostitutes known as such to the police or that they had received any payment for their acts of impropriety or fornication.

Held: there was evidence on which it could be found that persons of opposite sexes had been permitted to come to the premises and there have illicit sexual connection, and, therefore, that the occupier of the premises had committed an offence under the section.

Definition by GROVE, J., and LOPES, J., of a "brothel" in *R.* v. *Holland, Lincolnshire, Justices* (1) (1882), 46 J.P. 312, applied.

Notes. Section 13 (2) of the Criminal Law Amendment Act, 1885, has been replaced by ss. 35 and 36 of the Sexual Offences Act, 1956. Considered: *Egerton* v. *Esplanade Hotels, London, Ltd.*, [1947] 2 All E.R. 88.

As to offences relating to brothels, see 10 HALSBURY'S LAWS (3rd Edn.) 671–675; and for cases see 15 DIGEST (Repl.) 902–907. For Sexual Offences Act, 1956, see 36 HALSBURY'S STATUTES (2nd Edn.) 215.

Cases referred to:

(1) *R.* v. *Holland, Lincolnshire, Justices* (1882), 46 J.P. 312; 15 Digest (Repl.) 903, *8708*.

(2) *Singleton* v. *Ellison*, [1895] 1 Q.B. 607; 64 L.J.M.C. 123; 72 L.T. 236; 59 J.P. 119; 43 W.R. 426; 18 Cox, C.C. 79; 15 R. 201, D.C.; 15 Digest (Repl.) 904, *8715*.

(3) *Durose* v. *Wilson* (1907), 96 L.T. 645; 71 J.P. 263; 21 Cox, C.C. 421, D.C.; 15 Digest (Repl.) 904, *8719*.

(4) *R.* v. *de Munck*, [1918] 1 K.B. 635; 87 L.J.K.B. 682; 119 L.T. 88; 82 J.P. 160; 34 T.L.R. 305; 62 Sol. Jo. 405; 26 Cox, C.C. 302, C.C.A.; 15 Digest (Repl.) 1021, *10,042*.

Case Stated by justices.

An information was preferred by the appellant, William Winter, deputy chief constable for the county of Cambridge, under s. 13 (2) of the Criminal Law Amendment Act, 1885, against the respondent, Eileen Allen Woolfe, for that she, between Nov. 24, 1929, and Feb. 2, 1930, being the occupier of certain premises known as River Cottage and a dance room at Fen Ditton, Cambridge, unlawfully and knowingly did permit such premises to be used as a brothel or for the purposes of habitual prostitution. At the close of the case for the Crown the justices dismissed the information, but consented to state and sign this Case.

The respondent was the occupier of a house known as River Cottage, Fen Ditton (about two miles from Cambridge), and of a dance room on ground adjoining.

The dance room was open for dancing and teas every Sunday from 4 p.m. to 7 p.m., the music for dancing being sometimes supplied by a band and sometimes by a gramophone. In the Case Stated were described in detail acts of lewdness and impropriety which were said to have taken place between 7 and 11 p.m. at these premises by men and women resorting to them on several occasions between the dates charged. There was contained in the Case Stated evidence of actual sexual intercourse having taken place between a man and a woman on Nov. 24, 1929, Dec. 8, 1929 (twice), Feb. 2, 1930 (in a motor car on land adjoining the premises), and on Jan. 26, 1930. At 8.40 p.m. on Nov. 24, 1929, a motor car arrived at the boundary of the premises containing four men and two girls. The occupants went to River Cottage, where the respondent came to the door and said: "Have you been here before to-night," and one of the girls replied: "The men have not, but we girls have." The respondent then went across to the dance room with the party, and put on a gramophone record. Among the females present on the respondent's premises on the evening of Jan. 26, 1930, were two women known to the police of Cambridge (who were keeping observation on these premises) as morally undesirable characters, who, because of their behaviour in Cambridge, had been cautioned by the police, but had never been convicted as prostitutes. There was no evidence that either of these two women behaved improperly at any time on these premises. The respondent was not present on any of the occasions when sexual intercourse took place, but she had knowledge that the couples were on the premises. She was present on various occasions when couples were seen in suggestive and indecent positions. The men present were mostly undergraduate members of the university of Cambridge, and the women were of the working-class type. There was no evidence that the women resorting to the premises were convicted prostitutes, or received any payments for the acts of indecency that had taken place, and there was no evidence that the respondent made any profit out of the conduct of the premises other than that arising out of the sale of teas and similar refreshments.

At the close of the case for the Crown it was submitted on behalf of the respondent that upon this charge there was no case to answer. The justices expressed the opinion (i) that the premises were used for acts of gross indecency and for acts of fornication, the acts of fornication being, in the opinion of one of them, "occasional," and, in the opinion of the other, of such frequency as to be "habitual"; (ii) that the premises were so used with the knowledge, or at all events with the connivance, of the respondent; (iii) that the women resorting to the premises were not prostitutes within the meaning of the legal definition of the word "prostitute," as laid down in the decisions of *Singleton* v. *Ellison* (2), *Durose* v. *Wilson* (3), and *R.* v. *de Munck* (4); (iv) that the acts of gross indecency and fornication did not amount to "prostitution" within the meaning of s. 13; and (v) that the respondent had not committed the offence alleged. Accordingly, they dismissed the information, and the appellant appealed.

By the Criminal Law Amendment Act, 1885, s. 13:

> "Any person who (1) keeps or manages or acts or assists in the management of a brothel, or (2) being the tenant, lessee, or occupier of any premises, knowingly permits such premises or any part thereof to be used as a brothel or for the purposes of habitual prostitution or . . . shall on summary conviction in manner provided by the Summary Jurisdiction Acts be liable [to the penalty or punishment therein provided]. The Criminal Law Amendment Act, 1922, s. 3, has substituted other penalties for those in s. 13, the provisions for which are repealed."

Grafton D. Pryor for the appellant.
Eustace Fulton for the respondent.

AVORY, J.—The respondent was charged upon an information for that she on divers days and at divers times on and between Nov. 24, 1929, and Feb. 2, 1930, at the parish of Fen Ditton in the county of Cambridge, being the occupier of certain premises known as River Cottage and a dance room adjoining, unlawfully and knowingly did permit such premises to be used as a brothel or for the purposes of habitual prostitution, contrary to s. 13 of the Criminal Law Amendment Act, 1885. The justices dismissed that information upon the findings and grounds which are set out in the Case Stated. They say (a) that the premises were used for acts of gross indecency and for acts of fornication—the acts of fornication being in the opinion of one of them "occasional" and of the other of such frequency as to amount to "habitual"; (b) that the premises were so used with the knowledge, or at all events with the connivance, of the respondent; but (c) that the women resorting to the premises were not prostitutes within the meaning of the legal definition of the word "prostitute" as laid down in the decisions that had been cited to them, namely, *Singleton* v. *Ellison* (2), *Durose* v. *Wilson* (3), and *R.* v. *de Munck* (4). Lastly, the justices said that in their opinion the acts of gross indecency and fornication did not amount to prostitution within the meaning of this Act. For these reasons the justices came to the conclusion that the respondent had not committed the legal offence that was alleged in the information.

In my opinion, the justices have given too restricted a meaning to the word "brothel" as it is used at common law and in s. 13 of the Criminal Law Amendment Act, 1885. It is not disputed that the justices have dismissed this information on the ground that the women resorting to these premises were not known by the police as prostitutes, and that there was no evidence that the women resorting to these premises for the purpose of fornication, and resorting to them frequently, received any payment. That appears from the statements of counsel on the arguments advanced to the court to have been the reasoning that influenced the justices. There was evidence before them from which the reasonable inference was that a number of men were resorting to these premises for the purpose of committing fornication with women who resorted there for the same purpose. One example of this evidence is in the Case Stated, from which it appears that on Nov. 24, 1929, at 8.40 p.m., a motor car arrived containing four men and two girls. The occupants went to River Cottage and the respondent came to the door and said: "Have you been here before to-night," and a girl replied: "The men have not, but we girls have." From this and the other evidence in the case the inference is that these girls had been resorting to the place for improper purposes with the men who came with them. That of itself is quite sufficient to justify the inference that these premises were being used for the purposes of prostitution in the ordinary sense of the word—quite apart from any inference that these women could be described in the ordinary sense of the word as public prostitutes. I am content to accept the definition of a brothel given by Grove, J., and Lopes, J., in *R.* v. *Holland, Lincolnshire, Justices* (1). Grove, J., said:

> "The sole question is whether there was any evidence to support this conviction before the justices for permitting these licensed premises to be a brothel . . . I do not think that the matter of nuisance is of any importance, for it is too well known that these places are often kept in such a way as to be no nuisance at all, but kept perfectly private. But what needs only to be proved is this, namely, that the premises were kept knowingly for the purpose of people having illicit sexual connection there."

Lopes, J., said:

> "Now the sole question before the justices was whether the applicant permitted his premises to be a brothel. What is the meaning of permitting the premises to be a brothel? I think my brother Grove has given a very apt definition, namely, that it is permitting people of opposite sexes to come there and have illicit sexual intercourse. That is a very complete and satisfactory definition of the whole matter."

There was in this case evidence upon which the only reasonable inference was that these men and women were resorting to these premises habitually for the purpose of having illicit sexual intercourse, and of this, on the evidence, it is not

A really disputed that the respondent must have known. In fact, the justices stopped the case at the conclusion of the evidence for the Crown on the ground that the women who resorted to the premises were not shown to be prostitutes within the ordinary meaning of that word. The appeal will be allowed and the case remitted to the justices to hear and determine according to the law as it is now laid down by this court.

B

SWIFT, J.—I am satisfied that there was evidence on which, if uncontradicted, the justices ought to have come to the conclusion that the respondent was unlawfully and knowingly permitting these premises to be used as a brothel. As the evidence stands at present it appears that these premises were being used with the knowledge or connivance of the respondent for the purpose of people of opposite sexes having illicit sexual connection there—that is to say, at premises of which C the respondent had the control, being a bawdy-house at common law and a "brothel" within the meaning of s. 13 (2) of the Criminal Law Amendment Act, 1885. I say nothing as to whether it appeared that these premises were being used for the purposes of habitual prostitution. It is sufficient for my judgment to say that, in my opinion, the evidence as it stands shows that these premises were being used as a brothel.

D

ACTON, J.—I agree.

Appeal allowed. Case remitted.

Solicitors: *Field, Roscoe & Co.*, for *Guy W. Stanley & Shaw*, Cambridge; *Smith, Rundell, Dods & Bockett.*

E

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

F

SIVIOUR *v.* NAPOLITANO

[KING'S BENCH DIVISION (Avory, Swift and Charles, JJ.), December 16, 1930]

G

[Reported [1931] 1 K.B. 636; 100 L.J.K.B. 151; 144 L.T. 408; 95 J.P. 72; 47 T.L.R. 202; 75 Sol. Jo. 80; 29 L.G.R. 195; 29 Cox C.C. 236]

Criminal Law—Brothel—Lessee permitting premises to be used for prostitution—Need to prove immediate control of premises—Criminal Law Amendment Act, 1885 (48 *&* 49 *Vict. c.* 69), *s.* 13 (2).

H

By s. 13 of the Criminal Law Amendment Act, 1885: "Any person who . . . (2) being the tenant, lessee, or occupier of any premises, knowingly permits such premises or any part thereof to be used as a brothel, or for the purposes of habitual prostitution . . . shall on summary conviction" be liable to a penalty.

Held: the word "lessee" in s. 13 (2) meant a lessee having immediate control of the premises so used.

I

N., a lessee for a term of years of premises, sub-let unfurnished a part of them, i.e., two flats, to two women who were said to be prostitutes. Apart from his position as landlord, N. had no right to enter the flats.

Held: on a charge against N. for that he, being the lessee of the premises, unlawfully and knowingly permitted part of them, namely, the two flats, to be used for the purposes of habitual prostitution, that N. was not a "lessee" of the premises within the meaning of the subsection.

Notes. Section 13 (2) of the Criminal Law Amendment Act, 1885, has been replaced by s. 36 of the Sexual Offences Act, 1956.

As to offences relating to brothels, see 10 Halsbury's Laws (3rd Edn.) 671–675; and for cases see 15 Digest (Repl.) 902–907. For Sexual Offences Act, 1956, see 36 Halsbury's Statutes (2nd Edn.) 215.

Case Stated by a metropolitan magistrate.

An information was preferred by Police-sergeant George Siviour, the appellant, against Francesco Paolo Napolitano, the respondent, for that he, being lessee of certain premises, to wit, No. 7, Kingly Street, Westminster, unlawfully and knowingly permitted part of such premises, to wit, the first and second floors, to be used for the purposes of habitual prostitution.

The respondent was the lessee of the whole of the premises, 7, Kingly Street, and had held the lease for some seven years. The premises consisted of a shop and three floors above. The respondent carried on a tailor's business on the ground floor and basement. Two upper floors which were approached by a separate entrance and not through the shop were sub-let respectively by the respondent unfurnished as flats to two women. Apart from his position as landlord the respondent had no right to enter the flats and did not occupy them. Observation was kept upon the premises by the police who stated that the two women were known to them as prostitutes and took men to their respective flats, but that no other women used the premises and the user of the two sub-tenants was confined each to her own flat.

It was contended by the appellant that as lessee of the whole of the premises the respondent was liable under sub-s. (2) of s. 13 of the Criminal Law Amendment Act, 1885, subject to knowledge of the immoral use to which the women were putting the premises occupied by them being established. It was contended on behalf of the respondent that the respondent was not a lessee within the meaning of the subsection. The learned magistrate was of opinion that, even if the premises were used for the purposes of habitual prostitution and the respondent knowingly permitted it, he was not guilty of the offence since only those who had immediate control of the premises were responsible, and he dismissed the charge.

By s. 13 of the Criminal Law Amendment Act, 1885:

> "Any person who: (1) keeps or manages or acts or assists in the management of a brothel, or (2) being the tenant, lessee, or occupier of any premises, knowingly permits such premises, or any part thereof, to be used as a brothel, or for the purposes of habitual prostitution, or (3) being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same or any part thereof with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is wilfully a party to the continued use of such premises or any part thereof as a brothel, shall on summary conviction in manner provided by the Summary Jurisdiction Acts be liable"

to a penalty.

R. P. Croom-Johnson, K.C., and *Eustace Fulton* for the appellant.

J. C. Maude for the respondent.

AVORY, J.—We have to consider the opinion of the learned magistrate that, even if the premises were used for the purposes of habitual prostitution and the respondent knowingly permitted it, he was not guilty of the offence charged against him. The respondent was summoned for that he, being lessee of certain premises, "unlawfully and knowingly permitted part of such premises, to wit, the first and second floors, to be used for the purposes of habitual prostitution." The respondent, therefore, was summoned as being the lessee of the whole premises, and not as being the lessee of the flats. The learned magistrate, in construing sub-s. (2) of s. 13 of the Criminal Law Amendment Act, 1885, said that he considered only those who had immediate control of the premises were responsible and that the word "lessee" must be construed ejusdem generis with "tenant" and "occupier," by which I understand he meant that "lessee" must be construed as meaning a lessee in occupation of the two flats. He said further that the word "lessee" was probably A included ex abundanti cautela to include a tenant for a longer term than three years; the fact that the respondent was the lessee to a third party was irrelevant, and he was no more liable on that account than if he had been the freeholder; and s. 13 (3) alone dealt with permission by a landlord of immorality by his tenant, that being the relation in the present case. In my view, this construction of s. 13 (2) is correct, and it is true to say that the relation of the respondent to the two B women was that of a landlord to tenants, and that he was not, as far as these flats were concerned, a "lessee" of them within the meaning of sub-s. (2) of this section. The appeal must be dismissed.

SWIFT, J.—I agree.

C

CHARLES, J.—I agree.

Appeal dismissed.

Solicitors: *Allen & Son*; *Percy Robinson & Co.*

[*Reported by* C. G. Moran, Esq., *Barrister-at-Law.*]

D

E

Re BOLTON. Ex parte NORTH BRITISH ARTIFICIAL SILK, LTD.

[Chancery Division (Luxmoore, J.), October 28, 1929, January 29, 30, February 12, 1930]

F

[Reported [1930] 2 Ch. 48; 99 L.J.Ch. 209; 143 L.T. 425; [1929] B. & C.R. 141]

Company—Shares—Forfeiture—Non-payment of money due on allotment and for calls—Shares re-allotted to other holders at a loss—Bankruptcy of shareholder—Company only entitled to prove for actual loss suffered.

A company by its articles had power to forfeit shares for non-payment of G moneys due on allotment and calls, and, notwithstanding the forfeiture, to require the defaulter to pay all calls or money owing at that time. In 1928 the company exercised its powers of forfeiture in the case of one B. who had defaulted in the payment of sums due on allotment and calls. The company then sold and re-allotted the shares to other persons, but in so doing sustained loss. B. having become bankrupt, they claimed to prove in his bankruptcy. H

Held: on construction of the prospectus and articles of association of the company the contract between the company and the bankrupt provided that the liability of the bankrupt on the forfeiture of his shares should be limited to the actual loss suffered by the company, and, therefore, the sums received from the new allottees of the shares must enure for the benefit of the bankrupt, and the company could only prove for the difference between those sums I and the sum owed to the company by the bankrupt.

Re Randt Gold Mining Co. (1), [1904] 2 Ch. 468, applied.

Notes. As to forfeiture of shares, see 6 Halsbury's Laws (3rd Edn.) 265–268; and for cases see 9 Digest (Repl.) 441 et seq.

Cases referred to:

(1) *Re Randt Gold Mining Co.*, [1904] 2 Ch. 468; 73 L.J.Ch. 598; 91 L.T. 174; 53 W.R. 90; 20 T.L.R. 619; 12 Mans. 93; 9 Digest (Repl.) 451, *2964*.

(2) *Randt Gold Mining Co.* v. *New Balkis Eersteling, Ltd.*, [1903] 1 K.B. 461; 72 L.J.K.B. 143; 88 L.T. 189; 51 W.R. 391; 19 T.L.R. 215; 10 Mans. 289, C.A.; affirmed sub nom. *New Balkis Eersteling, Ltd.* v. *Randt Gold Mining Co.*, [1904] A.C. 165; 73 L.J.K.B. 384; 90 L.T. 494; 52 W.R. 561; 20 T.L.R. 396; 48 Sol. Jo. 368, H.L.; 9 Digest (Repl.) 451, *2963*.

Motion by North British Artificial Silk, Ltd., by way of appeal from the rejection of their claim against the estate of one Bolton, a bankrupt

The facts appear in the judgment.

Vaisey, K.C., and *Kingham* for the company.
Stable for the trustee in bankruptcy.

Cur. adv. vult.

Feb. 12. **LUXMOORE, J.**, read a judgment in which he stated the facts, found that the forfeiture was valid and effective under the articles, and continued: It is, therefore, necessary to consider the alternative submission put forward by counsel for the trustee. On Oct. 11, 1928, it is admitted, there was due from the bankrupt to the company for calls and interest the total sum of £7,264 11s. 3d. It is agreed that the company by its subsequent re-allotment of the forfeited shares has received £6,162 12s. 6d. Counsel has argued that the only proof the company can make in the circumstances is for £1,101 18s. 9d. It is admitted that, if articles are silent as to the liability existing at the time of forfeiture of a shareholder whose shares are forfeited, the company on forfeiture gets its shares back and the shareholder who has had his shares forfeited is wholly discharged from his liability. To get over this difficulty an article to the effect of art. 34, by which the shareholder is to remain liable for all calls or other money owing on the shares at the time of forfeiture, is almost invariably inserted in all modern articles of association. Counsel for the trustee has contended that, notwithstanding this article the company cannot in fact receive more than the actual damage it has suffered, that is, the amount unpaid at the date of the forfeiture in respect of calls made and the liability in respect of uncalled capital together with the interest of which the company has been deprived by reason of the non-payment. At the date of the forfeiture no doubt £7,264 11s. 3d. was the total sum owing by the bankrupt on the two heads, but before the proof in the bankruptcy was put in the company had received aliunde in respect of the shares the total sum of £6,162 12s. 6d., so that in fact the only damage suffered by the company by reason of the bankrupt's default is the sum of £1,101 18s. 9d. Counsel has contended that this is all that the company would have recovered against the bankrupt if the bankruptcy had not supervened and an action had been brought against him, and consequently this is the only sum for which proof can be admitted in the bankruptcy.

In my view, this contention is sound. The application for the shares followed by the allotment of those shares to the bankrupt constituted a contract between him and the company, the terms of which are to be found in the prospectus and articles of association. If the contract is broken by the allottee the company is entitled to recover damages for the breach. The quantum of the damages is the same whether the appropriate relief is by action or proof in the bankruptcy. It is true the parties to the contract can always provide that the damage is to be a particular sum, and if they do so provide the question arises: "Is the agreement to pay the particular sum an agreement to pay liquidated damages or a penalty?" If the result of the agreement to pay a particular sum is that far more than the actual loss may be recovered, then the particular sum may be treated as a penalty and the excess over the actual damage may be irrecoverable. In the present case there is no agreement to treat the sum due at the date of the forfeiture as liquidated damages. The agreement, in my view, only provides that the liability of the shareholder whose shares have been forfeited is to remain with a limit of the liability to the amount due at the date of the forfeiture. In respect of this liability the company can recover the actual loss suffered not exceeding the limit fixed. In other words the company must give credit for all sums received or receivable in mitigation of the damage.

There is no reported case which covers the facts of the present case, but the converse appears to have been decided by Buckley, J., in *Re Randt Gold Mining Co.* (1). But before I refer to that decision it will, I think, be convenient if I refer to another decision in connection with the same company which led up to that case. It is the *New Balkis Eersteling, Ltd.* v. *Randt Gold Mining Co.* (2). The decision was that when shares which have been forfeited for non-payment of a call are sold and a certificate of proprietorship is given to the purchaser stating that he is to be deemed to be the holder of the shares discharged from all calls due before the date of the certificate, the purchaser is liable for payment of future calls. The shares in question, which were of the nominal value of 5s. each, had originally been allotted to African Gold Properties, Ltd., and that company paid up 3s. 4d. on each share. The remaining 1s. 8d. was called up, and it was by reason of the failure of African Gold Properties, Ltd., to pay this call that the forfeiture took place. The Randt company, having forfeited, sold the shares to the appellant company, a certificate being issued stating that "the remaining 1s. 8d. per share has been called up and is payable by African Gold Properties, Ltd., who were the holders of the said shares prior to the same being forfeited." After the sale to the appellant company, Randt company made a call of 1s. 3d. per share in respect of the shares sold to the appellant company. The appellant company refused to pay, claiming that the liability was that of African Gold Properties, Ltd., and that they (the appellant company) were under no liability at all. Bucknill, J., the Court of Appeal and the House of Lords all decided that the appellant company was liable to pay the call of 1s. 3d. Lord Lindley in the course of his judgment said:

> "What would be the result if under a certificate of this kind, or proceedings of this sort, the Randt company were endeavouring to raise more than 5s. per share, I do not know; but that point has not arisen. I can conceive that there might be difficulties then . . . the Randt company are not attempting by this machinery to raise more money per share than they were by the Act authorised to raise."

That decision was followed very shortly afterwards by a claim by the liquidator of the Randt company (which had then gone into liquidation) against the New Balkis company for 5d. per share in respect of the 1s. 8d. per share which African Gold Properties, Ltd., had failed to pay at the date when the forfeiture became effective. Under the articles of the Randt company African Gold Properties, Ltd., remained liable for the unpaid calls of 1s. 8d. per share notwithstanding forfeiture. The Randt company obtained from African Gold Properties, Ltd., about 5d. per share on account of this liability. The New Balkis company resisted the payment of the 5d. per share on the ground that the Randt company had in fact received that sum from African Gold Properties, Ltd., in respect of the same shares for which the 5d. liability was being sought to be enforced against it, and that, if the 5d. per share was paid by the New Balkis company, the Randt company would receive 5s. 5d. in respect of each of the shares of the nominal value of 5s. Further, that although African Gold Properties, Ltd., paid the 5d. after forfeiture and under the special contract contained in the article, yet the New Balkis company was entitled to claim the benefit of that payment as being a payment on account of the outstanding calls. Buckley, J., assented to that view, and I will read the material passage from his judgment:

> "The material question is not what was the character of the person who paid, but what was the character of the payment made. If the company have received payment of 5d. in respect of the 5s., the nominal amount of the share, they cannot enforce payment of it a second time. In my judgment, it is plain that the 5d. was paid in respect of the 5s. payable upon the share. The special contract is that the member whose shares have been forfeited shall be liable

to pay all calls 'owing upon or in respect of such shares.' The payment which he made was made under a liability to pay the call upon or in respect of the shares at the time of forfeiture. Its payment was pro tanto, a discharge of the 5s. Suppose that a third party has guaranteed to a limited company the payment by a member of his calls upon his shares, and that under that guarantee the company recovers against the guarantor and not against the member, still the payment made by the guarantor will be a satisfaction pro tanto of the liability on the shares just as much as if the payment had been made by the member. I see no ground upon which the company should be entitled to recover the 5d. twice over—once from the forfeited member, and again from the member who becomes the purchaser after the forfeiture. The purchaser is liable for the whole amount unpaid, but not for the whole amount irrespective of such payments as the company may recover from the forfeited member."

In my judgment, the principle of that decision must cover the converse case, and to the extent that the new allottee pays up the uncalled capital this payment must enure for the benefit of the original allottee who has forfeited and release him pro tanto in respect of the damages for which his breach of contract in failing to pay the calls rendered him liable. For it would seem absurd to suggest that if the company sues the original allottee before seeking to make the new allottee liable the company can only recover the amount of the unpaid calls, while, if it sues the new allottee first, it can, having recovered the full amount of the unpaid calls from such new allottee, then proceed to recover the same amount from the original allottee and to the extent of the value of the unpaid calls receive the nominal amount of the share twice over. For these reasons I think the argument of counsel for the trustee must prevail, and the proof of the North British Artificial Silk, Ltd., must be limited to the £1,101 18s. 9d.

Solicitors: *Grundy, Kershaw, Samson & Co.*; *Thomas Cooper & Co.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

STURLEY *v.* POWELL

[KING'S BENCH DIVISION (Scrutton and Slesser, L.JJ., sitting as additional judges), February 7, 1930]

[Reported [1930] 1 K.B. 677; 99 L.J.K.B. 197; 142 L.T. 484; 46 T.L.R. 236; 18 Asp.M.L.C. 97]

Fishing—Dispute between boat owner and seaman—Recovery of money lent—Jurisdiction of county court—Merchant Shipping Act, 1894 (57 *&* 58 *Vict.*, *c.* 60), *s.* 387.

By the Merchant Shipping Act, 1894, s. 387: "A superintendent shall inquire into, hear, and determine any dispute, either between the owner of a fishing boat and the skipper or a seaman of the boat, or between the skipper of a fishing boat and any seamen of the boat concerning—(i) the skipper's or seaman's wages or his share in the profits of the voyage or trip or a fishing catch, or any deduction therefrom . . . if any party to the dispute calls on him to decide it, and his decision thereon shall be final and binding on all persons. . . ."

The plaintiffs, who were the owners of a fishing vessel, claimed £100 from the defendant, who had been a member of the crew and chief engineer. Half-yearly running agreements providing for the distribution of the net profits of the sale of the fish caught on each voyage were signed by the skipper and each member of the crew. A practice had, however, arisen by which, in cases when voyages resulted in a loss or only in a very small profit, the owners by way of loan paid each member of the crew a sum sufficient to bring his share of the remuneration up to £3 per week. The defendant had during his period of employment drawn from the plaintiff's agents the £100 in excess of the amount due to him as his share of the profits. The defendant contended that the county court judge had no jurisdiction to hear the action, by reason of the provisions of s. 387.

Held: the county court judge had jurisdiction because (per SCRUTTON, L.J.) there were no clear words excluding that jurisdiction in s. 387 (per SLESSER, L.J.) (i) the action was for money lent which did not fall within s. 387, (ii) a superintendent had jurisdiction under s. 387 only when he had been called on to decide a dispute and neither party had called on a superintendent in the present case, (iii) an action for money lent did not arise out of the Act of 1894, and, therefore, it was not necessary for the county court to have recourse to s. 387.

Notes. As to disputes concerning the wages of the crew of a sea fishing boat, see 17 HALSBURY'S LAWS (3rd Edn.) 390. For Merchant Shipping Act, 1894, s. 387, see 23 HALSBURY'S STATUTES (2nd Edn.) 596.

Appeal from Haverfordwest County Court.

The plaintiffs, Sturley and others, were the owners of a steam fishing boat constructed as a drifter and used for the purpose of fishing by line. The defendant, Powell, was a member of the crew and chief engineer of the vessel from May, 1924, to November, 1927. Half-yearly running agreements were signed by the skipper and each member of the crew. These provided, inter alia, that the net profits of the sale of the fish caught on each voyage should be divided, after deduction of expenses, and into twelve and a half shares. Five of these shares were to be the owners', and seven and a half the crew's; the crew's shares were to be divided in certain proportions, the defendant's proportion of the whole being one-and-one-eighth shares. A practice had arisen in cases, where voyages resulted in a loss or only in a very small profit, by which the owners paid each member of the crew a sum sufficient to bring his share of the remuneration up to £3 per week. The defendant contended, on this point, that the agreement was that he should have £3 per week as a minimum wage, plus a share of the profits, if these were sufficiently large. The plaintiffs, on the other hand, contended—and the judge accepted their contention at the trial—that the agreement was that the defendant's wages were to be his share of the profits only, but that after an unsuccessful trip they would help him by paying him £3 per week, on the understanding that that sum in so far as it exceeded the defendant's share of profits, was to be merely a loan, to be repaid to the plaintiffs out of the profits of a successful trip. In February, 1929, the plaintiffs brought this action against the defendant alleging that the defendant during his period of employment had from time to time drawn certain sums from the plaintiffs through their agents on account of his share of the net profits of sale of the catches of fish, which sums on a settlement of accounts between the parties exceeded by £106 10s. 4d. the amount to which the defendant was entitled in respect of that share. They claimed from the defendant £100, part of that sum, the excess of which they abandoned. The defendant, in his defence, said that he was not indebted to the plaintiffs in the sum claimed or at all; that the agreement between the parties was that at the end of each voyage the accounts in respect of it should be settled; that they had been settled accordingly, and that all moneys due to the defendant, and no more, had been paid to him by the plaintiffs in complete discharge and satisfaction of his share of profits or wages for each voyage; and that by virtue of the Merchant Shipping Act, 1894, s. 387, the court had no jurisdiction to hear the dispute. The plaintiffs gave evidence at the trial in support of their contentions to the effect that the sums advanced in so far as they exceeded the defendant's share of profits were merely loans, and the county court judge accepted this evidence. There remained for him to consider the question of his jurisdiction under s. 387 of the Merchant Shipping Act, 1894.

He held that there was here no dispute within the provisions of the section for a superintendent to inquire into; that no party to any such dispute had called upon the superintendent to decide it; that the jurisdiction of the superintendent was not exclusive of that of the county court, and that, therefore, the county court had jurisdiction to hear and determine the action. He gave judgment for the plaintiffs for £100. The defendant appealed on the ground that the county court judge was wrong in holding that he had jurisdiction to try the action.

E. A. Digby, *K.C.*, and *E. Jenkin Jones* for the defendant.
T. J. O'Connor, *K.C.*, and *G. W. Williams* for the plaintiffs.

SCRUTTON, L.J.—This case raises a question of some importance to fishermen who are remunerated by a share in the catch of fish. The agreement between the parties provided that the defendant was to have one-and-one-eighth share of the net profits of each catch. It is obvious that fishermen cannot rely on the amount of the catch as being in any degree constant, as they may return from a trip with a very poor catch, and, accordingly, a practice seems to have arisen by which the catches were averaged by the fisherman receiving £3 a week. On this point there was a substantial dispute between the parties. The defendant said that the agreement was that the fisherman was to have £3 a week as a minimum wage, plus a share of the catch, if the profits were sufficiently great. The plaintiffs said that the agreement was that the fisherman's wages should be his share of the catch only, but that they promised to help him after a poor trip by paying him £3 a week, but part of that £3 was to be merely a loan to be repaid out of the profits of a successful trip. The defendant was in a difficulty in regard to his contention that £3 a week was to be a minimum wage, because he was trying to set up a claim to wages that is not to be found in the articles of agreement. The county court judge found that the arrangement was as the plaintiffs stated it to be.

Before he entered on a discussion of the facts to enable him to arrive at that finding, a point in regard to his jurisdiction was taken. It was said on behalf of the defendant that s. 387 of the Merchant Shipping Act, 1894, which provides that a superintendent shall inquire into any dispute between the owner of a fishing boat and a seaman concerning the seaman's wages or share of the profits of a trip or catch, excluded the jurisdiction of the county court. As is said in MAXWELL ON THE INTERPRETATION OF STATUTES (7th Edn.), c. 5, which was referred to by SLESSER, L.J., during the argument, there is a presumption that the jurisdiction of the court is not excluded by a statute, if the court had jurisdiction before the statute which contains the provision relied upon as excluding jurisdiction, unless there are clear words of exclusion in the statute. The county court judge has taken the view that this is really a claim for money lent after trips where there was a poor catch, and that the plaintiffs lent the defendant money on the terms that it should be repaid out of the catches of profitable trips, when the defendant's share of profits amounted to more than £3 per week. The county court has always had jurisdiction to deal with actions for money lent. To exclude its jurisdiction, where money was lent in connection with a fishing trip, plain words of exclusion would be needed, and no such words are to be found in s. 387 of the Merchant Shipping Act, though plain words of exclusion do occur in certain other Acts, as, for example, the Friendly Societies Acts. The county court judge took the view that there are no words in s. 387 excluding the jurisdiction of the county court and I am of opinion that he was right in that view, and that, therefore, the county court had jurisdiction. It is not for us to decide whether he was right or wrong in the conclusion of fact to which he came, though, as I have pointed out, the fisherman was in a difficulty in regard to establishing his view of the facts, because he was asking for wages not provided for in the articles of agreement.

I do not decide, and do not intend to decide, what may happen in a case where a superintendent does inquire into a dispute and at the same time there is an action proceeding in the county court. Very possibly, the reasons which induce the High Court to restrain or not to restrain arbitration proceedings, or to restrain or not to restrain High Court proceedings when there is an arbitration, might be applicable to such a case. That question does not arise here, as there has been no call on the superintendent to inquire into the dispute. I decide this case on the ground that there are no words in s. 387 of the Merchant Shipping Act, 1894, excluding the jurisdiction of the county court in matters in which it previously had jurisdiction.

SLESSER, L.J.—I agree. The sole question argued before us has been whether the county court had or had not jurisdiction to entertain this claim by reason of s. 387 of the Merchant Shipping Act, 1894. The county court judge has found that the money sued for was a loan. He said: "The said advances were loans," and, in my judgment, on that view of the case the matter does not in any event fall within the language of the section, which does not apply to an action for money lent. That is the first ground on which I think the objection in regard to jurisdiction ill-founded. Secondly, the superintendent is required to hear and determine a dispute only when a party to the dispute calls upon him to decide it, and it is not suggested here that either party has so called upon him. If he had proceeded to hear and determine this case, he would have done so without authority under the statute, because his authority arises only when a party to a dispute calls upon him. Thirdly, even had he been called upon to decide the dispute and had the subject-matter of it been one which fell within the section, I can find nothing in the section to prevent a proceeding started in the county court in respect of the dispute being a valid proceeding, and the judgment given as a result of that proceeding being a valid judgment. The jurisdiction of the county court to hear and determine a dispute in an action for money lent does not arise out of the Merchant Shipping Act, and, therefore, it is not necessary to have recourse to s. 387. We have, therefore, a case where there is ordinary jurisdiction in the court altogether apart from s. 387, and where there are no words in the section which preclude the county court from exercising the jurisdiction of which it was otherwise possessed. For the reasons which my Lord has stated, and on the principles laid down in MAXWELL'S INTERPRETATION OF STATUTES, I am of opinion that in this case there is no reason to suppose that the legislature intended the county court judge's jurisdiction to be excluded. The objection to jurisdiction therefore fails and the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Berrymans*, for *J. Evan Rowlands*, Swansea; *Peacock & Goddard*, for *Eaton, Evans & Williams*, Milford Haven.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

LOCK *v.* BELL

[CHANCERY DIVISION (Maugham, J.), February 20, 21, 1930]
[Reported [1931] 1 Ch. 35; 100 L.J.Ch. 22; 144 L.T. 108]

Sale of Land—Contract—Time of the essence—Completion "on or about" specified date—Sale of interest in licensed premises.

On Oct. 19, 1928, the plaintiff agreed to sell to the defendant all her interest in a public-house, called The Thorns, for £1,200. The defendant was then licensee of another house called The Crown. The purchase was to be completed "on or about Nov. 10, 1928," and on default by the defendant a deposit paid by him of £120 was to be forfeited and he became liable to pay "the sum of £200 hereby mutually agreed upon to be the damages ascertained and fixed on breach" of the agreement. The defendant having failed to complete on Nov. 10, the parties agreed to delay completion until Dec. 8, but the defendant again failed to complete. On a claim by the plaintiff for a declaration that the agreement had been rescinded and for the payment to her of the deposit of £120 and £200 damages,

Held: (i) on the true construction of the contract completion must take place by the date mentioned or within a very short time thereafter, and in such a contract as the present it would be wrong for a court of equity to restrain the legal consequences of the contract according to that construction, and, therefore, time must be regarded as essential and the plaintiff was entitled to the declaration sought and the payment to her of the deposit; but (ii) as, under the contract, the £200 damages would become payable on a trivial breach or breaches, the payment of that sum must be regarded as a penalty with the result that the plaintiff could not recover it.

Per **Curiam:** Any doubts arising as to the true interpretation of "on or about Nov. 10" were entirely removed when Dec. 8 was definitely fixed for completion.

Notes. As to time of performance of a contract generally, see 8 HALSBURY'S LAWS (3rd Edn) 163–167; and as to that of a contract for the sale of land, see 29 HALSBURY'S LAWS (2nd Edn.) 296–300. For cases see 12 DIGEST (Repl.) 343–354 and 40 DIGEST (Repl.) 116 et seq.

Cases referred to:

(1) *Weston* v. *Savage* (1879), 10 Ch.D. 736; 48 L.J.Ch. 239; 27 W.R. 654; 40 Digest (Repl.) 260, *2191*.
(2) *Coslake* v. *Till* (1826), 1 Russ. 376; 38 E.R. 146; 40 Digest (Repl.) 119, *930*.
(3) *Stickney* v. *Keeble*, [1915] A.C. 386; 84 L.J.Ch. 259; 112 L.T. 664, H.L.; 40 Digest (Repl.) 120, *942*.
(4) *Tilley* v. *Thomas* (1867), 3 Ch. App. 61; 17 L.T. 422; 32 J.P. 180; 16 W.R. 166, L.JJ.; 40 Digest (Repl.) 118, *924*.
(5) *Bradley* v. *Walsh* (1903), 88 L.T. 737, D.C.; 17 Digest (Repl.) 158, *559*.

Action for a declaration that a certain sale agreement had been rescinded and that a deposit of £120, paid by the defendant thereunder had been forfeited to the plaintiff by reason of the failure of the defendant to fulfil the said agreement, and for damages.

The agreement, which was dated Oct. 19, 1928, was made between the plaintiff, as the executrix of her late husband, Hart Lock, she being then resident, where her husband had been the licensee before her, at the Thorns public-house, Horley, in the county of Surrey, and the defendant, Arthur Bell, who was at that time the licensee of the Crown Hotel, High Street, Chesham, in the county of Bucks. By the agreement the plaintiff agreed to sell all her right, title, and interest of the house and premises now in her possession known as The Thorns for the sum of £1,200, the consideration agreed for such interest and the goodwill of trade and the furniture, fixtures, and effects specified in the agreement. She also agreed to assign good and sufficient bar and other licences, on being paid for the time unexpired therein, and also the sound and saleable stock-in-trade consisting of ale and beer, wines, spirits, and compounds, not exceeding the value of £150 by gauge and valuation of two licensed gaugers or their umpire, such gauge and time of delivering up possession of the premises to be "on or about Nov. 10, 1928, at which time all rents, rates, and taxes and gaslight rent shall be cleared up, or an allowance made for the same." The plaintiff agreed that she would do all acts required for duly transferring the said licences to the purchaser. Secondly, the purchaser, the defendant, agreed to accept the house and premises, having a good title to the licences, and pay to the plaintiff the sum above-mentioned for her interest in the house and premises, and the goodwill of the trade, and the furniture, fixtures, fittings, and utensils with the stock-in-trade as aforesaid, and that such gauge and time of taking possession should be on or about Nov. 10, 1928, at which time the purchase money should be paid. Then followed this proviso:

> "If the said purchaser is not accepted by Mellersh & Neale, Ltd. [the freehold brewers to whom the house belonged] as tenant at the annual rent of £100 subject to the usual tenant's agreement, the deposit to be returned and this agreement void."

The agreement continued:

> "And as earnest of this agreement, the purchaser has paid into the hands of the vendor's agents as stake holders the sum of £120 [10 per cent. of £1,200] which is to be allowed in part of payment at the completion of this agreement; but if the vendor should not fulfil the same on her part she shall return the deposit in addition to the damages hereinafter stated. And if the purchaser shall fail to fulfil his part of the agreement, then the deposit money shall become forfeited in part of the following damages; and if either of the said parties should neglect to perform or refuse to comply with any part of this agreement, the party so refusing or neglecting shall pay to the other of them, on demand, the sum of £200, hereby mutually agreed upon to be the damages ascertained and fixed on breach thereof."

The agreement concluded as follows:

> "It is further agreed by the vendor that she will not take, keep, be interested or concerned in any licensed house, or any house for the sale of spirits, malt, or excisable liquors during the occupancy of the purchaser or his widow within the distance of three miles to be measured by the nearest highway from the within-named premises without returning the sum of £200, being part of such purchase money."

This agreement was on a printed form which was commonly adopted by brewers' valuers in Surrey, the only important departure from the print being that, instead of the words "on or before" the date fixed for completion, the word "before" is struck out and the word "about" is substituted, so that the contract is for possession to be given and completion to take place "on or about Nov. 10, 1928."

The defendant, to the knowledge of the plaintiff, was intending to sell his interest in the Crown Hotel, Chesham, and thereby to get a portion of the purchase money that he had to pay on the purchase of The Thorns. He was accepted by the brewers by Oct. 10, 1928, and nothing remained to be done on the date fixed for completion except the payment of the sum mentioned in the agreement, and a transfer of the licences. Mr. Bell went to the magistrate's clerk at Reigate and signed the notices with reference to a request for a temporary transfer of the licences on Nov. 10, and for the full transfer on Dec. 8. The matter seemed ripe for completion on the day mentioned in the contract as the date on or about which completion should take place, but at the end of October or beginning of November the person with whom the defendant had been negotiating for the sale of his interest in the Crown Hotel, Chesham, "cried off," and the defendant became aware that he would not be in a position to find the money, unless he could borrow it, or a sufficient portion of it, before Nov. 10. On Nov. 9 or 10 he went to Horley and told the brewers and the plaintiff that he could not complete. The parties then agreed to complete on Dec. 8, but fresh negotiations for the sale of the Crown Hotel, Chesham, broke down, and when Dec. 8 came, the defendant was unable to complete. On Dec. 20 the plaintiff's brokers wrote stating that, the defendant having neglected to perform his part of the agreement, the deposit of £120 became forfeited, and they asked for the balance of £80, being the balance of the £200 damages mentioned in the agreement, to be handed to them. The defendant sought to have completion deferred further to Jan. 30, 1929, but the brewers would not agree to that, and the plaintiff's interest in the house was eventually sold to another purchaser. The plaintiff then brought the action.

Daynes, for the plaintiff, cited *Weston* v. *Savage* (1), *Coslake* v. *Till* (2).

G. D. Johnston for the defendant.

MAUGHAM, J. [after stating the facts]: Two questions arise, apart from the question of damages. The first question is whether in such a contract as that of Oct. 19, 1928, time is, I will not use the phrase "of the essence of the contract," but I will use the phrase, whether time is not essential in that contract. It is a contract for the sale of the interest in a public-house being carried on by a widow, who was exceedingly anxious to get rid of it—a contract which involved a transfer of the business as a going concern. The business depended very largely upon the powers of management of the licensee, and prima facie there is no doubt whatever, in my mind, that in a contract of that kind time is of the essence of the contract. That, at any rate, was held in *Coslake* v. *Till* (2), by the then Master of the Rolls, and I do not think anybody has ever doubted that that was right. Stock is, of course, of a fluctuating kind, and the subject-matter of the contract in that respect is in its very nature exposed to daily variation, as stated in the judgment in that case.

But it is said in the present case that the contract is not for completion "on or before" Nov. 10, 1928, but "on or about" Nov. 10, 1928. What difference does that make? I think the legal matter is a little obscured by the circumstance that s. 25 (7) of the Supreme Court of Judicature Act, 1873, now replaced by s. 41 (1) of the Law of Property Act, is expressed in such terms that one would suppose at first sight that a court of equity construes a contract in reference to time in a different way from that in which a court of common law would construe it. It has, however, been held in the House of Lords in *Stickney* v. *Keeble* (3), following the decision of *Tilley* v. *Thomas* (4), that the legal construction of a contract in regard to time must be in equity the same as in a court of law. The real difference, before the passing of the Judicature Act in 1875, between the court of law and the court of equity was that the court of equity was accustomed to relieve against a failure to keep the date assigned by a contract either for completion or a step towards completion, if it could do justice between the parties. If the action had been brought at common law before the Judicature Act and the case was one in which the court of equity was being properly asked to grant specific performance, the court of equity would restrain proceedings at common law. There is in *Stickney* v. *Keeble* (3) a most illuminating judgment by LORD PARKER OF WADDINGTON. I will not cite from it at present, but it shows very clearly that in truth, in considering such a case as the present, where the claim is merely for the return of a deposit and damages, the view of the common law court with regard to the agreement is one which must prevail in equity, unless the case is such that equity would disregard the stipulations as to time and would restrain an action at law based on a breach of the contract. I am satisfied that in such a case as the present it would be quite wrong for a court of equity to restrain the legal consequences of the contract according to its true construction. Its construction must be that completion must take place by the date mentioned, or within a very short time thereafter. Accordingly, I think that, having regard to the subject-matter of the contract, time must be regarded as essential in this respect, and the circumstance that a little latitude is given as regards the precise day does not affect the matter, provided that the necessary latitude, or the proper latitude, whatever it may be, has been afforded to the purchaser.

On that ground, therefore, alone, I should be of opinion that a court of equity here is in no different position from that in which a court of common law would be before the Judicature Act, and that I have to consider the matter as it would have been considered if it had arisen in the Court of Common Pleas or in the Queen's Bench before the Act of 1873 was in force. In that case I should have to bear in mind that the contract was not completed on or about Nov. 10, and that, accordingly, the deposit must be forfeited. If, however, I am wrong in that view, I would add, having regard to what took place between the plaintiff and the defendant on Nov. 9, to the subsequent acts of the defendant, and to the circumstance that the date of Dec. 8 was definitely fixed for the completion of the transfer, that the parties, and, in particular, the defendant, definitely fixed Dec. 8 as the date for completion, and that any doubt that might have arisen as regards the true interpretation of the words "on or about Nov. 10" has been entirely removed. It is not quite a case where the plaintiff has made time of the essence of the contract, it not being of the essence before by a specific notice, but it amounts to the same thing. It is not necessary, I think, in such a case, that there should be anything more than a vendor offering a certain delay, in this case one month, and the purchaser accepting that delay as sufficient for his purpose, and the date being fixed by mutual agreement at a particular date, in this case, Dec. 8. If one joins those facts to the surrounding circumstances, including the subject-matter of the contract, I think there can be no doubt that after that was done Dec. 8 became a date which was essential to the contract in question. Accordingly, I am of opinion that the sale agreement has come to an end, and that the deposit of £120 has been forfeited to the plaintiff.

There remains the question of damages. It is noticeable that the contract contemplated £200 as the damages, of which £120 was to form part. On the other hand, it is curious that this is expressed to be damages upon failure by either of the parties neglecting to perform or refusing to comply with any part of the agreement. There are several examples which might be given of neglect to perform the contract. One curious one is that the vendor neglects to perform it by some wholly trivial breach of covenant against being interested or concerned in any licensed house within three miles. On the other hand, the purchaser might fail to perform it by neglecting to take over and pay for the whole of the stock-in-trade. There might be some trivial breach with regard to that. I have, however, the advantage of a decision of the Divisional Court in *Bradley* v. *Walsh* (5), which I am wholly unable to distinguish from the present case. That, like this, was the case of an agreement for the sale of licensed premises. The agreement appears to have been almost exactly in the same form as that with which I have to deal here. It was also provided in the agreement that if either of the parties should neglect to perform or refuse to comply with any part of this agreement, the party refusing or neglecting should pay the other a sum, in that case of £25, as liquidated damages. It was held that that was a penalty, and, accordingly, was a sum which could not be claimed by the plaintiff by reason of the breach of the agreement. I must follow that case, and must, therefore, decide that the damages in this case are not in the strict sense liquidated damages which can be recovered, but are in the nature of a penalty which the plaintiff cannot recover. Accordingly, while declaring that the sale agreement has been rescinded and the deposit of £120 has been forfeited, I will add, at the request of the plaintiff, an inquiry as to the damages, if any, suffered by reason of the breach of the sale agreement by the defendant in excess of the sum of £120; and the defendant must pay the costs of the action.

Solicitors: *Moon, Gilks & Moon*; *Arthur S. Joseph & Co.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

DANIELS *v.* PINKS

[King's Bench Division (Avory, Swift and Acton, JJ.), December 9, 1930]

[Reported [1931] 1 K.B. 374; 100 L.J.K.B. 337; 144 L.T. 372; 95 J.P. 23; 47 T.L.R. 166; 75 Sol. Jo. 59; 29 L.G.R. 120]

Gaming—Gaming house—Unlawful game—Members' club—Liability of members of committee—Unlawful Games Act, 1541 (33 *Hen. VIII*, *c*. 9)—*Gaming Act*, 1845 (8 *&* 9 *Vict.*, *c*. 109), *s*. 2—*Gaming Houses Act*, 1854 (17 *&* 18 *Vict. c*. 38), *s*. 4.

Where premises are used in such a way that they are "deemed to be a common gaming house" within s. 2 of the Gaming Act, 1845, a person permitting the premises to be so used may be convicted under s. 4 of the Gaming Houses Act, 1854, though the premises are not kept for the "gain, lucre or living" of any person within the meaning of s. 8 of the Unlawful Games Act, 1541. This is so where the premises are those of a members' club, in which case members of the committee of the club are liable to conviction as persons having "the care or management of the premises" within s. 4 of the Act of 1854.

Notes. As to gaming houses and offences in connection therewith, see 18 Halsbury's Laws (3rd Edn.) 189–194; and for cases see 25 Digest 427 et seq. For the Acts of 1541, 1845 and 1854 mentioned above, see 10 Halsbury's Statutes (2nd Edn.), pp. 735, 746 and 769 respectively.

Cases referred to:

(1) *Jenks* v. *Turpin* (1884), 13 Q.B.D. 505; 53 L.J.M.C. 161; 50 L.T. 808; 49 J.P. 20; 15 Cox, C.C. 486, D.C.; 8 Digest (Repl.) 676, *164*.

(2) *Jackson* v. *Roth*, [1919] 1 K.B. 102; 88 L.J.K.B. 397; 119 L.T. 769; 83 J.P. 26; 35 T.L.R. 59; 26 Cox, C.C. 340; 16 L.G.R. 907; 8 Digest (Repl.) 675, *158*.

(3) *A.-G.* v. *Luncheon and Sports Club, Ltd.*, [1929] A.C. 400; 98 L.J.K.B. 359; 141; L.T. 153; 45 T.L.R. 294, H.L.; Digest Supp.

Case Stated by the County of London Sessions.

The appellants, Sydney Daniels, Robert Goddard, George Knott, and Peter Hill, appealed to quarter sessions against convictions at Greenwich Police Court upon informations laid by the respondent, Sub-Divisional Inspector Edward Pinks, on behalf of the Commissioner of Police for the Metropolis. The appellants were convicted, (i) for that they on various dates in December, 1929, were persons having the care and management of the Deptford New Town Social Club, which premises were then being used for the purpose of betting with persons resorting thereto, contrary to s. 3 of the Betting Act, 1853, and (ii) on the same facts for permitting the premises to be used for unlawful gaming contrary to s. 4 of the Gaming Houses Act, 1854.

The following facts were proved or admitted: (a) The Deptford New Town Social Club, at Tanner's Hill, Deptford, was a "members' club" as distinguished from a "proprietary club," all the property of the club belonging to all the members jointly and being vested in trustees. It was managed by an elected committee, of which all the four appellants were members. (b) On Dec. 11, 1929, there was a meeting of the committee, at which the four appellants were present. The following resolution was proposed by the appellant Daniels, seconded by the appellant Goddard, and carried: "That fruit machines be again installed in the club for the use of members only, neither affiliated members nor visitors being allowed in the room where the machines are installed." (c) In pursuance of that resolution two "fruit machines" were installed in the bar, for the purpose of giving additional pleasure to the members. The case described the method of operating the machines, which were of the familiar type, returning to the player who inserted a penny in the slot odds varying according to the particular combination of "fruits," "bells" and "bars" appearing opposite a pointer when a lever was pressed. There had been many convictions under the Betting Act, 1853, and the Gaming Houses Act, 1854, where persons had used such machines in shops or places of public entertainment or in proprietary clubs, but the question had not been previously tested with regard to members' clubs. (d) On Dec. 16, 17 and 18, 1929, police officers who were affiliated members of the club entered the premises for the purpose of observation and saw the machines being used extensively by members of the club. On one occasion one of the police officers was invited by the steward to play on one of the machines. He did so and lost threepence. (e) On Dec. 27, 1929, the respondent, with other police officers entered the club premises and saw play taking place on one of the said machines. The appellants Knott, Daniels, and Hill were present in the club. Daniels said to the respondent: "There was a delegate meeting and it was discussed as to having machines in clubs, and I was informed that so long as only members played on the machines and they were the club's own property it would be in order. That was why I proposed the machines should be in this club, also to help the funds of the children's outing.

It was contended for the appellants that the position of a members' club was analogous to that of a private house, and that gaming upon the machines in a members' club was not unlawful gaming. The following cases were referred to: *Jenks* v. *Turpin* (1) and *Jackson* v. *Roth* (2). It was contended for the respondent that in the case of a members' club the committee of management was responsible for betting and gaming on the said machines in the same way as a proprietor was responsible in the case of a proprietary club. The court of quarter sessions found that the machines were installed in the club simply for the purpose of giving additional pleasure to the members and that the premises were not used for the purpose of betting with persons resorting thereto or for the purpose of unlawful gaming. They allowed the appeals, with costs, and the respondent appealed to the King's Bench Divisional Court.

By the Unlawful Games Act, 1541, s. 8:

> "No manner of person or persons, of what degree quality or condition soever he or they be . . . by himself, factor, deputy, servant, or other person, shall for his or their gain, lucre or living, keep, have, hold, occupy, exercise or maintain any common house, alley or place of dicing, table or carding, or any other manner of game prohibited by any statute heretofore made or any unlawful new game now invented or made, or any other unlawful new game hereafter to be invented, found, had or made . . ."

By the Gaming Act, 1845, s. 2:

> "And whereas doubts have arisen whether certain houses alleged or reputed to be opened for the use of the subscribers only, or not open to all persons desirous of using the same, are to be deemed common gaming houses, be it declared and enacted, that in default of other evidence proving any house or place to be a common gaming-house, it shall be sufficient, in support of the allegation in any indictment or information that any house or place is a common gaming house, to prove that such house or place is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players exclusively of the others, or that the chances of any game played therein are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed or against whom the other players stake, play, or bet; and every such house or place shall be deemed a common gaming house, such as is contrary to law and forbidden to be kept by the said act of King Henry VIII, and by all other acts containing any provision against unlawful games or gaming houses."

By the Gaming Houses Act, 1854, s. 4:

> "Any person, being the owner or occupier or having the use of any house, room, or place, who shall open, keep, or use the same for the purpose of unlawful gaming being carried on therein, and any person who, being the owner

> or occupier of any house or room, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purpose aforesaid, and any person having the care or management of or in any manner assisting in conducting the business of any house, room, or place opened, kept, or used for the purpose aforesaid . . . may, on summary conviction thereof before any two justices of the peace, be adjudged by such justices to forfeit and pay such penalty not exceeding £500 as to such justices shall seem fit. . . .''

Whiteley, K.C., and *Vernon Gattie* for the respondent.
Rayner Goddard, K.C., and *Frampton* for the appellants.

AVORY, J.—This is a Case Stated by the chairman of the County of London Sessions, and it raises a question whether certain persons named Daniels, Goddard, Knott, and Hill were liable to be convicted under s. 4 of the Gaming Houses Act, 1854, of the offence that, they being persons having the care and management of certain premises known as the Deptford New Town Social Club, those premises were then being used for the purpose of unlawful gaming. There was also a summons against the same persons alleging that the premises were used for the purpose of betting with persons resorting thereto contrary to the Betting Act, 1853. That appears to be bad in form because premises cannot be used for the purpose of betting with persons resorting thereto, and the summons ought to have alleged that they were kept for the purpose of some person betting with persons resorting thereto. However, that did not matter, since it was clear that there could not have been a conviction under the first part of s. 1 of the Betting Act, 1853, since the decision of the House of Lords in *A.-G.* v. *Luncheon and Sports Club, Ltd.* (3). It must be understood that this court is expressing no opinion on any similar case in which a charge may be made under the second branch of the section. That may require consideration in the case of a members' club just as much as in the case of a proprietary club.

For the purpose of our judgment here I am content to say that I think the appellants ought to have been convicted of the offence with which they were charged under the Gaming Houses Act, 1854. It is necessary to have clearly in mind what it was necessary to prove—namely, that they were persons who had the care and management of the premises in question and that those premises were in fact kept or used for the purpose of unlawful gaming. If those things were proved they clearly came within the section. In order to see whether the premises were used for unlawful gaming, it is necessary to refer back to s. 2 of the Gaming Act, 1845. It is clear that in the present case the game that was played was a game in which chances were not alike favourable to all the players including the bank, and primâ facie, therefore, it being established that these premises were kept or used for the purpose of that game being played therein, the premises were a common gaming house. Counsel for the appellants has contended that is not sufficient, but that the concluding words of s. 2 of the Gaming Act, 1845, refer back to the Unlawful Games Act, 1541, and that premises are only to be deemed a common gaming house if they comply with the terms of that statute and are kept "for gain, lucre or living." I cannot accept that interpretation. I think that as soon as everything mentioned in s. 2 of the Gaming Act, 1845, is proved the premises are a gaming house as much as if they had complied with the statute of Henry VIII.

With regard to the present case, as soon as it is established that the game being played was an unlawful game—and that, I think, is clearly established by *Jenks* v. *Turpin* (1)—the only question is whether it makes any difference that it was a members' club. HAWKINS, J., in *Jenks* v. *Turpin* (1) said (13 Q.B.D. at p. 512):

> "When all these facts are looked at even with a most indulgent eye, it is impossible for any man in his senses to doubt that the house was really opened and kept for the purpose of gaming at the game of baccarat as its main and principal object, and not as a mere social club, to which gambling even to a

> considerable extent was ancillary. I think it right, however, to add that if the house had been kept open for a double purpose, namely, as an honest social club for those who did not desire to play, as well as for the purpose of gaming for those who did, it would none the less be a house opened and kept 'for the purpose of gaming.' "

When we find as we do in this case, that on Dec. 11, 1929, there was a formal meeting of the committee of which the four appellants were members, and at which they were present and that a resolution was passed:

> "That fruit machines be again installed in the club for the use of members only, neither affiliated members nor visitors being allowed in the room where the machines are installed,"

I cannot doubt that these machines were installed for the purpose of unlawful gaming being carried on by the members of the club. If, in fact, they were used for that purpose, it is clear that the members of the committee knew that they were being so used, and must be taken to have known it. I think, therefore, that the appeal must be allowed and the case remitted to quarter sessions accordingly.

SWIFT, J.—I agree.

ACTON, J.—I agree.

Appeal allowed.

Solicitors: *Wontner & Sons*; *Pattinson & Brewer.*

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

Re WILLIAMS. RICHARDS *v.* WILLIAMS

[CHANCERY DIVISION (Farwell, J.), June 19, 1930]

[Reported [1930] 2 Ch. 378; 99 L.J.Ch. 476; 143 L.T. 630]

Administration of Estates—Right to prefer creditors—Exercise of right—Equitable assignment of future assets—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *sub-s.* (2).

An administrator who gives to a creditor an equitable assignment of future moneys to come into the hands of himself or his agent effectually exercises his right to prefer creditors under s. 34 (2) of the Administration of Estates Act, 1925.

The main property of an intestate consisted of farming stock and implements which his administratrix had placed in the hands of auctioneers for sale. G., a creditor for £300, issued a writ to recover his debt. The administratrix gave to the auctioneers an authority to pay to G. £300 and interest out of the proceeds of sale, "this sum to be a first charge on the net amount due to me." P., another creditor for £829, also issued a writ to recover his debt, and signed judgment, but, on the administratrix giving to the auctioneers an authority to pay to P. £829 and costs out of the proceeds of sale and on the auctioneers giving an undertaking to do so, he did not proceed to execution. The stock and implements having been sold for £942 net, the estate was found to be insolvent. In a creditor's administration action it was contended on behalf of the general creditors that the documents given to G. and P., being only equitable assignments of moneys which did not at the time exist, were not valid exercises of the administratrix's right to prefer creditors, and that under s. 34 of the Administration of Estates Act, 1925, which imported s. 33 (5) and (7) of the Bankruptcy Act, 1914, the debts of all the creditors must be paid pari passu.

Held: the documents operated as effective assignments of the moneys directly they came into the hands of the auctioneers, and were good exercises of the administratrix's right to prefer creditors, so that G. was entitled to be paid £300, but without interest, and, subject to G.'s claim, P. was entitled to be paid £829, in preference to the other creditors.

Notes. As to a personal representative's right to prefer creditors, see 16 Halsbury's Laws (3rd Edn.) 306, 307; and for cases see 23 Digest (Repl.) 368–370. For Administration of Estates Act, 1925, see 9 Halsbury's Statutes (2nd Edn.) 740.

Cases referred to:

(1) *Earl Vane* v. *Rigden* (1870), 5 Ch. App. 663; 39 L.J.Ch. 797; 18 W.R. 1092, L.C. & L.JJ.; 24 Digest (Repl.) 625, *6199*.

(2) *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523; 58 L.J.Q.B. 75; 60 L.T. 162; 37 W.R. 513; 4 T.L.R. 726, H.L.; 20 Digest 334, *770*.

(3) *Re Jones*, *Peak* v. *Jones*, [1914] 1 Ch. 742; 83 L.J.Ch. 568; 58 Sol. Jo. 579; 23 Digest (Repl.) 369, *4383*.

(4) *Hepworth* v. *Heslop* (1849), 6 Hare, 561; 18 L.J.Ch. 352; 13 Jur. 166; 67 E.R. 1286; 23 Digest (Repl.) 369, *4382*.

(5) *Lett* v. *Morris* (1831), 4 Sim. 607; 1 L.J.Ch. 17; 58 E.R. 227; 8 Digest (Repl.) 575, *244*.

(6) *Brice* v. *Bannister* (1878), 3 Q.B.D. 569; 47 L.J.Q.B. 722; 38 L.T. 739; 26 W.R. 670, C.A.; 8 Digest (Repl.) 553, *78*.

(7) *Cotton* v. *Heyl*, ante, p. 375; [1930] 1 Ch. 510; 99 L.J.Ch. 289; 143 L.T. 16; Digest Supp.

Summonses in administration proceedings.

Evan Williams, a farmer, died intestate on Dec. 25, 1926, and on April 5, 1927, letters of administration to his estate were granted to his widow. His estate was sworn at £1,522. There was no real estate, and the personal estate consisted mainly of farming stock, implements, &c., which were put into the hands of auctioneers for sale. The sale was delayed until September, 1927, when it was considered that better prices might be obtained. On May 19, 1927, John Griffith, a creditor of the intestate, issued a writ to recover a debt of £300 and interest. The administratrix was desirous of avoiding litigation, and on June 3, 1927, addressed to the auctioneers, and signed over a 6d. stamp, the following document:

> "I hereby authorise and request you to pay to Mr. John Griffith . . . the sum of £300 and interest out of the proceeds of the sale of my farming stock, this sum to be a first charge on the net amount due to me."

This document was witnessed, and a copy of it was given to Griffith by the auctioneers. On Sept. 10, 1927, David Pugh, another creditor of the intestate, issued a writ for a debt of £829. On Sept. 21, the administratrix handed to Pugh's solicitor, and signed over a 6d. stamp, the following document:

> "*Pugh* v. *Williams*.—I hereby authorise and request you to pay to [Pugh's solicitor] the sum of £829 and costs of the writ herein out of the proceeds of sale of my farming stock and effects, being the amount due to Mr. David Pugh, and his receipt shall be a sufficient discharge to you for the same."

This document, although obviously intended to be addressed to the auctioneers, was not actually addressed to them, but was handed to them by Pugh's solicitor. On Sept. 23, Pugh signed judgment for £829 and costs, but he did not proceed to execution upon the administratrix obtaining from the auctioneers the following undertaking, which was signed by them at the request of the administratrix:

> "We the undersigned hereby agree to pay to Mr. David Pugh the sum of £829 the amount due herein together with ten guineas the costs herein as requested

> by [the administratrix] on April 29, out of the proceeds of sale of farming stock and effects at . . ."

This document was handed to Pugh's solicitor. The sale by auction of the farming stock, &c., took place on Sept 26, and realised the sum of £942 net. Up to the date of the sale the administratrix believed the estate to be solvent, but it was then found to be insolvent. On Dec. 21, 1927, the present action for the administration of the intestate's estate was commenced by another creditor. On Jan. 20, 1928, a receiver was appointed, and on Aug. 7, 1928, the auctioneers paid to the receiver £942, being the net proceeds of sale. The receiver was subsequently discharged, and on Mar. 12, 1929, all moneys in his hands were paid into court. The question then arose whether, as the estate had proved to be insolvent, Griffith and Pugh were entitled to be paid their debts of £300 and £829 in preference to the ordinary creditors. Pugh issued a summons to determine this point on Dec. 9, 1929, and Griffiths issued a summons on Jan. 13, 1930. These summonses now came on together for hearing.

Andrew Clark, for Pugh, relied on *Earl Vane* v. *Rigden* (1) and *Tailby* v. *Official Receiver* (2) as showing that the documents constituted good equitable assignments.

J. Leonard Stone, for Griffith, adopted the same arguments, and also referred to *Re Jones, Peak* v. *Jones* (3), *Hepworth* v. *Heslop* (4), *Lett* v. *Morris* (5), *Brice* v. *Bannister* (6), and *Cotton* v. *Heyl* (7).

W. G. Hart, for the plaintiff, on behalf of the general body of the creditors.

By Administration of Estates Act, 1925, s. 34 (2):

> "The right of retainer of a personal representative and his right to prefer creditors may be exercised in respect of all assets of the deceased, but the right of retainer shall only apply to debts owing to the personal representative in his own right, whether solely or jointly with another person."

FARWELL, J. [after stating the facts]: It is not disputed that the administratrix could prefer one creditor to another, and it is plain that this right is preserved by s. 34 (2) of the Administration of Estates Act, 1925. Here the administratrix did not exercise her right to prefer by actual payment, nor did she give a legal charge on money actually in anybody's hands. She merely created equitable assignments of so much of the future proceeds of sale of the farming stock and implements as would be necessary to give Griffith £300 and interest and Pugh £829. The plaintiff, on behalf of the general body of creditors, contends that an equitable assignment of moneys not yet in existence is nothing more than an agreement to assign, and that a mere agreement to assign is not a good exercise of the right to prefer. He submits that the right to prefer can only be exercised by actual payment in cash, or by giving a legal charge equivalent thereto, and not by a mere agreement. He admits that these two creditors could ask for specific performance of the agreement, but contends that the moment they did so the court would have to consider the countervailing equity of the general body of creditors, and refuse that remedy.

It is not, however, necessary to determine what would have happened if there had been nothing more than an agreement, because, in my judgment, an administratrix who gives to a creditor an equitable assignment of future money to come into the hands of herself or her agents, effectually exercises her right to prefer under s. 34 (2) of the Administration of Estates Act, 1925. The plaintiff distinguishes *Earl Vane* v. *Rigden* (1) because, in that case, the assignment was of book debts then owing, and, therefore, assignable, whereas in the present case there were no moneys in existence until the farming stock was sold. But, in my judgment, having regard to *Tailby* v. *Official Receiver* (2), the equitable assignment for value of moneys, not then in existence, so far as the parties were concerned, but to come into the hands of the auctioneers upon the sale, operated as an effective assignment of those moneys directly they came into the auctioneers' hands, and the creditors could have recovered them without an action for specific performance. The administratrix has, therefore, preferred these two creditors, but

Griffith's preferential claim must be limited to his £300 debt, and he must prove for his interest. There will be a declaration that Griffith is entitled to be paid out of the moneys in court £300 in preference to all other creditors, and that, subject to Griffith's claim, Pugh is entitled to be paid £829 in preference to all other creditors.

Solicitors: *Harvey Clifton*, for *Robert Griffith*, Blaenau-Festiniog; *G. F. Hudson, Matthews & Co.*; *Gregory, Rowcliffe & Co.*, for *W. Morris Jones*, Portmadoc.

[*Reported by* E. K. CORRIE, ESQ., *Barrister-at-Law*.]

Re CAYLEY AND EVANS' CONTRACT

[CHANCERY DIVISION (Bennett, J.), March 13, 14, April 15, 1930]

[Reported [1930] 2 Ch. 143; 99 L.J.Ch. 411; 143 L.T. 405]

Settled Land—Compound settlement—Form of vesting deed—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 5 (1).

An estate was settled by a compound settlement consisting of (i) a settlement of 1882, (ii) an indenture of 1884 appointing a jointure, (iii) a disentailing deed of February, 1915, and (iv) a resettlement of August, 1915. In May, 1926, the trustees for the purposes of the Settled Land Acts, 1882–1890, of the resettlement of August, 1915, executed a vesting deed purporting to vest the property in the tenant for life, and, in that vesting deed, of the above-mentioned four documents, the only document that was recited was the resettlement of 1915.

Held: the relevant settlement was the compound settlement constituted by the four documents; the vesting deed must be framed so as to give effect to the compound settlement, but it was plainly framed on the footing that the only relevant settlement was the resettlement and it was executed by the trustees of the resettlement in their capacity as such and without any reference to any other settlement; and, therefore, the vesting deed did not comply with the requirements of s. 5 of the Settled Land Act, 1925, and the tenant for life could not dispose of any part of the settled land.

Notes. Distinguished: *Re Curwen, Curwen* v. *Graham*, [1931] All E.R.Rep. 737.

As to vesting deed, see 29 HALSBURY'S LAWS (2nd Edn.) 534 et seq.; and as to compound settlements, see ibid. 756 et seq. For cases see 40 DIGEST (Repl.) 845 et seq. For Settled Land Act, 1925, see 23 HALSBURY'S STATUTES (2nd Edn.) 12.

Case referred to:

(1) *Re Cradock's Settled Estates*, [1926] Ch. 944; 95 L.J.Ch. 364; 135 L.T. 370; 40 Digest (Repl.) 846, *3232*.

Vendor and Purchaser Summons.

The facts are set out in the judgment of BENNETT, J.

Harman for the applicant, the vendor.

D. H. Jenkins for the respondent, the purchaser.

Cur. adv. vult.

April 15. **BENNETT, J.**, read the following judgment. The question which arises for decision upon this originating summons is whether Sir Kenelm Cayley, the tenant for life of the Llannerch settled estate, having entered into four contracts for the sale to William Evans, as purchaser, of four plots of freehold land at Colwyn Bay, being part of the Llannerch estate, has caused the steps required by the Settled Land Act, 1925, to be taken to enable him to exercise his powers of sale as tenant for life, and to convey the four plots of land in question to the purchaser in accordance with his contracts.

The following are the facts and circumstances which give rise to the question. On Dec. 31, 1925, the Llannerch estates stood charged with a yearly rentcharge of £500 by way of jointure in favour of Lady Mary Susan Cayley, who is still living. The rentcharge had been charged by an indenture dated Sept. 16, 1884. By this deed one George Everard Cayley, in addition to charging the said Llannerch estate with the said yearly rentcharge, had appointed the said estate to trustees for a term of two hundred years to commence from his death upon trust for securing the payment of the said jointure. The said jointure had been charged in exercise of a power in that behalf contained in an indenture of settlement dated July 12, 1882 (hereinafter referred to as the settlement of 1882). On Dec. 31, 1925, subject to the said jointure, the said estate, under and by virtue of a disentailing deed, dated Feb. 5, 1915, and an indenture of resettlement (hereinafter referred to as the settlement) dated Aug. 26, 1915, stood limited to uses under which Sir Kenelm Cayley was tenant for life in possession thereof with divers remainders over. One Richard Baker Baker was the sole surviving trustee for the purposes of the Settled Land Acts, 1882 to 1890, of the settlement of 1882. The said Richard Baker Baker and John de Bathe Crossley were the trustees for the purposes of the Settled Land Acts, 1882 to 1890, of the resettlement. On May 1, 1926, a vesting deed was executed to which the said Richard Baker Baker and John de Bathe Crossley were parties, of the one part, and Sir Kenelm Cayley was party, of the other part. The material parts of the vesting deed are as follows. It recites the indenture of settlement of Aug. 26, 1915, and refers to it as "the settlement," and recites that under that settlement Sir Kenelm Cayley was tenant for life in possession of, among other hereditaments, the Llannerch estate. It recites that Sir Kenelm Cayley had power under the settlement of appointing a new trustee or trustees of the settlement, and it recites that Richard Baker Baker and John de Bathe Crossley were trustees of the settlement for the purposes of the Settled Land Act, and that Sir Kenelm Cayley had requested those trustees to execute the vesting deed, and for giving effect to the requirements of the Settled Land Act, 1925. The deed witnessed that the trustees declared that the lands, hereditaments and premises mentioned in the first, second and third schedules, which included the Llannerch estate, which were then by any means subject to the limitations of the settlement, were vested in Sir Kenelm Cayley in fee simple, subject so far as affected thereby to family charges specified in the fourth schedule. The family charges specified in the fourth schedule included the jointure payable to Lady Mary Susan Cayley. It also declared that Sir Kenelm Cayley should stand possessed of the premises upon the trusts and subject to the powers and provisions contained and subject to which under the settlement or otherwise the same ought to be held from time to time, and also that the trustees were the trustees of the settlement, for the purposes of the Settled Land Act, 1925. By a deed of appointment of new trustees, dated Nov. 19, 1926, Henry John Cator was appointed a trustee of the resettlement jointly with John de Bathe Crossley in place of the said Richard Baker Baker, who retired from the trust for all the purposes for which the said Richard Baker Baker was appointed a trustee thereof. On Dec. 20, 1926, an order was made by Eve, J., headed:

> "In the Matter of the Cayley settled estates in the counties of Denbigh and Flint settled by a compound settlement consisting of the following documents: (i) A settlement dated July 12, 1882; (ii) an indenture dated Sept. 16, 1884, being the deed whereby the jointure was appointed to Lady Mary Susan Cayley; (iii) a disentailing deed dated Feb. 5, 1915; and (iv) the resettlement, and in the matter of the Settled Land Act, 1925."

By that order Eve, J., appointed John de Bathe Crossley and Henry John Cator trustees of the compound settlement for the purposes of the Settled Land Act, 1925.

On July 5, 1926, Sir Kenelm Cayley entered into the four contracts in question with the purchaser, Mr. Evans. The purchaser then delivered requisitions and objections on title. The first one is in these terms:

> "The purchaser contends that the vesting deed of May 1, 1926, is defective and invalid for the following reasons: (i) The settlement affecting the property for the purposes of the Settled Land Act, 1925, was the compound settlement consisting of the settlement of 1882, the jointure deed of 1884, the disentailing deed of 1915, and the resettlement of 1915 (see proviso to s. 1 (1) of the Settled Land Act, 1925), whereas the vesting deed only deals with the resettlement of 1915 and is not expressed to be and cannot operate as a vesting deed for the purposes of the compound settlement above referred to. (ii) The vesting deed should have been executed by the trustees of the compound settlement, but was in fact executed by Baker and Crossley as trustees of the resettlement of 1915. (iii) The vesting deed does not contain the names of the persons who were the trustees of the settlement (i.e., the compound settlement), as required by s. 5 (1) (c) of the Settled Land Act, 1925, but merely a statement that Baker and Crossley were the trustees of 'the said settlement' (i.e., the resettlement of 1915) for the purposes of the Act. It is, accordingly, submitted that a proper vesting deed must be executed by the trustees of the compound settlement above referred to before the vendor can effectively convey the property to the purchaser in exercise of the Settled Land Act powers."

The reply to that was:

> "This contention is not admitted. (i) At the date of the vesting deed Mr. Baker was the sole surviving trustee of the settlement of 1882, and, therefore, of the compound settlement affecting this estate. He was a party to the vesting deed which, therefore, contains all the statements and particulars required by s. 5 of the Settled Land Act, 1925. The fact that Mr. Baker is not described as a trustee of the compound settlement does not invalidate the deed (s. 5 (3) ibid.), nor is it material for the same reason that the vesting deed is only expressed to operate on the settlement of 1915. Such a deed has no operation except as machinery and does not vest anything in anybody. It is merely executed in order to enable the tenant for life to execute his powers."

The vendor took out this summons for a declaration that the objections of the purchaser to the title of the vendor to the property comprised in the four contracts had been sufficiently answered and that a good title to the property had been shown.

The purchaser's objections are based upon the provisions of s. 13 of the Settled Land Act, 1925, which (as amended by Sch. I to the Law of Property (Amendment) Act, 1926) is in the following terms:

> "Where a tenant for life or statutory owner has become entitled to have a principal vesting deed or a vesting assent executed in his favour, then until a vesting instrument is executed or made pursuant to this Act in respect of the settled land, any purported disposition thereof inter vivos by any person, other than a personal representative (not being a disposition which he has power to make in right of his equitable interests or powers under a trust instrument), shall not take effect except in favour of a purchaser of a legal estate without notice of such tenant for life or statutory owner having become so entitled as aforesaid, but, save as aforesaid, shall operate only as a contract for valuable consideration to carry out the transaction after the requisite instrument has been executed or made, and a purchaser of a legal estate shall not be concerned with such disposition unless the contract is registered as a land charge. Nothing in this section affects the creation or transfer of a legal estate by virtue of an order of the court or the Minister or other competent authority."

It is not disputed that Sir Kenelm Cayley was a tenant for life who became entitled to have a principal vesting deed executed in his favour, and it is not disputed that the purchaser knew that he had become so entitled. The question is whether the vesting deed of May 1, 1926, to which I have referred, is a vesting instrument executed or made pursuant to the Settled Land Act, 1925, in respect of the settled land in question, namely, the Llannerch estate. Unless it is and until such a vesting instrument has been executed, the provisions of the section impose a fetter upon the powers of Sir Kenelm Cayley to dispose of any part of the Llannerch estate, and the purchaser's objection is a good one.

The purchaser says that the vesting deed in terms has no reference to any settlement except the 1915 resettlement, and that, as the land was on Dec. 31, 1925, the subject of a compound settlement, the requirements of s. 5 of the Settled Land Act, 1925, have not been complied with, and, therefore, no vesting instrument has been made or executed pursuant to the Settled Land Act, 1925, as is required by s. 13 of that Act. In my judgment, the purchaser's objection is a good one. It is a highly technical one, but none the less must, I think, prevail. On Jan. 1, 1926, by virtue of the provisions of s. 1 of the Law of Property Act, 1925, and of paras. 3 and 5 of Part II of Sched. I to that Act, the legal estate in fee simple absolute in the Llannerch estate vested in Sir Kenelm Cayley. On the same date Lady Mary Susan Cayley's jointure was converted into an equitable interest by virtue of the provisions of Part I of the same schedule. The resettlement was, of course, a settlement subsisting at the commencement of the Settled Land Act, 1925. By virtue of the provisions of s. 3 of that Act, the settlement of 1882 was also a subsisting settlement. By the combined effect of s. 1 (1) of para. 1 of Sched. II to the Settled Land Act, 1925, and para. 31 of s. 117 of that Act, the settlement of 1882, the indenture of Sept. 16, 1884, charging the jointure, the disentailing assurance of Feb. 5, 1915, and the resettlement, together constituted a trust instrument whereby the trusts of the Llannerch estate were declared. The result, in my judgment, is that the Llannerch estate is the subject of a compound settlement, and was so on Jan. 1, 1926, and by virtue of the proviso to sub-s. (1) of s. 1 of the Settled Land Act, 1925, references in that Act to the settlement are to be construed as meaning such compound settlement unless the context otherwise requires.

Turning now to the transitional provisions in para. 1 of the second schedule, as I have already stated, the four instruments to which I have referred together constituted the trust instrument by virtue of s. 1 (1) of the said paragraph. It is then necessary to apply the terms of sub-s. (2) of s. 1 to the facts of the case, and, so applying them, in my judgment, they require the execution of a principal vesting deed with reference to the land, the subject of the compound settlement, by the trustees of that settlement. This is, I think, one of the points decided by ASTBURY, J., in *Re Cradock's Settled Estates* (1). The vesting deed must conform to the provisions of s. 5 of the Settled Land Act, 1925, and should be framed for the purpose of giving effect to the relevant settlement. The relevant settlement in this case is, in my judgment, the compound settlement, consisting of the settlement of 1882, the indenture of Sept. 16, 1884, the disentailing deed of Feb. 5, 1915, and the resettlement. The vesting deed of May 1, 1926, is plainly and undoubtedly framed upon the footing that the only relevant settlement is the resettlement and is executed by the trustees of that settlement in their capacity as such and without any reference to any other settlement.

In my judgment, it is not possible to hold that the deed is a compliance with the requirements of the Act in reference to the compound settlement upon the trusts of which the Llannerch estate was held on and after Jan. 1, 1926. It follows, therefore, that Sir Kenelm Cayley is not able to exercise his statutory powers as tenant for life of disposing of the Llannerch estate or any part thereof, and that the summons must be dismissed.

Solicitors: *Gibson & Weldon*, for *Tasker, Hart & Munby*, Scarborough; *Amphlett & Co.*, for *Amphlett & Co.*, Colwyn Bay.

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

PILKINGTON *v.* UNITED RAILWAYS OF THE HAVANA AND REGLA WAREHOUSES, LTD.

[CHANCERY DIVISION (Luxmoore, J.), April 1, 10, 1930]

[Reported [1930] 2 Ch. 108; 99 L.J.Ch. 555; 144 L.T. 115;
46 T.L.R. 370; 74 Sol. Jo. 264]

Company—Stock warrant—Power to issue—Companies Act, 1929, *s*. 70 (1).

There is nothing in s. 83 (1) of the Companies Act, 1948 (formerly s. 70 (1) of the Companies Act, 1929), to prevent a company, if authorised by its articles of association, issuing stock warrants to bearer. The provision in s. 112 (1) (b) of the Act of 1948 (formerly s. 97 (1) of the Act of 1929) that a "statement of the shares" included in the warrant must be entered in the register of members of the company is not to be construed as implying a distinction between stock and shares and excluding stock from inclusion in the word "shares" in s. 83 (1) and, where applicable, in s. 112. To construe s. 112 otherwise would be to disregard the clear direction in s. 455 (1) of the Act of 1948 (replacing s. 380 of the Act of 1929) that "'share' includes stock except where a distinction between stock and shares is expressed or implied."

Notes. As to stock and share warrants, see 6 HALSBURY'S LAWS (3rd Edn.) 249, 250; and for the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

(1) *Bank of England* v. *Vagliano Bros.*, [1891] A.C. 107; 60 L.J.Q.B. 145; 64 L.T. 353; 39 W.R. 657; 7 T.L.R. 333; sub nom. *Vagliano* v. *Bank of England*, 55 J.P. 676, H.L.; 42 Digest 779, *2094*.

(2) *Re Irrigation Co. of France, Ex parte Fox* (1871), 6 Ch. App. 176; 40 L.J.Ch. 433; 24 L.T. 336, L.JJ.; 10 Digest (Repl.) 1093, *7559*.

(3) *Thomas* v. *United Butter Cos. of France, Ltd.*, [1909] 2 Ch. 484; 79 L.J.Ch. 14; 101 L.T. 388; 25 T.L.R. 824; 53 Sol. Jo. 733; 16 Mans. 345; 10 Digest (Repl.) 1084, *7503*.

(4) *MacConnell* v. *E. Prill & Co., Ltd.*, [1916] 2 Ch. 57; 85 L.J.Ch. 674; 115 L.T. 71; 32 T.L.R. 509; 60 Sol. Jo. 556; 9 Digest (Repl.) 601, *3990*.

Motion by the plaintiff on behalf of himself and all other members of the company for an injunction to restrain it and the directors from issuing stock warrants to bearer until trial or further order, except as provided by a private Act obtained by the company in 1906.

The company was incorporated in 1898 with a capital of £1,540,000 in 154,000 shares of £10 each. By special resolutions the capital was altered in 1905 by the substitution of ordinary and preference shares and stock. Stock warrants to bearer had been issued under the Companies Act, 1867, and in 1906 under the private Act. The capital was now represented by preference, ordinary, and deferred stock. The plaintiff submitted that there could be no further issue of such warrants to bearer by reason of the provisions of the Companies Act, 1929, s. 70, which, it was argued, repealed the provisions in former Companies Acts.

Lindon, for the plaintiff, referred to *Bank of England* v. *Vagliano Bros.* (1), *Re Irrigation Co. of France, Ex parte Fox* (2), and *Thomas* v. *United Butter Cos. of France, Ltd.* (3).

Gordon Brown, for the company, referred to *MacConnell* v. *E. Prill & Co., Ltd.* (4).

Cur. adv. vult.

April 10. **LUXMOORE, J.,** read the following judgment. The defendant company had, before the passing of the 1906 Act, issued warrants to bearer in respect of the original ordinary share capital which had been converted into ordinary stock, and also in respect of the preference shares which had also been converted into preference stock. This had been done under the provisions of the Companies Act, 1867. Section 27 of that Act provided that:

> "In the case of a company limited by shares the company, if authorised so to do by its regulations as originally framed, or as altered by special resolution, and subject to the provisions of such regulations, may, with respect to any share which is fully paid up, or with respect to stock, issue under their common seal a warrant stating that the bearer of the warrant is entitled to the share or shares or stock therein specified, and may provide by coupons or otherwise for the payment of the future dividends on the share or shares of stock included in such warrant, hereinafter referred to as a share warrant."

Then follow in the succeeding sections, down to and including s. 36, a number of provisions applicable to warrants relating either to shares or stock, but there is one provision at any rate which is applicable only to warrants to bearer relating to shares and not to stock. I refer to the provision in s. 31, which requires the entry in the register of a statement in which each share included in a warrant to bearer is to be distinguished by its number. I should also state that the group of sections dealing with warrants to bearer relating to shares or stock appear together in the 1867 Act under the heading "Share Warrants to Bearer" and there is no definition in that Act which provides that share shall include stock, or vice versa.

After the passing of the Act of 1867 it became a common practice to insert in the articles of association of a company with liability limited by shares power to convert fully paid shares into stock and to issue warrants to bearer in respect of shares or stock. I assume that the defendant company had in fact taken such powers, for, before 1906, the defendant company had converted shares into stock, and had issued stock warrants to bearer. After the passing of the defendant company's Act of 1906, further warrants to bearer were issued by the defendant company in respect of the stock constituted under that Act. No question is raised as to the validity of these bearer warrants. It is admitted that they have been properly and validly issued, but the company proposes to issue warrants to bearer in respect of the unissued shares when fully paid up and converted into stock.

It is to test the validity of the defendant company's proposals that this motion has been launched. It is argued that the Companies Act, 1929, has by implication repealed the provisions of the previous Companies Acts relating to the issue of bearer warrants in respect of stock, while keeping unaltered the provisions with regard to the issue of bearer warrants in respect of shares. No reason is suggested for the repeal of these provisions in respect of stock and their retention in respect of shares. This differentiation between stock and shares, if it has in fact been effected, would appear to be of an arbitrary nature, and none the less so having regard to the fact that the stock warrants to bearer outstanding at the date when the 1929 Act came into force admittedly remain valid and in force. As I have already stated the answer to the question depends on the construction to be placed on the material sections of the Companies Act, 1929, and I propose to refer to these sections; but before doing so it is necessary to trace the development of the provisions contained in the Act of 1867 down to the date of the 1929 Act.

The provisions of the 1867 Act remained in force and unaltered down to the passing of the Companies (Consolidation) Act, 1908. The Act of 1908 incorporated the provisions of ss. 27 to 32 inclusive of the Act of 1867 in s. 37, and the provisions of ss. 34 to 36 inclusive in s. 38, but beyond mere verbal alterations consequential on such incorporation, the provisions of the two Acts are for all practical purposes the same, and, in particular, sub-s. (5) of s. 37 of the 1908 Act reproduces the provisions of s. 31 of the Act of 1867 in requiring the entry in the register, where warrants to bearer are issued, of particulars including (ii) "a statement of the shares or stock included in the warrant, distinguishing each share by its number." The Act of 1908 contains a definition section—s. 285—and in that section "share" is defined as meaning "share in the share capital of the company," and includes stock except where a distinction between stock and shares is expressed or implied.

The next Act to consider is the Act of 1928. This Act was passed for the purpose of amending the Companies Acts, 1908 to 1917, and besides making important and substantial amendments in those Acts, it also makes many minor amendments which are collected and specified in Sched. II to the Act of 1928. Neither in the substantial amendments contained in the Act itself, nor in the minor amendments set out in Sched. II, is there any reference to, or any amendment of, the existing provisions as to warrants to bearer, whether relating to stock or shares. The Act of 1928 was followed by the Companies Act, 1929, which is said to have altered the law with regard to stock warrants to bearer as opposed to share warrants to bearer.

Before I deal with the material sections it is necessary to remember that the Companies Act, 1929, is described as an Act to consolidate the Companies Acts, 1908 to 1928, and certain other enactments connected with the said Acts, but, as counsel for the motion pointed out, the 1929 Act is not purely a consolidation Act, for it does contain amendments of the earlier Acts. I call attention to this fact because it is said that different canons of construction apply to an Act which is purely a consolidating statute and to an Act which is an amending Act, though, in my view, little if anything turns on it, for even in a consolidating Act the construction of any particular provision must turn on the meaning of the words used, and, if that meaning is plain, even though an alteration in the existing law results, such meaning must be given to the words which fall to be construed.

The material sections of the 1929 Act are ss. 50, 62, 70, 71, 72, 95, 97, 108, and 380. Section 380 is a definition section, and in it is a definition of the word "share" in the same terms as are to be found in s. 285 of the 1908 Act, that is, "share" means share in the share capital of a company, and includes stock except where a distinction between stock and share is expressed or implied. Section 50 confers power on the company, if authorised by its articles, to alter its share capital, including in sub-s. (1) (c) power to "convert all or any of its paid-up shares into stock and re-convert that stock into paid-up shares of any denomination." Section 62, sub-s. (2), provides that: "Each share in a company having a share capital shall be distinguished by its inappropriate number." Section 70 provides for the issue of share warrants to bearer. It is in these terms:

> "(1) A company limited by shares, if so authorised by its articles, may, with respect to any fully paid-up shares issue under its common seal a warrant stating that the bearer of the warrant is entitled to the shares therein specified and may provide by coupons or otherwise for the payment of the future dividends on the shares included in the warrant. (2) Such warrant as aforesaid is in this Act termed a 'share warrant.' (3) A share warrant shall entitle the bearer thereof to the shares therein specified, and the shares may be transferred by delivery of the warrant."

Sections 70 and 71 relate respectively to personation of a shareholder and to offences in connection with share warrants. I need not refer to them in detail; it will be sufficient to notice that in those sections there are references to share warrants, and there is, apart from the definition in s. 380, no reference to stock warrants. Section 95 provides that every company shall keep

> "a register of its members and enter therein the following particulars: (a) The names and addresses and the occupations, if any, of the members and in the case of a company having a share capital a statement of the shares held by each member, distinguishing each share by its number and of the amount paid or agreed to be considered as paid on the shares of each member; (b) the date at which each person was entered in the register as a member; (c) the date at which any person ceased to be a member."

Then follows this proviso:

> "Provided that where the company has converted any of its shares into stock and given notice of the conversion to the registrar of companies, the register shall show the amount of stock held by each member instead of the amount

> of shares and the particulars relating to shares specified in para. (a) of this subsection." A

Then sub-s. (2) provides:

> "If default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine."

Down to this point it is clear that reference to shares, except in s. 62 (2), in the B sections to which I have referred, is not required by the context to be limited to "shares" in the strict meaning of the word when compared with stock, but can and should properly be construed, in accordance with the requirement of the definition in s. 380, as including stock.

The next section is s. 97. This is the first section on which counsel for the motion in substance bases his argument. Subsection 1 provides: C

> "On the issue of a share warrant the company shall strike out of its register of members the name of the member then entered therein as holding the shares specified in the warrant as if he had ceased to be a member and shall enter in the register the following particulars, namely: (a) the fact of the issue of the warrant; (b) a statement of the shares included in the warrant distinguishing each share by its number; and (c) the date of the issue of the warrant." D

Counsel says that in this section the word "share" cannot be construed as including stock, because to apply the words of the definition a distinction between stock and shares is at least implied, if not expressed. In my view, this argument is not well founded. It is conceded that share can properly include stock throughout the whole of s. 97, except in sub-s. (1) (b), where the phrase "distinguishing each share by its number" is to be found. Obviously this cannot apply to stock, for E stock from its nature cannot have a number assigned to it, and, consequently, having regard to the definition it is plain that in this phrase share must have its restricted meaning; but that is a very different thing to saying that because it has its restricted meaning in this phrase, the word "share" in the other parts of the section must also have the same restricted meaning that is necessarily required in sub-s. (1) (b), although in such other parts of the section there is nothing either F express or implied, to require the restriction. In my view, so to construe the section would result in a disregard of the clear direction contained in the definition section that the word "share" is to include stock throughout the Act unless the context otherwise requires except in those places where a distinction between stock and shares is expressed or implied. In my judgment, there is no distinction express or implied between share and stock in any part of s. 97 except in the phrase G to which I have referred in sub-s. (1) (b).

The next section referred to is s. 108, which deals with annual returns to be made by a company having a share capital. The particulars required to be set out in the returns are set out in sub-s. (3) under various headings, each enumerated under a letter of the alphabet. In many of the enumerations the word "share" is mentioned, and in all except one of those enumerations "share" can quite plainly H include stock. Counsel for the motion indeed frankly admitted this, but as in the case of s. 97, he argued that the facts that the particulars required under the letter (m) which is as follows: "The number of shares comprised in each share warrant," must necessarily be confined to shares used in the strict sense and cannot be construed as including stock. He, therefore, argued that "shares" and "share" throughout the whole section must be so confined. For the reasons I have already I stated with regard to s. 97, I am unable to accept this argument. In my judgment, the words of the definition clause require the wider definition of "share" as including stock wherever it appears, unless in the actual place where the word is to be construed there is an express or implied distinction between stock and share.

The only other fact relied upon by counsel for the motion was that in Table A to the Act of 1929 there are no articles relating to the issue of warrants to bearer in respect of stock or shares, although there are articles—Nos. 30 to 33 inclusive—relating to the conversion of shares into stock, but I do not appreciate how this fact can assist the contention that the Companies Act, 1929, has not kept alive the power to issue warrants to bearer in respect of stock, although it has kept such power alive in respect of shares. In my judgment, for the reasons I have stated, the Act of 1929 has on its true construction kept alive both powers, and consequently the plaintiff is not entitled to any such order as is prayed. The motion therefore fails.

Solicitors: *Linklaters & Paines*; *Norton, Rose & Co.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* MANCHESTER CORPORATION

[CHANCERY DIVISION (Maugham, J.), July 17, 18, 21, 22, 1930]

[Reported [1931] 1 Ch. 254; 100 L.J.Ch. 33; 144 L.T. 112; 46 T.L.R. 629; 28 L.G.R. 634]

Local Government—Land—Acquisition for specific purpose—Power to apply to Minister for use for different purpose—No dedication of right of way to public —Manchester Corporation Act, 1844 (7 *&* 8 *Vict.*, *c. xli*), *s.* 88—*Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 175—*Public Health Acts* (*Amendment*) *Act*, 1907 (7 *Edw.* 7, *c.* 53), *s.* 95.

In 1875 the defendant corporation acquired land in Manchester under a private Act for the purposes of street construction. Included in the land was a plot which was neglected for some years and was then laid out by the corporation as an open space. Later a fountain was erected on it. The public used the plot freely and continuously. In 1928 the corporation applied to the Minister of Health for permission to build a tuberculosis dispensary and offices on the land, and the Minister approved its appropriation for this purpose. In a relator action for an injunction to restrain the corporation from building so as to interfere with the public's right of user and enjoyment of the plot as an open space,

Held: (i) the public had not acquired a right of way over the plot by user, there having been no animus on the part of the corporation to dedicate.

Folkestone Corpn. v. *Brockman* (1), [1914] A.C. 388, followed.

(ii) on the true construction of the Public Health Acts (Amendment) Act, 1907, s. 95, the corporation was to be the sole judge whether lands acquired by it for a specific purpose were "not required for the purposes for which [they] have been acquired," and, the corporation having acted in good faith, the approval of the Minister of Health gave the corporation authority to use the land in question for the purposes so approved.

Notes. Referred to: *Williams-Ellis* v. *Cobb*, [1934] All E.R.Rep. 465.

As to the creation of a public right of way by dedication and acceptance, see 19 HALSBURY'S LAWS (3rd Edn.) 43–44, paras. 60–62; and for cases on the subject, see 26 DIGEST 297–300, *279–313*.

Cases referred to:

(1) *Folkestone Corpn.* v. *Brockman*, [1914] A.C. 338; 83 L.J.K.B. 745; 110 L.T. 834; 78 J.P. 273; 30 T.L.R. 297; 12 L.G.R. 334, H.L.; 26 Digest 284, *189*.

(2) *Piggott* v. *Goldstraw* (1901), 84 L.T. 94; 65 J.P. 259; 19 Cox, C.C. 621, D.C.; 26 Digest 299, *304*.

(3) *A.-G.* v. *Hanwell U.D.C.*, [1900] 2 Ch. 377; 69 L.J.Ch. 626; 82 L.T. 778; 48 W.R. 690; 16 T.L.R. 452; 44 Sol. Jo. 572, C.A.; 36 Digest (Repl.) 356, *39*.

(4) *A.-G.* v. *Teddington U.D.C.*, [1898] 1 Ch. 66; 67 L.J.Ch. 23; 77 L.T. 426; 61 J.P. 825; 46 W.R. 88; 14 T.L.R. 32; 42 Sol. Jo. 46; 36 Digest (Repl.) 357, *43*.

(5) *Poole* v. *Huskinson* (1843), 11 M. & W. 827; 152 E.R. 1039; 26 Digest 286, *194*.

(6) *Robinson* v. *Cowpen Local Board* (1893), 63 L.J.Q.B. 235; 9 R. 858, C.A.; 26 Digest 300, *309*.

(7) *Staffordshire and Worcestershire Canal Navigation* v. *Bradley*, [1912] 1 Ch. 91; 81 L.J.Ch. 147; 106 L.T. 215; 56 Sol. Jo. 91; 75 J.P. Jo. 555; 25 Digest 15, *125*.

(8) *Re Cuno, Mansfield* v. *Mansfield* (1889), 43 Ch.D. 12; 62 L.T. 15, C.A.; 42 Digest 704, *1207*.

Action.

The writ in this action was issued on the fiat of the Attorney-General by the relator, the owner of the Rivoli Palais de Danse, Aberdeen Street, Manchester, claiming an injunction to restrain the defendants, the Manchester Corporation, from allowing a wall to remain erected and/or from building a tuberculosis dispensary and offices or other buildings on a plot of land situate in the city of Manchester and bounded as therein defined, and containing in area 1,555 square yards or thereabouts, so as to interfere with the right of user and enjoyment of the said plot of land by the public as an open space and uncovered footway, or from obstructing or interfering with the rights of the public to use the said plot of land as an open space and uncovered footway.

Under and in pursuance of the powers conferred by s. 88 of the Manchester Corporation Act, 1844, by s. 158 made a public Act intituled "An Act for the improvement of the town of Manchester," the corporation, in June, 1875, acquired lands in the neighbourhood of Oxford Road, including the plot of land the subject of this action. By s. 91 of that Act it was provided that:

> "Nothing in this Act contained shall enable the said council to alienate, incumber, or demise, for the purposes of this Act, without the approbation of the Commissioners of Her Majesty's Treasury of the United Kingdom of Great Britain and Ireland, or any three of them, any lands, tenements, or hereditaments which they could not have sold, alienated, or incumbered, or demised without such approbation before the passing of this Act, anything in this Act to the contrary notwithstanding."

By s. 25 of the Manchester Corporation Act, 1845, intituled "An Act to effect improvements in the borough of Manchester for the purpose of promoting the health of the inhabitants thereof," it was provided that:

> ". . . in any case in which the council shall have purchased or acquired, either under the fourth-recited Act [the Act of 1844] or this Act, any houses or ground within the borough which shall not be required for the improvement thereof, it shall be lawful for the council to sell and dispose of all or any part of such houses or ground to such person, and at such time and in such manner, as the council shall think proper; and the receipt of the treasurer of the borough shall be a sufficient discharge to the purchaser of any such houses or ground for the money in any such receipt acknowledged to be received."

And by s. 26:

> "Nothing in this Act contained shall enable the council to alienate, incumber, or demise, for the purposes of this Act, without the approbation of the Commissioners of Her Majesty's Treasury, or any three of them, any lands, tenements, or hereditaments which they could not have sold, alienated, incumbered or demised without such approbation before the passing of this Act, anything in this Act to the contrary notwithstanding."

The corporation constructed a new street, Denmark Road, on part of the lands so acquired, and other roads, the roads being metalled and having pavements. They sold the remainder of the said land with the exception of the plot in question of about 1,555 square yards. The plot of land was neglected and in a rough state, and was once offered for sale as a building site. In 1891 the Whitworth trustees expressed a desire that it should not be covered with buildings, and offered to lay it out as an open space. At a meeting on April 8, 1891, the corporation made it over to the Parks Committee to be used as an open space and suggested that the Whitworth trustees should be allowed to lay it out. That proposal was eventually carried out, the cost being defrayed by the corporation. Subsequently the Whitworth trustees were allowed to erect a drinking fountain there and the corporation undertook to supply light and water "for all time." The purposes for which the plot of land had been used from time to time since 1891 were shortly: (a) To accommodate a cabmen's hut, removed in 1893; (b) for the erection of a cabmen's shelter, converted into a shop in 1895 and enlarged in 1899; (c) for the erection of a circular fountain; (d) in 1895 for the erection of a public lavatory; (e) from 1898 to 1919 for the erection of a fire brigade hut station and the placing of a ladder fire escape. At present it had a gravelled surface on a level with the streets, and contained four small plots, railed in and planted with trees and shrubs, and a fountain and lavatory. Until the recent erection of a wall, the land could be entered from almost any point in Oxford Road, from a space about 10 feet wide in Denmark Road between two shrubberies, from a space at the south-west corner, and also from a like space between two shrubberies in Aberdeen Street. Until such erection, it was open to the public, and had been used for many years as an open space and as an extension of the footpaths of the adjoining streets and for the purpose of crossing from corner to corner or from Oxford Road to Aberdeen Street and from Oxford Road to Denmark Road, and vice versa.

In 1928 the corporation communicated with the Minister of Health in order to obtain his approbation to the erection thereon of a tuberculosis dispensary and ancillary offices, and to the borrowing of £24,000 in connection therewith. By an order dated Dec. 27, 1928, and made in pursuance of s. 95 of the Public Health Acts (Amendment) Act, 1907, the Minister, after holding a public local inquiry during October, 1928, approved of the appropriation of the said plot of land by the corporation for these purposes.

Sir Gerald Hurst, K.C., and *John Bennett*, for the plaintiff, referred to *Folkestone Corpn.* v. *Brockman* (1)and *Piggott* v. *Goldstraw* (2).

Spens, K.C., and *Evershed*, for the defendants, referred to *A.-G.* v. *Hanwell U.D.C.* (3); *A.-G.* v. *Teddington U.D.C.* (4); *Folkestone Corpn.* v. *Brockman* (1); *Poole* v. *Huskinson* (5); *Robinson* v. *Cowpen Local Board* (6); *Staffordshire and Worcestershire Canal Navigation* v. *Bradley* (7).

MAUGHAM, J., stated the facts and continued: The statement of claim does not raise the question of a public right of way. It is not surprising that people who live near the site resent the building of a tuberculosis dispensary, or, indeed, any other building on it, because it is a pleasant spot near what is now the very heart of the city. Since 1893 that plot of land has been a public highway. I have to bear in mind the powers of the corporation under s. 88 of the Manchester Corporation Act, 1844. The corporation had powers thereunder to throw any of the land which they had bought into any street within its area. Accordingly, I think that the whole or any part of the said plot of land might properly have been put to the uses stated. In my opinion, the piece of land was not laid into any street, and the resolution of the corporation was that the piece of land was to be used for the purposes of "the improvement of the township." Further, in my opinion, the piece of land was laid out at the expense of the corporation as an open space on which buildings were not intended to be erected except so far as the corporation might from time to time think fit to erect buildings for the purposes of the inhabitants. It was already indicated by the correspondence and the minutes that the intention of the corporation was to dedicate the piece of land perpetually to the user of the public.

I am not convinced that the word "dedication" is altogether appropriate to the acts of a local authority in regard to lands acquired under public or local statutes. A private landowner who dedicates to the public a road laid out by him deals for the public benefit with property that is his own; the position is altogether different in the case of a local authority, which holds lands acquired under and by virtue of certain powers conferred on it by public or local Acts in order to carry out clearly specified duties. A local authority is not entitled to give away any part of the land acquired by them under powers conferred on them by Act of Parliament; the local authority, primâ facie, having obtained a loan for the purpose of acquiring land are not entitled to apply the land for purposes other than those mentioned in the Act. Having regard to the corporation's decision concerning the fountain, I must conclude that the corporation of that date intended the plot of land to be laid out permanently as an open space. Apart from s. 95 of the Public Health Acts (Amendment) Act, 1907, which expressly provided that any lands not required for the purposes for which they were acquired might be appropriated for any purposes approved by the Local Government Board, now the Ministry of Health, I should, in the circumstances of the present case, have felt bound to decide that the corporation was not entitled to alter the user of the plot of land.

The next question that arose was whether it was possible for the public to acquire a right of way over the plot of land by extensive user. In my opinion, it would be wrong to come to any such conclusion. The legal position in regard to the requirements for the acquisition of a public right of way is clear. *Folkestone Corpn.* v. *Brockman* (1) laid it down that, notwithstanding a long-continued user, it was also necessary to establish an animus to dedicate; see also *Poole* v. *Huskinson* (5). If I am right in concluding that the land was laid out as an open space, it seems to me, therefore, that it must follow that no public rights were acquired.

I have already said that the corporation, having acquired land for a specific purpose, and having applied the land for that purpose, is not entitled to alter that purpose and to apply the land differently except under the authority of a special statute in that behalf. The decision in the present case really turns on the true construction of s. 95 of the Act of 1907. What is the meaning of the phrase "not required for the purposes for which those lands have been acquired?" Is it a question of fact on which the court may express an opinion, or is it a question on which the determination of the local authority is to prevail? In my opinion, s. 95 of the Act of 1907 must be compared with s. 175 of the Public Health Act, 1875, and, accordingly, I think under either one or the other of those two sections the local authority, acting in good faith, must be the sole judge whether the lands are "not required" or "not required for the purposes for which they have been acquired." There is no ground for thinking that the court can substitute its own judgment on such a question for that of the local authority, which is given such wide powers of local government by those Acts. Therefore, I conclude that, in the present case, the corporation, acting in good faith, formed the opinion that the land was no longer required for the purposes for which it had been acquired in the year 1875.

Another question which arises under s. 95, not wholly free from doubt, is whether the local authority is thereby enabled, either with or without the approval of the Minister of Health, to override either public or private rights which might have been acquired by the inhabitants of the neighbourhood. The general principle has been lucidly stated by BOWEN, L.J., in *Re Cuno* (8) (43 Ch.D. at p. 17) that

> "... in the construction of statutes you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature."

The presumption is that the lands had been acquired by the local authority for a specific purpose, and, therefore, according to the construction I put on s. 95 of the Act of 1907, in the event of the local authority's believing in good faith that the land was no longer required for that purpose, if there was any fresh purpose for which it was required to be used, that purpose primâ facie must be approved by the Minister of Health, after consideration of all the objections made by persons affected. The interests of the public are doubly safeguarded—in the first place there is the presumption that the local authority primâ facie is going to do its best in the interests of the inhabitants, and in the second place there is the obligation to obtain the approbation of the Minister of Health. There can be no doubt that, in cases where s. 95 is applicable, public rights must always be affected by the alteration of the purposes for which the land has been acquired. In the case, by way of example, of an open space, a swimming bath or a market, people living in the neighbourhood doubtless have some kind of private right in relation to the land while it is being used for those purposes. In the case of a market acquired by the local authority under a special Act, or under a general Act, it might well be that people had built shops or constructed offices in the neighbourhood relying on the proximity of the market. Then, if subsequently circumstances arose which rendered the further retention of that market quite unnecessary, could it be said in such a case that s. 95 of the Act of 1907 was not applicable because of the existence of public rights which would be interfered with by the alteration of the purpose for which the land had been acquired and its use for some other purpose by the local authority? I quite agree that it is a reasonable presumption that private rights obtained by persons in the neighbourhood cannot be interfered with under s. 95. But public rights of way are in a special position; it is not necessary to decide what the true conclusion would be had I been able to hold that there were public rights of way across the open space created by dedication had the open space in question been laid into the streets within the meaning of the sections referred to of the Act of 1844; those rights would have been saved by the reference in s. 95 of the Act of 1907 to "any special provision affecting the use of the lands contained in any local Act."

However, on the opinion I have formed, I must deal with the position that the rights of the public have never been defined, and, indeed, I doubt very much whether they were capable of definition. Although it is true that members of the public had been invited to enter the gravelled part of the plot of land, and also that children had been invited to play on it, nevertheless all those rights were precarious. The case is one where—the public rights in the plot of land being such as they were when the proposal to appropriate the site for the new purposes was made—I am not prepared, on the construction of s. 95 of the Act of 1907, to come to the conclusion that rights of that kind could not be affected or even destroyed as a result of the application of that section, provided that the Minister of Health, after local inquiry and consideration of any objections made by the persons affected, approved of the new purposes for which the land was to be used.

Therefore, I have come to the conclusion that the approval of the Minister of Health under s. 95 of the Public Health Acts (Amendment) Act, 1907, has given the corporation authority to use the land for the purpose which had been approved; accordingly, the action must fail and be dismissed.

Solicitors: *Roberts, Riley, Creeke & Anderson*, Manchester; *Sharpe, Pritchard & Co.*, for *F. E. Warbreck Howell*, Town Clerk, Manchester.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

Re ROBINSON. LAMB *v.* ROBINSON

[CHANCERY DIVISION (Eve, J.), June 18, 1930]

[Reported [1930] 2 Ch. 332; 99 L.J.Ch. 431; 143 L.T. 593; 46 T.L.R. 542]

Will—Revocation—Intention of testator—Inconsistent provision in later will—Later gift failing through incapacity of devisee.

The question whether a gift in a will is revoked by an inconsistent gift in a later will which fails by reason of the incapacity of the devisee and not through any inherent infirmity in the instrument depends on whether the testator has evidenced an intention to revoke the earlier document.

Where the only indication in the second will that the testatrix intended to revoke the first will was the altered disposition which the second will contained,

Held: it must be ascertained from the language of the two instruments whether the first gift had been altogether displaced; on construction of the documents there was no clear intention to revoke the earlier will; and, therefore, the gift in the first will had not been revoked.

Ward v. *Van der Loeff* (1), [1924] A.C. 653, and *Vencatanarayana Pillay* v. *Subammal* (2), L.R. 43 Indian App. 20, applied.

Notes. As to revocation of a will by a later will, see 34 HALSBURY'S LAWS (2nd Edn.) 78–83; and for cases see 44 DIGEST 320 et seq.

Cases referred to:

(1) *Ward* v. *Van der Loeff*, *Burnyeat* v. *Van der Loeff*, [1924] A.C. 653; 93 L.J.Ch. 397; 131 L.T. 292; 40 T.L.R. 493; 68 Sol. Jo. 517, H.L.; 44 Digest 336, *1662*.

(2) *Vencatanarayana Pillay* v. *Subammal* (1915), 32 T.L.R. 118; L.R. 43 Ind. App. 20; 44 Digest 335, *1656*.

(3) *Baker* v. *Storey* (1874), 31 L.T. 631; 23 W.R. 147; 44 Digest 335, *1655*.

Adjourned Summons.

The testatrix, Sarah Robinson, died on Feb. 18, 1929. By a will made on Nov. 20, 1914, she, in substance, gave her estate to trustees upon trust for sale, conversion, and investment, and directed them to pay to her son, Harry Hewitt Robinson, out of the rents and income thereof, or, if they should be insufficient, then out of the capital, an annuity of £156 free of income tax, and, subject thereto, her trustees were to stand possessed of her estate upon trust for such of her grandchildren, children of her two sons, H. H. Robinson and Frank Robinson, as should be living at the decease of H. H. Robinson, or, in case he should die in her lifetime at her own decease, and should attain the age of twenty-one years. The estate was of an insufficient amount to produce an annuity of £156. On Sept. 5, 1921, the testatrix executed a document in the following terms:

> "This is my last will and testament. I, Sarah Robinson, leave all I possess at my death to my son, Harry Hewitt Robinson, of 61, Grange Avenue, Leeds, including the reversion I bought for him, being his share under his late father's will. I wish him to have £100 at once, the rest of his share as soon as possible after my death without any restrictions whatever."

Both documents were admitted to probate, but, as the wife of the son Harry was one of the attesting witnesses to the second will, the disposition therein contained was void under s. 15 of the Wills Act, 1837.

R. M. Pattison for the summons.

I. A. Wolfe, for a grandchild, submitted that in the circumstances there was an intestacy.

N. C. Armitage, for the son H. H. Robinson, contended the contrary.

EVE, J.—The question is whether the first will was revoked by the later one, in which case the deceased has died intestate, or whether the earlier will is still effective. Had I been called on to decide this question a few years ago I should have held that it was concluded by the decision in *Baker* v. *Storey* (3), where it was held that the inconsistency of a gift in a second testament with a gift in an earlier one was a revocation of the earlier instrument, although the second gift failed by reason of the incapacity of the devisee and not through any infirmity in the instrument. But on the most recent authorities it would seem to be in all cases a matter of intention. Has the testator evidenced an intention to revoke the earlier testament? In arriving at an answer to that question, it is immaterial whether the later testament fails to be operative through some inherent infirmity or by reason of the incapacity of the intended legatee to take under it. There is no distinction to be made between the two classes of case.

Did the testatrix in the present case intend that, if the gift contained in the second will failed, the other gift should remain effectual? The only indication in the second document that the testatrix intended to revoke the first is in the altered disposition which it contained. Ought I to say that this was enough to indicate an intention to revoke? It is said that this is a will, not a codicil, but there is nothing in it to show that the testatrix remembered that she had made a previous will. The point which has been raised is dealt with by Lord Dunedin in *Ward* v. *Van der Loeff* (1), where he referred to the distinction above alluded to and said:

> "I do not think this is a sound distinction. It would be curious if it were so. The question obviously depends on the intention of the testator as gathered from the words he has used, and it is difficult to understand how that intention can be varied accordingly as the insufficiency of the new arrangement depends on whether he has not legally carried out his intention by the words he has used, or whether the law has made impossible the thing he was trying to do."

Lord Phillimore expressed the same view, and Lord Wrenbury, in an Indian case, *Vencatanarayana Pillay* v. *Subammal* (2), dealing with *Baker* v. *Storey* (3), came to the same conclusion—that the matter depended on the intention.

If the testator has made two distinct gifts to a person by two instruments it must be ascertained from the language of the two instruments whether the first gift has been altogether displaced. If there is a clear intention to revoke the earlier instrument the failure of the second gift will not restore the first one. In the face of the authorities I cannot hold that the first will has been revoked, so far as the estate of the testatrix is concerned.

Solicitors: *Warren, Murton, Miller & Foster*, for *Parker, March & Charlton*, Selby.

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* PRICE'S TAILORS (1928), LTD.

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), June 23, 1930]

[Reported [1930] 2 Ch. 316; 99 L.J.Ch. 511; 143 L.T. 416; 94 J.P. 226; 29 L.G.R. 15]

Local Government—Street—Building line—Alteration of shop fronts—Ground floor projecting beyond upper floors—"Front . . . taken down in order to be re-built"—"Front"—Whole of front exterior of premises—Public Health Act, 1875 (38 *&* 39 *Vict., c.* 5), *s.* 155.

The defendants were the owners of two adjacent three-storey buildings with, on the ground floor, shops, each of which projected towards the street about four feet beyond the upper floors. The defendants proposed to convert the two shops into one and for that purpose submitted plans to the local authority, which were disapproved, the local authority passing a resolution that, in pursuance of the powers given them by the Public Health Act, 1875, s. 155, a building line be prescribed by setting back the ground floor front to the existing exterior of the floors above. The defendants refused to comply with the resolution, and carried out the alterations, removing the main wall between the two shops, substituting as the support of the building above, a steel structure supported by two columns, and replacing the two existing shop fronts by a single shop front with one door. They did not otherwise alter the permanent structure of the ground floor. In an action brought by the Attorney-General on the relation of the local authority for a declaration that the defendants were not entitled to build except in accordance with the prescribed building line and for an order that they remove so much of the new shop front as projected beyond the line,

Held: on the true construction of s. 155 of the Public Health Act, 1875, "front . . . taken down, in order to be re-built" meant the whole of the front exterior of the premises and not merely that part of it nearest the street; in the present case the whole of the front exterior had not been taken down; and, therefore, the local authority had no power to prescribe a new building line.

A.-G. v. *Hatch* (1), [1893] 3 Ch. 36, applied.

Notes. As to the power of a local authority to prescribe a building line, see 19 Halsbury's Laws (3rd Edn.) 223–227, paras. 356–361; and for cases on the subject, see 26 Digest 563–564, *2577–2587*.

Case referred to:

(1) *A.-G.* v. *Hatch*, [1893] 3 Ch. 36; 62 L.J.Ch. 857; 69 L.T. 469; 57 J.P. 825; 9 T.L.R. 513; 2 R. 533, C.A.; 26 Digest 564, *2580*.

Appeal from an order of Luxmoore, J.

The defendants carried on the business of tailors and clothiers, and for the purpose of their business took a lease for forty-two years from Sept. 29, 1929, of two buildings known as Nos. 104 and 106, High Street North, East Ham. Each of the buildings was a three-storied building, of which the ground floor at the date of the lease was used as a shop. The ground floor in each case projected towards the street for a distance of four feet three inches beyond the external wall of the upper floors. The two buildings formed part of a block of nine buildings, being Nos. 100 to 116 (even numbers), on the eastern side of High Street North. As respects Nos. 102 and 100 to the south of Nos. 104 and 106, there were no projections of the ground floor; but Nos. 108 to 116 to the north of Nos. 104 and 106 had like projections of the ground floor. The defendants being desirous of converting the two shops on the ground floors of Nos. 104 and 106 into one shop for the purpose of their business, on Sept. 16, 1929, deposited with the borough council of East Ham plans showing the intended alterations. The proposed alterations were of a substantial character consisting in removing the internal brick wall dividing the two shops; in substituting therefor, as the support of the building above, a steel structure itself supported by two new columns; and in replacing the two existing shop fronts and their several doors by a single shop front with one door. The council disapproved the plans and on Oct. 22, 1929, in the exercise of their powers under s. 155 of the Public Health Act, 1875, prescribed a building line for the re-building of any premises on the site in question—setting back the ground floor to the existing main wall of the floors above. The defendants proceeded with the alterations as indicated in their plans, commencing them on Nov. 2, 1929, and completing them on Dec. 14, 1929. On Dec. 18, 1929, a writ was issued on behalf of the Attorney-General on the relation of the East Ham Corporation, claiming a declaration that the defendants were not entitled to erect the fronts of the buildings, Nos. 104 and 106, High Street North, except in accordance with the line prescribed by the relators under s. 155 of the Public Health Act, 1875; an order directing the defendants to remove so much of the new fronts of such buildings as was in front of the line; and an injunction restraining the defendants, their servants, agents and workmen, from erecting the fronts of such buildings except in accordance with such line. The plaintiff also moved the court for an interlocutory injunction of a like character, and for an order that so much of the buildings as had been erected otherwise than within the prescribed line should be removed forthwith by the defendants. It was agreed by the parties that the hearing of the motion should be treated as the trial of the action.

Section 155 of the Public Health Act, 1875, provides as follows:

> "When any house or building situated in any street in an urban district, or the front thereof, has been taken down, in order to be re-built or altered, the urban authority may prescribe the line in which any house or building, or the front thereof, to be built or re-built in the same situation shall be erected, and such house or building, or the front thereof, shall be erected in accordance therewith. The urban authority shall pay on tender compensation to the owner or other person immediately interested in such house or building for any loss or damage he may sustain in consequence of his house or building being set back or forward, the amount of such compensation, in case of dispute, to be settled by arbitration in manner provided by this Act."

F. K. Archer, K.C., and *R. A. Glen* for the plaintiff.

W. P. Spens, K.C., and Maurice P. Fitzgerald for the defendants.

LORD HANWORTH, M.R.—These proceedings were taken by the Attorney-General at the relation of the local authority in order to restrain the defendants from proceeding with some alterations that they were making to two houses which they had acquired, namely, 104 and 106, High Street North, East Ham. I need not recount the whole of the facts, but the point that is involved is whether or not the local authority have the powers which they are seeking to enforce under s. 155 of the Public Health Act, 1875. The course of the proceedings was that after the writ had been issued on Dec. 18, 1929, a motion was made before the learned judge and, by consent, that motion was turned into the trial of the action. Evidence was heard and the learned judge gave his judgment, and he came to the conclusion that the local authority were not entitled to the remedy they sought, and he, therefore, dismissed the action with costs, and from that decision the appeal is taken to this court.

It is important that one should appreciate the facts on which the case was decided by LUXMOORE, J. Apart from his more careful appreciation of them, I will just state shortly those that are necessary for the purpose of the case. There is in High Street North a series of houses, the bottom parts of which are now turned into shops. It would seem that the houses were originally residential houses, but the ground floor has now been turned into a shop, and large window panes have been inserted. On the first floor there are bay windows which project from the main wall of the house. In fact, in these two houses Nos. 104 and 106, High Street, there was a projection on the ground floor, which stood out towards the street a distance of 4 ft. 3 in. beyond the main wall of the house. Although it is not certain, it is probable that that projection was a development from an original bay window which the house had on the ground floor at the time when it was built. However, these and the other houses in sequence have these projections of 4 ft. 3 in. beyond the main wall of the house; and on the first floor they have the projection of the bay windows which come forward something like 3 ft. or 3 ft. 3 in. The defendants having acquired these shops, were minded to turn them into one large emporium, and it is plain from the photograph of what has now been completed, that they have made a very attractive and large shop out of the two previous ones. While they were making these alterations, correspondence took place, in which the local authority said that they disapproved of the plans which had been submitted for their approval by the defendants, and indicated that their reason for the disapproval was that they did not assent to the defendants replacing their premises to the exact distance that they projected previously on the pavement, and they were minded to set back the building line so as to prevent these projections. The defendants, however, quite fairly indicated that their view was that the local authority had no such power, and stated that they intended to proceed without delay. The local authority took a little time for consideration of the matter, and, on Nov. 2, the town clerk wrote acknowledging the letter of Nov. 1, in which the defendants had said that the Public Health Act, 1875, s. 155, did not apply to these proposals, and that they would be prepared to accept service of any proceedings. That letter was acknowledged on Nov. 2, the day after, and it was not until Nov. 23 that the town clerk wrote the letter in which he said that he had taken counsel's opinion, and that he had been advised that the powers of the council as claimed by them were good, and that they would apply to the Attorney-General for his fiat to bring the action claiming an order for the removal of so much of the building as was in front of the prescribed line. Comment was made that there was that delay of three weeks on the part of the local authority. Inasmuch as that comment has been made, I think it right to say that I do not think the local authority are justifiably subject to that comment. There must be a certain time taken by a public authority to ascertain their position by obtaining counsel's opinion and the like, and I do not think that that criticism on them is well founded.

We have to consider, therefore, whether or not Luxmoore, J., is right in the view which he took of the law applicable to the case and the facts as he interpreted them. It appears from the evidence which is before us that the defendants have not completely altered or pulled down the front part of the ground floor of their two houses; they have left standing on the north side, and in part on the south side, two columns with what is called a truss stone on them. That indicates the limitation of what has been done by the defendants in between those two remaining and clearly marked definitive positions. They have altered the fascia of their shops, and they have carried out some internal affairs with which the court is not concerned. It seems difficult, however, to say that they have in any way altered the permanent structure of the ground floor of their premises, however much it is clear that they have altered the disposition of the windows and the glass and door which affords an entrance to the premises.

The case put on behalf of the local authority is this. They claim that they have powers to call on the defendants to set back their building to a line which has been prescribed—in fact, on Oct. 22—by steps properly taken. The building line is a line which is just 4 ft. 3 in. back from the projections of the houses Nos. 104 and 106 to the pavement. Section 155 of the Public Health Act says this:

> "When any house or building situated in any street in an urban district, or the front thereof, has been taken down, in order to be re-built or altered, the urban authority may prescribe the line in which any house or building, or the front thereof, to be built or re-built in the same situation shall be erected, and such house or building, or the front thereof, shall be erected in accordance therewith. . . ."

A It will be observed that the right of the urban authority to prescribe the line appears to arise when the house or building has been taken down, and it would appear that the local authority acted quite within their rights in prescribing the line on Oct. 22. But it is said by the defendants that the powers of s. 155 are not operative, because they have not taken down the house or the building or the front thereof; what they have done is to alter a part of their house abutting on the street. The local B authority says: "Inasmuch as you have taken down the part abutting on the street, you have taken down the front for the purpose of the section, because the section intends the front which is abutting on the street."

We know that the old houses in London had forecourts or gardens in front of them, and in those forecourts or gardens shops were built, the main house standing at some distance—it may be as much as 40 ft., 50 ft. or 60 ft., or possibly more— C from the main pavement. It is quite unnecessary to consider such cases as those, because they do not arise on the facts of this case. It is quite unnecessary to consider problems which arise when there is a front of a shop abutting on the pavement and at some distance back, it may be a considerable distance, a house which is in connection with that shop, but which really stands at the other end of a forecourt in which the shop is built. In the present case, we have premises D of which the ground floor projects beyond the now established building line, as also do the bay windows which are on the first floor; and the question is whether or not the front of this house has been taken down, within the meaning of the section, in the course of the alterations which the defendants have made to these two houses.

In *A.-G.* v. *Hatch* (1), a case which is binding on this court, the Court of Appeal E had to consider the effect and the meaning of s. 155. LINDLEY, L.J. (as he then was), said ([1893] 3 Ch. at p. 45): "In order to bring the power given by this section into operation, it must be made out that the house or the front of it has been taken down." Then he puts the question:

> "Now, can it be said that this house has been taken down? I do not say that a house might not be considered to be taken down within the meaning of this F section if only a few bricks were left standing; but when a substantial portion, such as the whole top floor, is left untouched, I think that the house has not been taken down, and I do not think that any jury would find that it has. The defendant did not intend to take down his house, but to keep his house and alter the shop. A real substantial part of the house has been left standing, and I cannot come to the conclusion that the house has been taken down. Then as G to the front, the defendant never intended to take down his front; he only intended to take out part of it. This is not a case of de minimis non curat lex; he left standing a substantial part, about one-third of the front. The corporation never thought of proceeding under s. 155 till they found they could not come to terms with the defendant."

It is plain, I think, from that decision, that one has to consider whether or not H there has been such a demolition of so large a portion of the house or the front of it as to justify one in holding that it has been taken down. "Taken down" does not mean merely re-modelled, it means "removed." In the present case, as I have pointed out, the columns and truss stone at each end remain, and all that has been done has been some re-modelling in the middle of the ground floor, and the first floor and the second floor have not been in any way touched. It seems quite I impossible to hold that there has been a taking down of the front of the house, for certainly two-thirds of the front of the house have been left untouched. It is, perhaps, of interest to look at how the section became what it is. Section 68 of the Towns Improvement Clauses Act, 1847, said that houses which projected beyond the line of the street, when they were taken down should be set back. The terms of that section were: "Where any house or building, any part of which projects beyond the regular line of the street," so the powers of the section were limited to those houses of which a part projected beyond the regular line of the street. That limitation was removed by s. 35 of the Local Government Act, 1858. In

1875 added power was given by inserting the words "or the front thereof." There are, therefore, now the wider powers, by the elimination of the limitation which stood in 1847, but the power to intervene and to trespass on private rights can only be exercised where either the house or the front has been taken down.

Luxmoore, J., in considering this matter, came to some conclusions of fact which are of importance. He said:

> "It would certainly seem to me to be an abuse of language to call the exterior wall and shop window of the ground floor of Nos. 104 and 106, High Street North, the front of those two houses, to the exclusion of the exterior wall and windows of the first and second floor, and I therefore, quite apart from authority, come to the conclusion that on the true construction of this section, the front of the houses Nos. 104 and 106, High Street North, includes the exterior walls and windows of the first and second floors of those houses as well as the exterior wall and windows of the ground floor."

With that view I quite agree. On the facts of this case, I do not think it would be possible to come to any other conclusion, although for safety I call attention to the facts of the present case, which do not necessarily cover the other case which has been suggested, namely, the case of an almost independent shop being built on a forecourt. Luxmoore, J., has, therefore, come to the conclusion that the front of the house has not been taken down, and on the second point he has come to a conclusion that what has been done to this front on the ground floor is not the taking down of that front, even if the ground floor be considered as a front in itself. I agree with those findings of the learned judge, and with his construction of the section. It appears that he is right on both points, that, in the present case, the front of the house has not been taken down, and that the front of the ground floor has not been substantially taken down. Agreeing, therefore, with the learned judge on both those points, the appeal must be dismissed with costs.

LAWRENCE, L.J.—I agree, and have nothing to add.

ROMER, L.J.—I agree. Section 155 of the Public Health Act, 1875, is not dealing with a case where part of the front of the building has been taken down, nor, indeed, where the front of the building has been taken down, but where the front of the whole building has been taken down. I can see for myself no reason whatsoever for thinking that the word "front" in s. 155 is used in the section in any other than its ordinary meaning. That being so, the first question that arises on the appeal is purely a question of fact, namely, has the front of the house been taken down? As to that I agree with Luxmoore, J., that it would be an abuse of language to say, looking at these two houses, that the front—the whole front—of the houses has been taken down.

On the other point referred to by the Master of the Rolls, I have nothing to add. I will only say this, that, supposing we had been able to accede to the contention of the plaintiff that "the front of the house or building" in the section means that part of the front of the building which is nearest to the street, the results of the application of the section might be ridiculous, because I consider that, in such a case, there is nothing whatsoever to prevent the local authority from prescribing a building line which would be further away from the street than the line of the front of the first and second floors, and the result of that would be that, if the building owner built in accordance with the terms of the local authority, as he is obliged to do, the top part of his house would, or might, come tumbling down.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Wilson & Blew*; *Gisborne & Co.*, for *Carr, Sandelson & Co.*, Leeds.

[*Reported by* Geoffrey P. Langworthy, Esq., *Barrister-at-Law.*]

KITANO MARU (OWNERS) *v.* OTRANTO (OWNERS). THE OTRANTO

[HOUSE OF LORDS (Lord Buckmaster, Lord Dunedin, Lord Blanesburgh, Lord Warrington and Lord Thankerton), November 11, 13, 14, December 9, 1930]

[Reported [1931] A.C. 194; 100 L.J.P. 11; 144 L.T. 251; 47 T.L.R. 163; 18 Asp.M.L.C. 193]

Shipping—Collision—Crossing ships—Duty of stand-on vessel—Regulations for Preventing Collisions at Sea, 1910, *Arts.* 19, 21 (*note*).

It is beyond all doubt of the utmost consequence that r. 21 of the Collision Regulations, 1948 (formerly art. 21 of the Sea Regulations, 1910), which provides: "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed," and, by a note: "When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision," should be obeyed. The ship that is bound to keep her course is not entitled to alter it at a moment when there is ample time for the ship that is bound to give way to discharge her duty, for that ship is entitled to rely on obedience to the rule by the ship that has to keep her course. But, acknowledging to the full the vital consequences of strict obedience, there still remains the fact that these rules were made for the guidance of mariners and not of mathematicians, and that it is not right, by an elaborate process of calculation after the event, to decide that the ship that was bound to keep her course acted a little before the moment that in fact she need have done. When two ships are travelling at 16 and 13 knots [as in the present case] the moment when safety has passed and peril has arrived cannot be determined to a hair's breadth. The rule was designed to secure that the stand-on vessel shall maintain her course until the last safe moment. What that safe moment is must depend primarily on the judgment of a competent sailor, forming his opinion with knowledge of the necessity of obedience to the rule and in face of all the existing facts. Subsequent examination may show that his judgment could not properly have been formed, in which case the rule has been broken without excuse, but the ultimate decision is not to be settled merely by exact calculations made after the event, but by considering these facts as they presented themselves to a skilled man at the time.

The respondents' steamship *O.* sighted the appellants' steamship *K.M.* at a distance of about seven miles on her port bow. The *O.* kept her course and speed until about three minutes before the collision, when, the *K.M.* having taken no action to avoid her, the master of the *O.* determined that the *K.M.* could not avoid the *O.* by her own action alone, and he starboarded and then hard-a-starboarded, and sounded two short blasts. Half a minute later the *K.M.* was seen to be porting, and the master of the *O.* gave the order: "Hard-a-port," and shortly after went full speed astern on both engines. About a minute later the vessels came into collision.

Held: while it was impossible to lay down a general rule that in all cases of crossing ships a starboard helm for the stand-on ship must necessarily be a negligent act, in the present case the starboarding, coupled with maintaining speed, was a negligent manœuvre, and both vessels must be held to be to blame.

Notes. Considered: *The Manchester Regiment*, [1938] P. 117; *Heranger Steamship Owners* v. *Diamond Steamship Owners*, [1939] A.C. 94. Referred to: *The Bremen* (1931), 47 T.L.R. 505.

As to the effect of art. 21 of the Sea Regulations, 1910 (replaced as mentioned above), see 30 Halsbury's Laws (2nd Edn.) 757 et seq.; and for cases see 41 Digest 740 et seq.

Cases referred to:

(1) *Tasmania* (*Ship Owners and Freight Owners*) v. *Smith, etc., City of Corinth* (*Owners*), *The Tasmania* (1890), 15 App. Cas. 223; 63 L.T. 1; 6 Asp.M.L.C. 517, H.L.; 41 Digest 708, *5446*.

(2) *The Olympic and H.M.S. Hawke*, [1913] P. 214; 83 L.J.P. 113; 29 T.L.R. 441, C.A.; affirmed sub nom. *Olympic* (*Owners*) v. *Blunt*, *Olympic* (*Owners*) v. *Admiralty Comrs.*, [1915] A.C. 385; 84 L.J.P. 49; 112 L.T. 49; 31 T.L.R. 54; 12 Asp.M.L.C. 580, H.L.; 41 Digest 745, *5960*.

(3) *The Orduna*, [1919] P. 381; 122 L.T. 510; 14 Asp.M.L.C., C.A.; affirmed sub nom. *Orduna* (*Owners*) v. *Shipping Controller*, [1921] 1 A.C. 250; 90 L.J.P. 67; 150 L.J.Jo. 356, H.L.; 41 Digest 741, *5925*.

(4) *S.S. Albano* v. *Allan Line Steamship Co., Ltd., Union Dampfschiffsrhederei Act* v. *S.S. Parisian*, [1907] A.C. 193; 76 L.J.P.C. 33; 96 L.T. 335; 10 Asp.M.L.C. 365; sub nom. *S.S. Albano* v. *S.S. Parisian*, 23 T.L.R. 344, P.C.; 41 Digest 742, *5935*.

(5) *New England* (*Owners*) v. *Rayford* (*Owners*) (1922) 10 Lloyd, L.R. 743.

Appeal from an order of the Court of Appeal (Lawrence and Greer, L.JJ.; Scrutton, L.J., dissenting) in a damage action.

The plaintiffs, owners of the Japanese steamship *Kitano Maru*, claimed damages from the defendants, owners of the steamship *Otranto*, in respect of a collision between the *Kitano Maru* and the *Otranto*, which took place at about 8.48 p.m., shortly after sunset, on Aug. 11, 1928, in the North Sea, some miles from the mouth of the river Humber. The weather at the time was fine and clear. The *Kitano Maru*, a vessel of 7,952 tons gross, 474 ft. long, was in the course of a voyage from Middlesbrough to Antwerp with about 2,000 tons of cargo. The *Otranto*, a vessel of 20,032 tons gross, 12,021 tons net, 658 ft. in length, was on a voyage from Immingham to Copenhagen and other northern capitals, with a large number of passengers. The facts as found by Hill, J., were that the *Otranto* was travelling at about 16 knots, and saw about seven miles distant the *Kitano Maru* on a bearing which was accurately taken by the officer on watch; the bearing continued the same for about ten minutes, and the officer then sent a message to the master, who came on the bridge and took charge from the second officer. Eight minutes before the collision the *Kitano Maru* was judged to be two or two-and-a-half miles away, and about 3½ points on the port bow. The bearing continued almost the same, varying only by one degree. Three or four minutes before the collision, when the distance, as the master judged, was a quarter to half-a-mile, and was judged by the second officer to be hardly three-quarters of a mile, the *Kitano Maru* had not altered her course or her speed or given any signal. The master of the *Otranto*, therefore, recognised that the position was very dangerous, and he decided to take action, and approximately about three minutes before the collision he gave an order, "starboard," and immediately afterwards "hard-a-starboard." That order was carried out, and he gave two short blasts. He brought the *Kitano Maru* a little on the port bow, and then the *Kitano Maru* began to turn to starboard, and gave a short blast. Immediately upon that he gave an order "hard-a-port," but before it could be carried out he countermanded it, and repeated "hard-a-starboard," and followed that by full astern on both engines about a minute before the collision.

The Court of Appeal held (Scrutton, L.J., dissenting, upon the ground that the *Otranto* was to blame for not keeping her course) that the *Otranto* ought not to be held to blame for failing to take off her way. The relevant authorities established no general rule that a vessel in taking action justified by the note to art. 21, must first take off her way. The *Otranto* was, therefore, bound to take such action as in the circumstances might appear best calculated to avoid the collision, and the master of the *Otranto* was not negligent in taking the action which he took, notwithstanding that if the *Otranto* had taken off her way the collision might in the circumstances have been avoided. The owners of the *Kitano Maru* appealed.

The Regulations for Preventing Collisions at Sea, 1910, so far as material, are as follows:

> "Art. 19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."
>
> Art. 21. Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed. NOTE.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision: (see arts. 27 and 29)."

Dunlop, K.C., and *R. F. Hayward* for the appellants.

A. T. Miller, K.C., and *H. C. S. Dumas* for the respondents.

The House took time for consideration.

Dec. 9. **LORD BUCKMASTER** read the following opinion.—On Aug. 11, 1928, in the North Sea, off the mouth of the Humber, the *Otranto*, a twin screw steamship of 20,032 tons gross register and 658 ft. in length, bound from Immingham in the Humber to Copenhagen on a cruise to Norway with 586 passengers, was proceeding at a speed of about sixteen knots on a course of North 59° E. true. The *Kitano Maru*, a twin screw steamship of 7,952 tons gross register and 474 ft. in length, was bound from Middlesbrough to Antwerp partly laden with cargo. She was proceeding at a speed of about thirteen knots on a course of S. 38° E. true. The wind was light, the sea smooth and the tides were slack. The courses of the vessels were crossing at about a right-angle, the *Kitano Maru* bearing about three-and-a-half points on the port bow of the *Otranto* and the *Otranto* bearing about four-and-a-half points on the starboard bow of the *Kitano Maru*. It was the duty of the *Kitano Maru*, being the vessel which had the other on her starboard side, to keep out of the way of the *Otranto* and avoid crossing ahead of her. The time of day was just after 8 p.m. The light was good, permitting of seeing approaching vessels without difficulty, but making the estimate of distance a little uncertain. There resulted a collision between the two vessels in which both vessels were damaged. Litigation was initiated at the instance of the owners of the *Kitano Maru* against the owners of the *Otranto* in which litigation the claim was met by a counter-claim. The case was heard before HILL, J., with the assistance of Trinity Masters, and he found both vessels to blame and made no apportionment of damage. Appeal was taken to the Court of Appeal who, sitting with assessors, by a majority, SCRUTTON, L.J., dissenting, found the *Kitano Maru* alone to blame. Appeal has now been taken to your Lordships' House and what is asked is to restore the judgment of HILL, J.

It has not been contended that the *Kitano Maru* was not to blame. HILL, J., before whom the case depended, found that the crew on board the *Kitano Maru* put forward an absolutely false account of the events prior to the collision. He said in plain words that the witnesses were liars. On the other hand, he believed the story given by the officers on board the *Otranto*. That estimate was agreed to by all the learned judges of the Court of Appeal. The facts of the case may, therefore, be taken according to the testimony on board the *Otranto*. The *Kitano Maru* was first observed from the deck of the *Otranto* a little before 8.30, at which time she was about six to seven miles distant, by Shurrock, the supernumerary second officer, who had come on duty at 8 p.m. At 8.29 he took a bearing of the *Kitano Maru*. This he took from the standard compass. He then returned to the bridge, but went up again at 8.35 p.m. and took another bearing, and found it was the same as before. The *Kitano Maru* was still a good way off. He continued to watch her and finding that she was not altering her bearing he sent for the captain, who came at once at 8.40 p.m. At that time he estimated the distance between the two ships at about two-and-a-half miles. He went and took another bearing and found it practically the same. The story may now be taken up according to the testimony of the captain. On arriving on the bridge he was told by the second officer of what he had observed as to the bearing. He estimated the vessel at this time at about two-and-a-half miles off. He watched her closely and could see her quite well, but she held on her course without altering either course or speed. That continued five minutes, another report as to the bearing being unaltered was given by the second officer from the compass. By this time she was apparently up to a quarter to half a mile distant. Then, to give the captain's own words: "I considered that I was in a very dangerous position. She had shown no sign of altering her course or speed and I assumed that she was trying to cross my bow and I thought it was time for me to take immediate action." Accordingly, at 8.45 p.m. he ordered the helm hard-a-starboard and sounded two short blasts. Up to this time there had been no alteration on the part of the *Kitano Maru* of either course or speed. Half a minute after the helm of the *Otranto* had been put hard to starboard and when the vessel had begun to pay off, the second officer suddenly shouted: "She is altering her course to starboard. She is porting," and then, again using the words of the captain: "I immediately gave an order 'hard-a-port.' The ships were so close together then that I could see that a collision was inevitable, but, I think, before the helm was even amidships I put her helm back to hard starboard and from the time I starboarded my ship was swinging hard to port under a starboard helm. At 8.48 p.m. the collision occurred. One minute before the collision the engines of the *Otranto* were put hard astern."

The regulations applicable to this set of circumstances are these:

> "19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.
>
> 21. Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed. Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision: (see arts. 27 and 29).
>
> 27. In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

I agree with Greer, L.J., that these rules must aid each and that the note to r. 21 which relates to special conditions does not destroy the effect of r. 27 which is of general application. In obedience to r. 21, therefore, the *Kitano Maru* was the ship bound to give way, and the *Otranto* to keep her course and speed. The negligence of the *Kitano Maru* was gross and palpable. She made no attempt whatever to give way until two minutes of the spot where disaster was inevitable. She did not, in fact, stir from her course until thirty seconds after the *Otranto* had begun to swing to port, and she then turned to starboard under a port helm. It was impossible to excuse such manœuvres, and, apparently recognising this fact, the story told on behalf of her owners was found to be a mass of deliberate and concocted lies.

With this comment she can pass from consideration, for the real issue in this case, on which there has been great divergence of judicial and nautical opinion, is whether the *Otranto* was negligent in what she did? The negligence alleged against her can be summed up under four heads: (i) That she had no right to alter her course or her speed at the moment she did. (ii) That, if any step taken by her could be justified, it would have been that of reversing her engines. (iii) That, if she altered her helm, she should have altered it to port and steered her course to starboard. (iv) That, even if the engines had not been stopped

A before, they should have been stopped at once when she realised that the *Kitano Maru* was moving to starboard.

The only one of these points that is of general application is that relating to the moment when the *Otranto* altered her course, and upon this HILL, J., and SCRUTTON, L.J., are at variance. Much has been said about this rule in many cases. It is beyond all doubt of the utmost consequence that it should be obeyed. The ship B that is bound to keep her course is not entitled to alter it at a moment when there is ample time for the ship that is bound to give way to discharge her duty, for that ship is entitled to rely upon obedience to the rule by the ship that has to keep her course. But, acknowledging to the full the vital consequence of strict obedience, there still remains the fact that these rules were made for the guidance of mariners and not of mathematicians, and that it is not right, by an elaborate C process of calculation after the event, to decide that the ship that was bound to keep her course acted a little before the moment that in fact she need have done. When two ships are travelling at sixteen and thirteen knots, the moment when safety has passed and peril has arrived cannot be determined to a hair's breadth. The rule was designed to secure that the standing-on vessel shall maintain her course until the last safe moment. What that safe moment is must depend D primarily upon the judgment of a competent sailor, forming his opinion with knowledge of the necessity of obedience to the rule and in face of all the existing facts. Subsequent examination may show that his judgment could not properly have been formed, in which case the rule has been broken without excuse, but the ultimate decision is not to be settled merely by exact calculations made after the event, but by considering these facts as they presented themselves to a skilled man at E the time. This is in close accordance with the view expressed by LORD HERSCHELL in *The Tasmania* (1), where he says (15 App. Cas. at p. 226):

> "As soon then as it was, or ought to a master of reasonable skill and prudence to have been, obvious that to keep his course would invoke immediate danger, it was no longer the duty of the master of the *Tasmania* to adhere to the 22nd F (now the 21st) rule. He was not only justified in departing from it, but bound to do so, and to also use his best judgment to avoid the danger which threatened."

And again with VAUGHAN WILLIAMS, L.J., in *The Olympic and H.M.S. Hawke* (2) ([1913] P. at p. 245), where he says:

> G "I am inclined to think that in a case where good seamanship would assume that collision cannot be avoided by the action of the giving-way vessel alone, the case falls with the exception (namely, the exception to the rule to keep course and speed) even though in fact the giving-way vessel could by her own action have averted collision."

This is confirmed in other words by LORD PARKER in the same case: (at p. 279). H In *The Orduna* (3) ([1919] P. at p. 390), BANKES, L.J., comments on this, but does not express disagreement, nor can I find there was any disapproval in the judgment of this house in *Orduna* (*Owners*) v. *Shipping Controller* (3). A sentence from the opinion of LORD SUMNER shows at once how that case differs from the present. He says ([1921] A.C. at p. 260):

> I "The evidence of the officer of the watch, that at the moment when he took this helm action he judged the position to be a safe one, leaves him without excuse."

Here I have already referred to the evidence of the captain upon the point in chief and to it may be added his answers. In cross-examination, he is there asked: Q. "Was it then [namely, at 8.44] that you gave the order to starboard?" A. "Just after that." Q. "At that time do you say that it was a very dangerous position?" A. "Yes." And there is no evidence, nor, in my opinion, any calculation, that would justify us in saying he was wrong. In *The Albano* (4) ([1907]

A.C. at p. 207), Sir Gorell Barnes, in giving the judgment of the Privy Council, says this:

> "It must always be a matter of some difficulty for the master of a vessel which has to keep her course and speed with regard to another vessel which has to keep out of her way, to determine when the time has arrived for him to take action, for if he act too soon he may disconcert any action which the other vessel may be about to take to avoid his vessel, and might be blamed for so doing, and yet the time may come at which he must take action. Therefore he must keep his course and speed up to some point, and then act, but the precise point must necessarily be difficult to determine, and some little latitude has to be allowed to the master in determining this."

In these circumstances, I am not prepared to hold that the captain of the *Otranto* broke any rule when he decided to act. The lives of 560 passengers were in his care, and with such responsibility calculations cannot be expected to be as minute and accurate as when distances, speed, and times are afterwards plotted out in a law court on a sheet of paper. All the six experienced men who have advised the courts on this point are in agreement with this conclusion. But, although the captain was entitled to act, I am unable to find that his action was in accordance with the requirements of good seamanship. First, and before all things, he ought to have stopped and reversed his engines. Upon this point the nautical assessors by whom we have been advised are in agreement. This, by itself, might have saved an accident. But, in addition to this, whatever action he took ought to have been under a port helm, which would have tended to draw his vessel into line with the *Kitano Maru* and not opposed to it. I realise that his feeling was not to expose his unprotected flank to the beak of the Japanese ship, but in doing what he did he courted disaster, while the other manœuvre would have taken him into safety. I think, too, that, thirty seconds after he began to move, even if his engines had not been reversed before, they should have been reversed even then, though I doubt if, when once the initial mistake had been committed and the boat was swinging under a starboard helm, the collision could have been avoided, and had he changed to port helm, which he momentarily tried to do, he might have received the blow amidships. I have examined, but I have not been able to find much assistance from, the authorities. It seems to me impossible to lay down a general rule that in all cases of crossing ships a starboard helm for the stand-on ship must necessarily be a negligent act. It probably often is so, and it is remarkable that in no case quoted has a port helm been held negligent in similar circumstances and in only one case, the case of *The Rayford* (5), has starboarding been excused. Scrutton, L.J., who was one of the members of the Court of Appeal, says that in that case the view taken was that the starboarding was so slight as not to affect the collision. In the present case, coupled with maintaining speed, it was, as our assessors advise, a negligent manœuvre for which the *Otranto* must suffer the consequences, and from these consequences I cannot hold her absolved by the subsequent action of the *Kitano Maru*. Upon the question of altering the share of responsibility each has to take, this is primarily a matter for the judge at the trial, and unless there is some error in law or fact in his judgment it ought not to be disturbed. I am, therefore, of opinion that the judgment of Hill, J., was right in all respects and should be restored.

LORD DUNEDIN.—I concur. I confess I do so with the greatest regret, because I think the captain of the *Otranto* was put in a terribly difficult position by the utterly unjustifiable conduct of the *Kitano Maru*, but, in view of the advice we got from our assessors, and also the views expressed already by my noble and learned friend on the Woolsack, I am unable to resist the conclusion that the captain of the *Otranto* was wrong in keeping full speed.

A **LORD BLANESBURGH.**—I also concur.

LORD WARRINGTON.—I concur.

LORD THANKERTON.—I concur.

Appeal allowed.

B Solicitors: *Waltons & Co.*; *Parker, Garrett & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

C

SHELL CO. OF AUSTRALIA, LTD. *v.* FEDERAL COMMISSIONER OF TAXATION

D [PRIVY COUNCIL (Lord Sankey, L.C., Lord Dunedin, Lord Blanesburgh, Lord Russell and Lord Anglin, C.J.), June 30, July 1, 3, 4, 8, 10, December 2, 1930]

[Reported [1931] A.C. 275; 100 L.J.P.C. 55; 144 L.T. 421]

Australia—Income tax—Federal income tax—Board of Review—Administrative, E *not judicial, body—Australian Income Tax Assessment Act,* 1922–1925 (*No.* 37 *of* 1922, *No.* 28 *of* 1925), *ss.* 41, 44, 50—*Commonwealth of Australia Constitution Act*, 1900 (63 *&* 64 *Vict.*, *c.* 12), *Constitution*, *ss.* 71, 72.

Under the Constitution of the Commonwealth of Australia, ss. 71, 79 (see s. 9 of the Commonwealth of Australia Constitution Act, 1900), federal judges in Australia hold office during good behaviour. By s. 41 of the Australian Income F Tax Assessment Act, 1922–1925, members of the Board of Review, which had power to review such decisions of the Commissioner of Taxation, the Assistant Commissioner, and the Deputy Commissioner as were referred to them, were appointed for seven years.

Held: the Board did not exercise judicial powers, but was an administrative tribunal, and so the appointment of its members for a term of years was not in G breach of the Constitution and an assessment to federal income tax by the Board was valid.

Semble: It is not competent, either with or without legislation by the federal Parliament, to appoint justices of the High Court or of the other courts created under s. 71 of the Constitution with other than a life tenure of their office.

Per LORD SANKEY, L.C.: There are tribunals with many of the trappings of a H court which, nevertheless, are not courts in the strict sense of exercising judicial power. . . . It may be useful to enumerate some negative propositions on this subject: (i) a tribunal is not necessarily a court in this sense because it gives a final decision. (ii) Nor because it hears witnesses on oath. (iii) Nor because two or more contending parties appear before it between whom it has to decide. (iv) Nor because it gives decisions which affect the rights I of subjects. (v) Nor because there is an appeal to a court. (vi) Nor because it is a body to which a matter is referred by another body. It is not impossible under the Australian Constitution for Parliament to provide that the fixing of assessments shall rest with an administrative officer, subject to review, if the taxpayer prefers, by another administrative body, or by a court strictly so called, or, to put it more briefly, to say to the taxpayer: "If you want to have the assessment reviewed judicially, go to the court. If you want to have it reviewed by business men go to the Board of Review." . . . An administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a court, strictly so-called. Mere externals do not make a direction to an administrative officer by an ad hoc tribunal an exercise by a court of judicial power.

Notes. The Income Tax Assessment Act, 1922–1925, has been replaced by the Income Tax and Social Services Contribution Assessment Act, 1936–1957: see now ss. 178, 192–196 thereof.

Considered: *O. Martineau & Sons, Ltd.* v. *City of Montreal*, [1932] A.C. 113. Referred to: *O'Connor* v. *Waldron*, [1934] All E.R. Rep. 281; *Labour Relations Board of Saskatchewan* v. *John East Iron Works, Ltd.* [1949] A.C. 134.

As to the tenure of office of judges of federal courts in Australia, see 5 Halsbury's Laws (3rd Edn.) 514, 669; and as to what is a "court," see ibid., vol. 9, 342 et seq. For cases see 16 Digest 98–100 and 8 Digest (Repl.) 791–793.

Cases referred to:

(1) *Waterside Workers' Federation* v. *Alexander* (1918), 25 C.L.R. 434; 8 Digest (Repl.) 756, **829*.

(2) *British Imperial Oil Co., Ltd.* v. *Federal Commissioner of Taxation* (1925), 35 C.L.R. 422; 31 Argus L.R. 129; Digest Supp.

(3) *Huddart Parker & Co. Proprietary, Ltd.* v. *Moorehead*, *Appleton* v. *Moorehead* (1909), 8 C.L.R. 330; 8 Digest (Repl.) 756, **819*.

(4) *R.* v. *Electricity Comrs., Ex parte London Electricity Joint Committee Co.* (*1920*), *Ltd.*, [1924] 1 K.B. 171; 93 L.J.K.B. 390; 130 L.T. 164; 88 J.P. 13; 39 T.L.R. 715; 68 Sol. Jo. 188; 21 L.G.R. 719, C.A.; Digest Supp.

Appeal by special leave from a judgment of the High Court of Australia upon a Special Case stated by the Supreme Court of Victoria for the opinion of the High Court of Australia, pursuant to s. 51 (a) of the Income Tax Assessment Act, 1922–1925.

The Case arose out of an assessment on the appellants, then known as the British Imperial Co., Ltd., to federal income tax for the financial year 1924–1925 under s. 28 of the Act of 1922–1925, to which the appellants lodged objection. The appellants were a company incorporated in Great Britain, and carrying on in the Commonwealth of Australia the business of selling oil, petrol and petroleum products. They contended that ss. 44, 50 and 51 of the Income Tax Assessment Act, 1922, sought to confer judicial power upon the Board of Appeal which had been established by s. 41, and that, as such board did not have a life tenure, such attempted conferring of judicial power was, having regard to ss. 71 and 72 of the Constitution, invalid. They further contended that an assessment under s. 28 of the Act was invalid by reason of the illegal constitution of the board. In making these contentions the appellants relied upon the interpretation of the Constitution settled by the decision of the High Court in *Waterside Workers' Federation of Australia* v. *Alexander* (1). By s. 9 of the Income Tax Assessment Act, 1925 (No. 28 of 1925), the name of the board was altered from "Board of Appeal" to "Board of Review," and the existing members of a Board of Appeal became members of a Board of Review. The duration of office was fixed for a term of seven years. In *British Imperial Oil Co., Ltd.* v. *Federal Commissioner of Taxation* (2) the High Court had held that the Board of Appeal was not validly constituted. In the present case the High Court (Isaacs, Higgins, Gavan Duffy, Reid and Starke, JJ., Knox, C.J., dissenting) delivered judgment in favour of the validity of the assessment appealed against. They were of opinion that the provisions relating to the Board of Review were not open to the same objections as had been successfully urged against the provisions relating to the Board of Appeal. The company appealed.

W. A. Greene, K.C., *Gavin Simmonds, K.C.*, and *A. Andrewes-Uthwatt* for the appellants.

Sir John Simon, K.C., and *D. B. Somervell, K.C.*, for the respondent.

Dec. 2. **LORD SANKEY, L.C.** -This is an appeal by special leave granted by order of the King in Council dated Jan. 29, 1929, from two judgments of the High Court of Australia, dated respectively Aug. 25, 1926, and Oct. 31, 1927. The judgment dated Aug. 25, 1926, was given on a Special Case stated by the Supreme Court of Victoria arising out of an assessment on the appellants to federal income tax for the financial year 1924–5. The judgment, dated Oct. 31, 1927 (following upon the decision of the Case Stated), dismissed an appeal of the appellants from a judgment of the Supreme Court dated Sept. 16, 1927, which, following also upon the same decision, had dismissed outright the appeal against the assessment made by the appellants to that court.

In their appeal to His Majesty in Council against these judgments the appellants have disputed the validity of certain Federal Income Tax Assessment Acts under which they were assessed as being contrary to ss. 71 and 72 of the Constitution of the Commonwealth which is set forth in s. 9 of the Commonwealth of Australia Constitution Act, 1900. Although the facts upon which that contention is based are undisputed, they are of a complicated character and the law applicable to them is somewhat intricate, but many points raised and decided in the High Court were not again ventilated on the appeal, and the questions that were actually argued before their Lordships may be compendiously stated as follows: (i) Is the Board of Review, which, under s. 41 (1) of the Australian Income Tax Assessment Act, 1922–1925, is constituted to review the decisions of the Commissioner of Taxation, a court exercising the judicial power of the Commonwealth within the meaning of s. 71 of the Constitution, or is it merely an executive or administrative tribunal? (ii) If it is a court exercising the judicial power of the Commonwealth, can the members thereof be appointed for a term of years? Or must they be appointed for life subject to the power of removal contained in s. 72? Under s. 41 of the Income Tax Assessment Act, 1922–1925, members of the Board of Review are appointed for seven years. The broad case of the appellants, accordingly, was: (i) That the Board was a court exercising the judicial power of the Commonwealth; (ii) that the appointment of the members of such a court for a term of years was unconstitutional; and (iii) that, as a necessary result, an assessment made upon the appellants for federal income tax and justified only by a statute unconstitutional in that respect could not be upheld. Before the Board each one of these assertions was challenged by the respondent. The first of them, especially, had failed in the court below. The High Court of Australia by a majority (Isaacs, Higgins, Gavan Duffy, Reid and Starke, JJ., Knox, C.J., dissenting) held that the Board of Review was an administrative or executive tribunal, and that, consequently, objection taken to the limited tenure of office by its members was not well founded. It was to the decision on that point that the present appeal as argued on behalf of the appellants was confined. Learned counsel for them did not contend before the Board that the appeal could succeed on any other ground if it failed there. As to the second of the above questions, it was not contested in the High Court by the respondent for the reason that, so far as that court was concerned, the matter was concluded by its own decision in the year 1918, in *Waterside Workers' Federation* v. *Alexander* (1), where it was held, to quote the words of Knox, C.J., in *British Imperial Oil Co., Ltd.* v. *Federal Commissioner of Taxation* (2):

> "that the judicial power of the Commonwealth can only be vested in 'courts'; that is, in courts of law in the strict sense; and that if any such court be created by Parliament the tenure of office of the justices of such court by whatever name they may be called shall be for life, subject to the power of removal contained in s. 72 of the Constitution."

The decision in the *Waterside Workers' Federation Case* (1), however, not being a decision binding on their Lordships' Board, the respondent at the hearing, as a further answer to the appeal, contested its correctness and submitted that it should now be overruled.

The appellants are a company duly incorporated in Great Britain and carry on in the Commonwealth of Australia the business of selling oil, petrol and petroleum products, from which they have derived income taxable under the Income Tax Assessment Acts of the Commonwealth of Australia. Their business is controlled principally by persons resident outside Australia. The present difficulty originates in that fact, inasmuch as, in the view of the Federal Commissioner of Taxation, it brought the appellants within the exceptional taxing provisions of s. 28 of the Income Tax Act, 1922, which so far as is now material was in the following terms:

> "(1) Where any business which is carried on in Australia is controlled principally by persons outside Australia, and it appears to the commissioner that the business produces either no taxable income or less than the ordinary taxable income which might be expected to arise from that business the person carrying on the business in Australia shall be assessable and chargeable with income tax on such percentage of the total receipts (whether cash or credit) of the business as the commissioner in his judgment thinks proper. . . . (3) A taxpayer who is dissatisfied with the decision of the commissioner under this section may require the commissioner to refer his case to a Board of Appeal and the commissioner shall refer the case accordingly."

The principal sections of the Act relating to the Board of Appeal in this last subsection mentioned have been constantly under reference in the present case, both in the judgments delivered in the High Court and in the course of the arguments before the Board, and it is not inconvenient at once to set them forth. It will be found that a comparison between them and statutory provisions relating to Boards of Review substituted for them in 1925, and later set forth, may be of assistance to the decision of the appeal. They are to be found in Part V of the Act which deals with "objections and appeals" and are as follows:

> "Section 41. (1) For the purposes of this part, there shall be a Board or Boards of Appeal. . . . (4) The members of a Board shall hold office for a term of seven years but shall be eligible for re-appointment.
>
> Section 44. (1) A Board of Appeal shall have power to hear such cases as are prescribed or are referred to it by the commissioner under this Act. (2) The provision of s. 51 of this Act shall apply so far as applicable to references by the commissioner to the Board as if these references were appeals.
>
> Section 50. (5) Objections which are treated as appeals to a Board of Appeal shall, if the taxpayer's written request is accompanied by a deposit of such amount as is prescribed for the particular class or case, be forwarded to the Board of Appeal by the commissioner not later than thirty days after receipt by him of the request. (6) A taxpayer shall be limited on the hearing of his appeal to the grounds stated in his objection. (7) If the assessment has been reduced by the commissioner after considering the objection the reduced assessment shall be the assessment appealed from. (8) When the appeal is to the High Court or a Supreme Court it shall be heard by a single justice of the court.
>
> Section 51. On the hearing of the appeal the Court or Board of Appeal may make such order as it thinks fit and may either reduce or increase the assessment. (2) An order of the Board on questions of fact shall be final and conclusive on all parties. (3) An order by the court shall be final and conclusive on all parties except as procured in this section. (4) The costs of the appeal shall be in the discretion of the court or the Board as the case may be. (5) The Board shall, if it considers an appeal to be frivolous or unreasonable, order the forfeiture of the whole or part of the amount mentioned in sub-s. (5) of the last preceding section. (6) On the hearing of the appeal the Board shall, on the request of a party, and the court may, if the court thinks fit, state a Case in writing for the opinion of the High Court upon any question arising in the appeal which in the opinion of the Board or the court, as the case may be, is a question of law. (7) The High Court shall hear and determine the question,

and remit the Case with its opinion to the court below or to the Board, as the case may be, and may make such order as to costs of the Case Stated as it thinks fit. (8) An appeal shall lie to the High Court, in its appellate jurisdiction, from any order, made under sub.-s. (1) of this section except a decision by the Board on a question of fact.''

The commissioner, acting upon his view, already stated, that s. 28, as just set forth, applied to the appellants, proceeded, instead of assessing them to income tax upon the taxable income derived from their business, to assess and charge them with income tax upon ten per cent. of the total receipts (whether cash or credit) of their business. The appellants did not accept that position. On the contrary, they at once took steps to question its correctness in relation to the first assessment upon them—the assessment for the financial year 1922–3—and in 1924 that dispute was still undecided. In relation to the assessment now under review—that for 1924–5—the appellants took up the same position. They treated themselves as ordinary taxpayers, and, on Sept. 30, 1924, pursuant to s. 32 of the Income Tax Assessment Act, 1922–1923, furnished in due form to the respondent a return setting forth a statement of the income derived by them during the year beginning July 1, 1923, and ending June 30, 1924. In response the respondent, once more purporting to act under the above-stated section, on Mar. 28, 1925, gave notice to the appellants that he had assessed the federal income tax payable by them for the financial year 1924–5 (i.e., in respect of income derived during the year ending June 30, 1924) at £21,365 17s., being an amount equal to one shilling in the pound on ten per centum of the appellants' gross receipts for such period, which gross receipts were £4,273,169. The appellants, on May 4, 1925, lodged with the respondent an objection in writing against the said assessment, and in such objection challenged the validity of the assessment and of the legislation under which it purported to be made.

The case which the appellants then proposed to put forward under their objections was that which they had already made with reference to the 1922–3 assessment, and it turned mainly upon the provisions above-quoted of the Income Tax Act, 1922, with reference to the status of the Board of Appeal. That Board was, they objected, a ''court'' exercising the judicial power of the Commonwealth and was unconstitutional in that it was composed of members appointed only for a term of years. To their objection the commissioner made no immediate answer, and by Dec. 1, 1925, when for the first time he did respond, the situation as it stood at the date of the objections had greatly changed.

In the first place, the objections taken by the appellants to the assessment of 1922–3 were during that interval disposed of by the High Court of Australia and in the sense contended for by the appellants. (Incidentally, and to avoid confusion, it should be stated here that these objections were taken by the appellants under their then registered name of the British Imperial Oil Co., and it is under that name that the proceedings with reference to them are reported in 35 C.L.R. 422. In that instance the appellants required their objections to the assessment then made upon them to be referred to the Board of Appeal under s. 28 (3) of the Act of 1922, and with reference to these objections that Board stated a Case for the opinion of the High Court of Australia, submitting therein, inter alia, the following questions: ''(i) Is s. 28 of the Income Tax Assessment Act, 1922, and are the Income Tax Acts, 1922 and 1923, so far as they operate thereon, within the legislative powers of the Parliament of the Commonwealth?'' ''(ii) Is the Income Tax Assessment Act, 1922, and are the Income Tax Acts, 1922 and 1923, within the legislative powers of the Parliament of the Commonwealth?''

The contentions put forward by the appellants have been already indicated. More particularly, they were: (a) That ss. 44, 50 and 51 of the Income Tax Assessment Act, 1922, sought to confer judicial power upon the Board of Appeal, and that, as such Board did not have a life tenure (s. 41), such attempted conferring of judicial power was, having regard to ss. 71 and 72 of the Constitution, invalid. (b) That

s. 28 (3) of the Income Tax Assessment Act, 1922, being thus invalid, the whole A of s. 28 was invalid, because sub-s. 3 was not severable from the rest of the section. In making the above contentions the appellants, as in the present case, relied upon the interpretation of the Constitution settled by the decision of the High Court in *Waterside Workers' Federation* v. *Alexander* (1) already referred to. As has been stated, the High Court accepted these contentions of the appellants, and, the Board of Appeal being on that footing invalidly constituted, the court, by its judgment B dated April 9, 1925, ordered that the Case Stated by it should be struck out.

No appeal against that judgment was brought by the respondent, but, doubtless as a result of it, an amending federal statute was passed and became law on Sept. 26, 1925, this being the second event which brought about the change in the previously existing situation already referred to. Under this amending Act the Board of Appeal disappeared and a Board of Review was constituted in its C place, the sections of the 1922 Act already set forth being dealt with so far as is presently material in the following way. By s. 7 of the new Act—which by s. 24 thereof was to be deemed to have commenced upon the date of the commencement of the Act of 1922—s. 28 of the Act of 1922 was amended by omitting sub-s. (3). By ss. 9, 10, 11 and 12, ss. 41, 44, 50 and 51 of the Acts of 1922 were so dealt with as to produce the result following: D

> "Section 9. Section 41 of the principal Act is amended—(a) by omitting from sub-s. (1) thereof the word 'Appeal' and inserting in its stead the word 'Review'; and (b) by omitting sub-s. (3) thereof and inserting in its stead the following subsection: '(3) The persons who were, prior to the commencement of this section, appointed, in relation to income tax, to be members of a Board of Appeal, shall be deemed, as from the commencement of this Act, to E have been appointed to be members of a Board of Review and shall continue to hold office as such members as if appointed under this Act.'
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> Section 10. Section 44 of the principal Act is repealed and the following section inserted in its stead: '44. (1) A Board of Review shall have power to review such decisions of the commissioner, assistant commissioner or deputy commissioner as are referred to it by the commissioner under this Act and, for F the purpose of reviewing such decisions, shall have all the powers and functions of the commissioner in making assessments, determinations and decisions under this Act, and such assessments, determinations and decisions of the Board, and the decisions of the Board upon review, shall, for all purposes except for the purposes of sub-s. (4) of s. 50 and sub-s. (6) of s. 51 of this Act, be deemed to be assessments, determinations or decisions of the commissioner. G (2) Notwithstanding anything contained in this Act, a determination made by the Board under s. 21 of this Act shall not be invalidated by reason of the fact that it is not made within the time prescribed by that section.'
>
> Section 11. Section 50 of the principal Act is amended by omitting sub-s. (4), (5), (6), (7) and (8) thereof and inserting in their stead the following subsection: '(4) A taxpayer who is dissatisfied with the decision of the com- H missioner, assistant commissioner or deputy commissioner may, within thirty days after the service by post of notice of that decision—(a) in writing, request the commissioner to refer the decision to a Board of Review for review; or (b) in writing, request the commissioner to treat his objection as an appeal and to forward it either to the High Court or to the Supreme Court of a State.'
>
> Section 12. Section 51 of the principal Act is repealed and the following I sections inserted in its stead: '51. (1) Where a taxpayer has, in accordance with the last preceding section, requested the commissioner to refer a decision to a Board of Review, the commissioner shall, if the taxpayer's request is accompanied by a deposit of such amount as is prescribed for the particular class of case, refer the decision to the Board not later than thirty days after receipt of the request. (2) A taxpayer shall be limited on the review to the grounds stated in his objection. (3) If the assessment has been reduced by the commissioner after considering the objection, the reduced assessment shall be

> the assessment to be dealt with by the Board under the next succeeding subsection. (4) The Board, on review, shall give a decision and may either confirm the assessment or reduce, increase or vary the assessment. (5) The Board may, if it considers the reference to be frivolous or unreasonable, order the forfeiture of the whole or part of the amount deposited in accordance with sub-s. (1) of this section. (6) The commissioner or a taxpayer may appeal to the High Court from any decision of the Board under this section which, in the opinion of the High Court, involves a question of law. 51A. (1) Where a taxpayer has, in accordance with s. 50 of this Act, requested the commissioner to treat his objection as an appeal and to forward it to the High Court or the Supreme Court of a State, the commissioner shall forward it accordingly. (2) The appeal shall be heard by a single justice of the court. (3) A taxpayer shall be limited, on the hearing of the appeal, to the grounds stated in his objection. (4) If the assessment has been reduced by the commissioner after considering the objection, the reduced assessment shall be the assessment appealed from. (5) On the hearing of the appeal, the court may make such order as it thinks fit, and may reduce, increase or vary the assessment. (6) An order of the court shall be final and conclusive on all parties except as provided in this section. (7) The costs of the appeal shall be in the discretion of the court. (8) On the hearing of the appeal, the court may, if it thinks fit, state a case in writing for the opinion of the High Court upon any question which in the opinion of the court is a question of law. (9) The High Court shall hear and determine the question, and remit the case with its opinion to the court below, and may make such order as to costs of the Case Stated as it thinks fit. (10) The commissioner or a taxpayer may appeal to the High Court, in its appellate jurisdiction, from any order made under sub-s. (5) of this section.' "

Finally, s. 16 of this amending Act is in these terms:

> "Every assessment, determination or decision of the commissioner . . . made under the Income Tax Assessment Act, 1922 . . . shall be as valid and effectual as if made under the principal Act as amended by this Act, and for the purposes of such assessment, determination or decision, the amendments contained in ss. 3 and 5 to 14 inclusive of this Act shall be deemed to have been in force at the time the assessment, determination or decision was made or given."

Such then was the position with regard to the appellants' objections to the present assessment when, on Dec. 1, 1925, the respondent, by notice in writing, disallowed them all. The response of the appellants was immediate. On the 24th of the same month they requested the respondent to treat their objections as an appeal and to forward them to the Supreme Court of the State of Victoria. The appellants, it will be seen, in taking this course did not exercise the right given them by the amending Act, to have the commissioner's decision referred to the Board of Review. They chose one of the other two alternatives open to them. It follows that the constitutionality of the Board of Review in the present case only arises on the contention that the provisions of s. 28 of the Income Tax Assessment Act, 1922–1925, are inseparably connected with those of s. 50 (4) (a) of the same Act as enacted in 1925 which give to the appellants the right to have the commissioner's decision referred to the Board of Review, and that the former stand or fall with the latter. This contention, it should at once be stated, was disputed by the respondent and a submission in the contrary sense was put forward by him as a separate answer to the present appeal.

The objections came before the Supreme Court of the State of Victoria (MACFARLAN, J.) on May 7, 1926, when His Honour, after discussion, stated a Case in writing for the opinion of the High Court upon the following questions: (i) Did the assessment cease to be valid or operative upon the raising of the dissatisfaction of the appellants therewith? (ii) Is the assessment appealed against good in law? The Case, as so stated, was argued before the High Court of Australia, judgment given upon Aug. 25, 1926. The answers given by the court, KNOX, C.J., dissenting, were to (i) "No," and to (ii) "Yes." The ground upon which the majority of the learned judges of the High Court proceeded when so answering these questions was that, in their opinion, the Board of Review, if in the present case the objections of the appellants had been referred to it, would not in entertaining them have been a court exercising the judicial power of the Commonwealth, but would have been merely a tribunal engaged in the administration of the statutes and one, therefore, quite properly constituted. The great question which has been argued on the appeal is whether the learned judges were right in that conclusion.

Now, it is hardly doubtful that the federal legislature, accepting as presumably it did, the correctness of the High Court's judgment of April 9, 1925, set itself by its amending Act of 1925 to get over the administrative difficulties which that judgment created. Indeed, a close examination of the sections of the new Act already set forth shows that suggestions to that end made by the learned judges who took part in the decision have therein been adopted and embodied. The learned counsel for the appellants urged that not only had the federal legislature no power to do as it did, but that, in effect, it had not succeeded in creating a new tribunal (the Board of Review) which was more valid than the old tribunal (the Board of Appeal). Without any disrespect, he suggested that the new Board of Review was, in effect, in just the same position as the old Board of Appeal, and that the legislation was camouflage.

It becomes necessary, therefore, to examine somewhat minutely not only the difference between the old Board of Appeal and the new Board of Review, but to consider the position of the Board of Review itself. It seems clear to their Lordships, as appears from a comparison of the provisions on the subject of the Act of 1922 with those of the Act of 1925, that there is a very real difference between the two Boards—a difference which, in the present case, is well worked out in the judgment of ISAACS, J., where he sums up the situation in that regard. After pointing out that, among other sections of the 1922 Act. s. 28 was altered by leaving, so far as that section is concerned, the commissioner's decision absolutely final, and that this was done by eliminating all reference to a Board, the learned judge proceeds:

> "(c) In s. 41 the title of the Board was altered from 'Board of Appeal' to 'Board of Review.' (d) Section 44, which previously expressly applied sections creating judicial powers to the Board, is absolutely transformed. Instead of assimilating the Board to the court, as in the old s. 44, the Board in the new s. 44 is assimilated to the commissioner. Instead of the Board being given the powers and functions of the court, it is given 'the powers and functions of the commissioner in making assessments, determinations and decisions under this Act.' Those are the only powers and functions conferred upon the Board for the purposes of decision. Other powers of formulation after decisions are given, but these are incidental only. (e) Section 44 then takes up the 'decisions' of the Board and says they are for all purposes (with certain exceptions) to be deemed those 'of the commissioner.' (f) The first exception is patently immaterial here. It is merely to prevent the taxpayer having a double choice instead of an alternative choice of tribunal from the commissioner. (g) The second exception, when carefully examined, is really to negative the notion of the Board being judicial. It allows an appeal to the court from any decision which, in the opinion of the court, is a question of law . . . The fact that the commissioner may appeal as well as the taxpayer only indicates that the Crown as well as the subject may invoke the court to correct a misconstruction of the law, which would, of course, affect not merely that taxpayer but all taxpayers in a similar position. (h) The Board's decision, when given may, by s. 51 (4), be formalised by confirming, reducing, increasing or varying the assessment. This is form only. (i) By the next subsection it may order the forfeiture of the deposit if it thinks the reference frivolous or unreasonable. Administrative 'orders' are numerous, and, in this instance, the exercise of the

> power rests, not on law, but on opinion. In any event, the subsection is quite subsidiary."

STARKE, J., speaking of the Board of Review, describes its position as follows:

> "It has power to review the assessments of the commissioner, and its decisions are to be deemed to be assessments, determinations or decisions of the commissioner (Act No. 28 of 1925, s. 10). Now the commissioner causes assessments to be made for the purpose of ascertaining the taxable income upon which income tax shall be levied (Act 1915–1921, s. 31; Act of 1922, s. 35). His function is to ascertain the amount of income upon which the tax is imposed. That does not, in my opinion, involve any exercise of the judicial power of the Commonwealth; it is an administrative function. The decision of a Board of Review stands, as we have seen, precisely in the same position. Its functions are in aid of the administrative functions of government. So far, then, a Board does not exercise the judicial power of the Commonwealth. We then come to the right of appeal to this court from determinations of Boards of Review. That is a right given both to the commissioner and to the taxpayer. A right of appeal in itself does not establish the vesting of judicial power either in the commissioner or in a Board of Review. The Parliament may have imposed upon the courts the duty of reviewing administrative determinations."

Is this right? What is "judicial power"? Their Lordships are of opinion that one of the best definitions is that given by GRIFFITH, C.J., in *Huddart Parker & Co. Proprietary, Ltd.* v. *Moorehead* (3) (8 C.L.R. at p. 357), where he says:

> "I am of opinion that the words 'judicial power' as used in s. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty, or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

This definition of "judicial power" suggests to their Lordships a further material difference in the status of the two Boards not alluded to by ISAACS, J. It will have been noticed that under the new s. 51A, the orders which the court, under sub-s. (5), may make are, by sub-s. (6), made final and conclusive on all parties except as provided by the section; and that by sub-s. (10), it is provided that the commissioners or a taxpayer may appeal to the High Court in its appellate jurisdiction from any order made by the court under sub-s. (5). But under the new s. 51, dealing with the orders of the Board of Review, there is no provision in any way corresponding to these sub-ss. (6) and (10) of s. 51A. The orders of the Board of Review are not there stated to be conclusive for any purpose whatsoever. On the other hand, under s. 51 (2) of the Act of 1922, the orders of the Board of Appeal on questions of fact were expressly declared to be final and conclusive on all parties. The distinction is, their Lordships think, both striking and suggestive. The decisions of the Board of Review are under the amending Act made the equivalent of the decision of the commissioner. No assessment of his, even when paid, is conclusive upon him. He retains under s. 37 the fullest power of subsequent alteration or addition, and it would appear that that power remains with him notwithstanding any decision in respect of the same assessment by the Board of Review. It is only the decision of the court which, in respect of an assessment, is now made final and conclusive on all parties—a convincing distinction as it seems to their Lordships between a "decision" of the Board and a "decision" of the court.

The authorities are clear to show that there are tribunals with many of the trappings of a court which, nevertheless, are not courts in the strict sense of exercising judicial power. It is conceded in the present case that the commissioner himself exercised no judicial power. The exercise of such power in connection with an assessment commenced, it was said, with the Board of Review, which was, in truth, a court. In that connection it may be useful to enumerate some negative propositions on this subject: (i) A tribunal is not necessarily a court in this strict sense because it gives a final decision. (ii) Nor because it hears witnesses on oath. (iii) Nor because two or more contending parties appear before it between whom it has to decide. (iv) Nor because it gives decisions which affect the rights of subjects. (v) Nor because there is an appeal to a court. (vi) Nor because it is a body to which a matter is referred by another body: see *R.* v. *Electricity Comrs., Ex parte London Electricity Joint Committee Co.* (*1920*), *Ltd.* (4). Their Lordships are of opinion that it is not impossible under the Australian Constitution for Parliament to provide that the fixing of assessments shall rest with an administrative officer, subject to review, if the taxpayer prefers, either by another administrative body, or by a court strictly so called, or, to put it more briefly, to say to the taxpayer: "If you want to have the assessment reviewed judicially, go to the court. If you want to have it reviewed by business men, go to the Board of Review."

It has been seen that, by s. 50 of the 1922–1925 Act, a taxpayer who is dissatisfied with the decision of the commissioner may request him (a) to refer the decision to a Board of Review for review, or (b) to request the commissioner to treat his objection as an appeal and to forward it either to the High Court or to the Supreme Court of a State. Section 51 which regulates reference to the Board is to be compared with s. 51 (a), which regulates appeals to the court. The differences between the two sections have already been referred to. The sections may again in this connection usefully be contrasted. Although superficially apparently minute, the contrast indicates that the status and function of the two tribunals are by no means the same. The Board of Review appears to be in the nature of administrative machinery to which the taxpayer can resort at his option in order to have his contentions reconsidered. An administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a court, strictly so-called. Mere externals do not make a direction to an administrative officer by an ad hoc tribunal an exercise by a court of judicial power. Their Lordships find themselves in agreement with ISAACS, J., when he says:

> "There are many functions which are either inconsistent with strict judicial action . . . or are consistent with either strict judicial or executive action. If consistent with either strictly judicial or executive action, the matter must be examined further . . . The decisions of the Board of Review may very appropriately be designed in LORD HALDANE's words, 'administrative awards,' but they are by no means of the character of decisions of the judicature of the Commonwealth."

They also agree with him when he says that unless

> "it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will."

In that view they have come to the conclusion that the legislation in this case does not transgress the limits laid down by the Constitution because the Board of Review are not exercising judicial powers, but are merely in the same position as the commissioner himself, namely, they are another administrative tribunal which is reviewing the determination of the commissioner who admittedly is not judicial, but executive.

As to the second point, namely, "whether it is competent to appoint to a court strictly so-called judges for a term of years," the opinion of their Lordships that the Board of Review acts as an executive body and is not a court within the meaning of s. 71 of the Constitution is sufficient to determine the fate of this appeal, and renders it unnecessary to pronounce any formal judgment upon the question which was argued as to tenure of judicial office. But, though relieved of the necessity of giving a decision upon the point, their Lordships desire to make it quite clear that, as at present advised, they are not prepared to assent to the view that it is competent, either with or without legislation by the federal Parliament, to appoint justices of the High Court or of the other courts created by the Parliament under s. 71 of the Constitution with other than a life tenure of their office.

It is not necessary to consider the various other points which emerged during argument. Counsel for the appellants, at the Bar, finally accepted the position that, if the Board of Review was validly constituted, or in other words, if it is an executive as distinguished from a judicial tribunal, the judgment of the High Court of Australia must stand. Their Lordships have arrived at the conclusion that the Board of Review is an administrative as distinguished from a judicial tribunal, and in these circumstances will humbly advise His Majesty to dismiss this appeal, with costs.

Appeal dismissed.

Solicitors: *Waltons & Co.*; *Coward, Chance & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

MICHELHAM'S TRUSTEES *v.* INLAND REVENUE COMMISSIONERS. EXECUTORS OF DOWAGER LADY MICHELHAM *v.* INLAND REVENUE COMMISSIONERS

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), October 20, 1930]

[Reported 144 L.T. 163; 15 Tax Cas. 737]

Income Tax—Annuity—Freedom from income tax and supertax—Benefit of freedom from supertax—Liability to tax as an additional annuity.

A testator bequeathed to his wife "an annuity of £25,000 free of income tax." The court held that the annuity was free of supertax as well as other income tax. As to the sums payable in respect of supertax,

Held: they constituted additional income of the wife which was itself liable to income tax and supertax.

Notes. Followed: *Jackson's Trustees* v. *I.R. Comrs.* (1942), 25 Tax Cas. 13. Referred to: *Re Reckitt, Reckitt* v. *Reckitt*, [1932] All E.R.Rep. 961; *Brodie* v. *I.R. Comrs.* (1933), 17 Tax Cas. 432; *I.R. Comrs.* v. *Pearson, I.R. Comrs.* v. *Pratt*, [1936] 2 All E.R. 731; *Re Tatham National Bank, Ltd., and Mathews* v. *Mackenzie*, [1945] 1 All E.R. 29; *Re Lyons, Barclays Bank, Ltd.* v. *Lyons*, [1951] 2 All E.R. 507.

As to surtax paid for annuitant by trustees, see 20 HALSBURY'S LAWS (3rd Edn.) 418, para. 782.

Cases referred to:

(1) *Meeking* v. *I.R. Comrs.* (1920), 7 Tax Cas. 603; 28 Digest 110, *681*.

(2) *A.-G.* v. *Ashton Gas Co.*, [1904] 2 Ch. 621; 73 L.J.Ch. 673; 91 L.T. 673; 68 J.P. 477; 53 W.R. 49; 20 T.L.R. 601, C.A.; affirmed sub nom. *Ashton Gas Co.* v. *A.-G.*, [1906] A.C. 10; 75 L.J.Ch. 1; 93 L.T. 676; 70 J.P. 49; 22 T.L.R. 82; 13 Mans. 35, H.L.; 10 Digest (Repl.) 1253, *8827*.

(3) *Hartland* v. *Diggines*, [1926] A.C. 289; 134 L.T. 492; 42 T.L.R. 262; 70 Sol. Jo. 344, H.L.; 28 Digest 88, *506*.

Appeals by the taxpayers from orders of ROWLATT, J., dated May 6, 1930, made on Cases Stated.

The following were the Cases Stated.

MICHELHAM'S TRUSTEES *v.* INLAND REVENUE COMMISSIONERS

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on Nov. 9, 1928, the trustees of the late Lord Michelham appealed against assessments to income tax for the five years ending April 5, 1926, made upon them in respect of so much of the annuities payable under the will of the late Lord Michelham as was not paid out of profits and gains brought into charge to tax.

The late Lord Michelham died on Jan. 7, 1919, and by his will bequeathed certain annuities for life, including an annuity of £25,000 free of income tax to his wife. In the course of the administration of the late Lord Michelham's estate application was made to the Court of Chancery for directions on certain questions arising under the will, including the question whether the annuity of £25,000 bequeathed to Lady Michelham was bequeathed free of both income tax and supertax. The latter was answered in the affirmative.

The question on which the opinion of the court was desired was whether for the purpose of arriving at the assessment under r. 21 and s. 26, the amount of the annuity payable to Lady Michelham should be taken to be £25,000, with the appropriate addition to make the grossed amount which will produce £25,000 net after deduction of income tax only, as claimed by the appellants, or whether, as claimed by the respondents, it should be arrived at by adding to the £25,000 that portion of the supertax assessed on the recipient of the annuity which bears the same proportion to the total supertax assessed on the recipient as the sum of £25,000 together with additions calculated on a similar basis for the previous year bore to the total income from all sources of the recipient during that year and then making a further addition to the sum so arrived at sufficient to make the total sum produce the sum so arrived at after deducting income tax at the rate current during the year. Thus for example the amount of the annuity for the year 1925–6 should be computed as follows:

Annuity	£25,000
Addition of 1/4th required to make the total such as would produce £25,000 after deduction of income tax at the rate of 4s. in the £	£6,250
Total amount of annuity	£31,250

The respondents on the other hand claimed that the amount of the annuity for the year 1925–6 should be computed as follows:

Annuity	£25,000
Supertax on the annuity calculated by taking the proportion of the total supertax for 1925–6 which the amount of the annuity for 1924–5 computed in accordance with the respondents' contention bore to the total income of Lady Michelham for 1924–5. $\frac{\text{48,668 (gross annuity for 1924–5)}}{\text{51,113 (total income of Lady Michelham for 1924–5)}}$ of £12,590 3s. (total supertax for 1925–6)	£11,988
	£36,988
Addition of 1/4th in respect of income tax at the rate of 4s. in the £	£9,247
	£46,235

It was contended on behalf of the appellants: (i) That the payment out of capital of supertax in any particular year did not form part of the income of Lady Michel-

A ham in that year, but was the mere payment out of capital of a debt when it became due pursuant to a direction arising out of the will. (ii) That in computing the amount of the annuity for the purpose of assessing income tax thereon no addition should be made in respect of any supertax assessed on the recipient or payment thereof out of capital. (iii) That there is no justification in the Income Tax Acts for treating any portion of a sum assessed on a person in respect of his B total income or the payment thereof out of capital as income of that person. (iv) That there is no authority in the Income Tax Acts for attributing any part of any sum assessed on a person in respect of his total income or the payment thereof out of capital as attributable to or applicable to any part of that income. (v) That neither an assessment to supertax in a particular year nor the payment out of capital of the sum assessed is or can be profits or gains of the individual assessed C arising within the year preceding the year of assessment within the meaning of r. 2 applicable to Case III of Sched. D, and there is no authority in the Income Tax Acts for treating them as if they did so arise. (vi) That supertax is a tax imposed on an individual in a particular year in respect of his total income from all sources, and therefore neither the supertax imposed nor the payment of it can form part of the total income of that individual in that year which ex hypothesi D has already been ascertained. (vii) The decision in *Meeking* v. *I.R. Comrs.* (1) and all the other reported decisions as to supertax are consistent with the view that where executors or trustees under a will apply any part of the taxable income in discharge of a liability on behalf of a beneficiary, the income so applied becomes part of the total income of the beneficiary, but where they merely discharge a liability out of capital the payment made does not become income of the beneficiary E unless it is declared by the testator to be payable as income.

It was contended on behalf of respondents: (i) That the case was indistinguishable from that of *Meeking* v. *I.R. Comrs.* (1). (ii) That in computing the amount of the annuity the supertax paid by the trustees, together with the income tax appropriate thereto, must be added.

The commissioners held that the payment of the supertax by the trustees was an F additional annuity to Lady Michelham, and that in computing the amount of the annuity for the purpose of assessment under r. 21 and s. 26 the supertax with the income tax appropriate thereto must be included.

There was no dispute as to figures, and the sole question on which the opinion of the court was requested was as to the proper method of computing the gross amount of the annuity to Lady Michelham for the purpose of the assessment under G r. 21 and s. 26 of so much of the annuity as was not paid out of profits or gains brought into charge to tax.

EXECUTORS OF DOWAGER LADY MICHELHAM *v.* INLAND REVENUE COMMISSIONERS

At a meeting of the Commissioners for the Special Purposes of the Income Tax H Acts held at York House, Kingsway, London, on Dec. 7, 1927, the executors of Right Hon. Aimee G. Dowager Lady Michelham, deceased, appealed against an assessment to supertax in the sum of £35,275 made upon Lady Michelham for the year ending April 5, 1927.

The question raised was already stated in the preceding case. It concerned an annuity payable to Lady Michelham under the will of the late Lord Michelham I who died on Jan. 7, 1919, as to which full particulars are set forth in a Case of even date with the present Case stated by the special commissioners upon an appeal against assessments made to income tax under r. 21 of the General Rules applicable to Scheds. A, B, C, D and E of the Income Tax Act, 1918, and s. 26 of the Finance Act, 1927, on the late Lord Michelham's trustees.

Lady Michelham re-married on Feb. 6, 1926, and it was agreed that her personal liability to supertax for the year ended April 5, 1927 (the year under appeal), had to be restricted to her income for the period from April 5, 1925, to the date of her re-marriage. Lady Michelham died on Jan. 1, 1927.

The income of the estate of the late Lord Michelham had been insufficient to pay the annuity to Lady Michelham in full, and a question had arisen as to the amount (if any) on which the trustees of his will ought to be assessed to income tax (under r. 21 and s. 26) in respect of so much of the annuity as had not been paid out of profits and gains brought into charge to income tax, but out of the capital of the estate. This question formed the subject of the appeal in the said case of Lord Michelham's trustees and the Inland Revenue Commissioners, which at the date of the hearing of this appeal had not been determined.

At the hearing of this appeal it was contended on behalf of the appellants that Lady Michelham's supertax liability should be restricted to the income payable to her under her first husband's will, plus income tax, but with no addition in respect of supertax. On behalf of the commissioners it was contended that Lady Michelham must be regarded as the recipient of the whole amount of the annuity payable under her first husband's will, plus an amount in respect of supertax plus the appropriate addition in respect of income tax.

The commissioners who heard the appeal decided in principle that the Crown's contention was correct and that supertax must follow the income tax liability. They accordingly adjourned their decision for the matter which had arisen under the r. 21 to be first determined. After the determination of the appeal under that rule, they fixed the supertax liability at £35,306, being the amount which (it is agreed) represents the total gross annuity payable by the trustees, including both an addition in respect of the payment of supertax calculated on the basis stated in the said case as to income tax, and the appropriate additions in respect of income tax.

Rowlatt, J., dismissed the appeals.

Gavin Simonds, *K.C.*, *Edwardes Jones*, *K.C.*, and *A. M. Bremner* for the taxpayers.

R. Stafford Cripps, *K.C.*, and *R. P. Hills* (with them the *Attorney-General* (*Sir William Jowitt*, *K.C.*) for the Crown.

LORD HANWORTH, M.R.—In our judgment, this appeal fails and the judgment of Rowlatt, J., is right.

Lord Michelham died on Jan. 7, 1919, and he left behind him his widow, to whom he bequeathed during her life, and in the event of her marrying again for her separate use, "an annuity of £25,000 free of income tax payable primarily out of the income of my residuary estate commencing from my death to be payable by equal quarterly payments." It was also provided that if the income of his estate should prove insufficient for the payment of these periodical sums, making up £25,000 in the year, resort might be had to the capital of his residuary estate from time to time to make good the deficiency, and the surplus income. A question arose whether or not the annuity of £25,000 was bequeathed to Lady Michelham free of both income tax and supertax. The matter was taken before the court, and the Court of Chancery determined that the annuity of £25,000 bequeathed to the applicant was so bequeathed free of income tax, including the additional income tax, in the Income Tax Act, 1918, referred to as supertax. The Inland Revenue Commissioners have accordingly made a demand on the trustees of Lord Michelham's estate for the payment of the sums which fall to be paid in respect of the income tax and the supertax, and the commissioners decided that the trustees were liable to make good these sums. The commissioners stated a Case at the request of the trustees, which came before Rowlatt, J., who held, supporting the decision of the commissioners, that there was a liability on the trust fund in respect of these sums.

The other case arises in this way: Lady Michelham had re-married on Feb. 6, 1926, and she died on Jan. 1, 1927. A question arose between the executors of her estate and the Inland Revenue Commissioners as to what the liability of her estate was in respect of the income tax and supertax to be paid. The points that arise in the two cases are really the same, and the two cases have been called on together.

Putting the case more specifically, it arises in this way: The court has determined that this annuity is to be paid free of income tax and supertax, and a table has been drawn up to explain the figures. That shows that in the first year following the death of Lord Michelham, i.e., the year ending on April 5, 1920, the sum of £25,000 was paid to Lady Michelham and no more, but there had to be added to that a sum in respect of income tax, for if the income tax had not been paid by the trustees—the income tax which would fall to be paid by Lady Michelham upon the receipt during the year of £25,000—she would have had to pay that charge for income tax out of the £25,000. The £25,000 would then have been depleted by the sum so paid and Lady Michelham would have had a right of recourse to the trustees, saying to them: "I have not in fact received, as my husband intended I should receive, a full sum of £25,000 without any deduction at all; I have received the sum, but out of it I have been compelled to pay income tax which amounts to £10,000." That was for the first year. But there was another liability which was imposed by the Income Tax Act, 1918, s. 4, which provides:

> "In addition to the income tax charged at the rate prescribed for any year, there shall be charged, levied, and paid for that year in respect of the income of any individual, the total of which from all sources exceeds [a certain quantum], an additional duty of income tax (in this Act referred to as supertax), at the rate or rates prescribed by Parliament for that year."

For the purpose of supertax, s. 5 of the Act provides that the total income is to be taken to be the income of the individual from all sources for the previous year. The result was that in 1922 there was supertax to be paid, and the income that had been received by Lady Michelham in this previous year was the £25,000, plus what I will call the reimbursement of income tax of £10,714, and these figures were rather increased by the fact that she had other income arising aliunde which would bring up the total liability to income tax and would very likely bring her into a higher rate for supertax. So year by year the matter went on, with the result that, as the years passed, an increasing sum was payable by the trustees in order that she should receive £25,000 complete and undiminished by any taxation imposed on her.

It has been often argued that this immunity from taxation is not a part of the person's income. It has been tried where a dividend has been paid free of income tax; it has been tried in the case of supertax, that supertax ought to be deducted from an income because the man who pays supertax has his income diminished, but there is no provision allowing the payment made on account of supertax to be deducted in the assessment of the statutory income which is charged to income tax. In the case of excess profits duty there was that specific right given to the subject; he was entitled to deduct the amount of the excess profits duty charged on him against the profits which were to be assessed to the duty. There is no such provision in the Income Tax Acts.

One can look at this matter first of all directly from the point of view of income tax. Lady Michelham has to pay her income tax. She has to pay income tax in respect of £25,000 which she receives in the year, and she has also to pay, as being part of her income, the amount in respect of which she receives immunity, by reason of the trustees, to avoid circuity, paying the income tax charged upon her.

BUCKLEY, J., in *A.-G.* v. *Ashton Gas Co.* (2) says in respect of a dividend which was paid free of income tax ([1904] 2 Ch.D. at p. 623):

> "When the company pays, say, 10 per cent. free of income tax, it gives the shareholder 10 per cent., and relieves him from liability to make any payment to the revenue or allowance to the company out of it. In other words, he receives 10 per cent., and an indemnity against a liability to pay part of it to the revenue. . . . He thus gets more than a 10 per cent. dividend."

Those words are very plain, and they have been held rightly to state the law upon the point. That same case went to the House of Lords. Lord Halsbury, there approving of what Buckley, J., had said, says ([1906] A.C. at p. 12):

> "The company having paid 10 per cent., and it having been ascertained what the proper quota of the shareholder would be in respect of the income tax, suppose the company give to the shareholders besides the 10 per cent. they have already given him the quota for the income tax also, will they or will they not have given the shareholder more than 10 per cent. for his dividend? It is obvious that they will have given him the amount, we will call it x, which is due in respect of dividend, plus y, which is the amount of the income tax which is due from him."

Those two passages have been relied on and reaffirmed in subsequent cases. It would only be to blur their lucidity if I were to go through a further number of cases or to endeavour to alter or vary their language. So on the main question of income tax, once it has been decided that the terms of the will intended the trustees to pay the income tax and imposed that liability on Lord Michelham's estate, there was payable to Lady Michelham not merely the £25,000, but something which was equivalent to the immunity which she enjoyed of having her £25,000 protected from any inroad into it by the charge of income tax.

In addition, the court has determined that this bequest of the annuity of £25,000 carried with it an immunity from supertax as well as income tax. Supertax is collected somewhat differently from income tax. It is not a case in which either r. 19 or r. 21, as the case may be, of the General Rules applicable to All Schedules of the Income Tax Act, 1918, apply to justify a deduction from any annual payment or annuity or the like before it is paid over to the annuitant. Supertax is imposed directly on the individual, as s. 4 says, and it is imposed by the Special Commissioners of Income Tax, who deal with the subject direct. Counsel for the taxpayers says that although it may well be that where the trustees had to make a deduction, where r. 19 or r. 21, as the case may be, applied, there the trustees were providing more than the £25,000, that instead of deducting any sum which they could hold back under r. 19 they paid it all over and paid the income tax which fell to be payable in respect of the £25,000, but he said the sum which he has paid in respect of supertax is quite different; it is not a sum which is deducted by the trustees; it is not a sum in which the trustees have any duty. That is so, but the supertax point arises in this way: There will be a charge or assessment to supertax made directly on Lady Michelham by the special commissioners, and she would have to pay the sum which she was charged by them direct to them. She would then be able to say: "I have not received in my hands £25,000 because I have had to pay away sums for supertax in the year 1922 of £8,643, and in the year 1923, £12,313, and the payment of those sums by me to discharge my liability imposed on me under the Act has depleted my £25,000. Under those circumstances you, the trustees, must repay to me the sum whereby my annuity has been diminished." That would be the ordinary course. What has happened apparently is that instead of Lady Michelham during these years paying the sum by her own cheque to the commissioners, that sum has been provided by the trustees in order that the £25,000 may remain in Lady Michelham's hands immune from the supertax.

The liability, it appears to us, is clear. The fact that it is paid, or may be paid, a little differently from the income tax, that deduction does not apply, does not alter its character. The whole reason why there is any liability to income tax or to supertax is because Lady Michelham, the person to be charged, is in receipt of an income which is liable to income tax and equally liable to supertax; she is the entity in respect of which these two taxes are charged, and in order to carry out her husband's will it is necessary either to defray these two sums or to reimburse the sums if she has paid them. Rowlatt, J., has decided in quite plain language in the same way as I have endeavoured to indicate in my judgment. He had the same point before him in *Meeking* v. *I.R. Comrs.* (1) and he followed his decision in that case. I will only add that in *Hartland* v. *Diggines* (3) I endeavoured to go through these same cases once before and to point out how it was that the liability for both income tax and supertax was to be estimated not merely at the actual income received, but also at the quantum of the immunity, which was provided under the terms of the will or the contract, as the case might be. For these reasons it appears to me that both these appeals fail and must be dismissed with costs.

SLESSER, L.J.—I agree, and have nothing to add.

ROMER, L.J.—I agree. Where a testator gives an annuity by his will he cannot, of course, deprive the Crown of its right to income tax in respect of that annuity, nor can he free the trustees of his will who have to pay the annuity from their liability to deduct from the payments of the annuity the appropriate sums in respect of income tax. The consequence is that where a testator by his will purports to give an annuity free of income tax the will necessarily must be read as conferring on the annuitant such an annuity as, after deduction of the tax therefrom, shall leave the clear sum mentioned by the testator. One can arrive at the same result in another way. Take any case. The annuity is to be paid free of income tax. The trustees are obliged to deduct from the annuity—call it A—the income tax; if it is at the rate of 4s. in the £ it is one-fifth of the annuity. They deduct one-fifth of A, the annuity that has to be paid to the annuitant, because the gift is of an annuity free from income tax; but that gift is an additional annuity, as pointed out by the Master of the Rolls, in respect of which the Crown are again entitled to income tax, and, therefore, the trustees must deduct, when they repay the one-fifth of A, one-fifth of that, viz., one twenty-fifth part of A. So, too, when they come to refund to the annuitant the one twenty-fifth part of A, they must deduct 1/125th part of A, and so on, to infinity. The result of that is that there is a geometrical progression, carried to infinity, which results in precisely the same thing as though the gift had been a gift of such an annuity as, after deduction of the tax, will leave the annuity, A. In the case where the income tax is 4s. in the £, the answer is five-fourths of that in either case. In the present case the effect of the gift by the testator has been held to be that the annuity shall be paid free of supertax, and it was so held by the Court of Chancery, and, in my opinion, was rightly so held. The result of that is, again, that there has been given to Lady Michelham in the present case an additional annuity of such a sum as, after deduction of the income tax thereon, will leave the amount of supertax for which she is chargeable in respect of the annuity given by the will.

It was argued before us by counsel for the taxpayers that a gift by a testator of such a sum as will be necessary to discharge a certain person's liability to supertax in every year is not a gift of an annuity which is liable to income tax. In my opinion, he is wrong. In such a case the Crown is clearly entitled to be paid income tax in respect of that annuity so given. The result is this, therefore: There is given to Lady Michelham in each year such a sum as, after deduction of income tax on that sum, will leave £25,000. There is given her in addition in each year such sum as, after deduction of the income tax thereon, will leave the sum that she has to pay in respect of supertax on the first annuity given. The result of that, to take one of the years in question—the year ending April 5, 1922—is this: The trustees had to pay to Lady Michelham such a sum as, after deduction of the income tax thereon, would leave £25,000. They had also to pay to her such a sum as, after deduction of income tax therefrom, would leave £8,643 10s., that being the sum which that year she had to pay in income tax in respect of the annuity given to her under the will. The result was, therefore, that there was given to her that year by the will a total annuity of £48,062 2s., because that is the sum which, after deduction of income tax on that sum, will leave the two sums of £25,000 and £8,643 10s. If the income tax on the £8,643 10s., or in respect of that part of the annuity, had to be paid by Lady Michelham herself, the result would be that she would not get £25,000 net and, therefore, it is necessary to ascertain what sum will leave the supertax payable by her for that year after deduction of the income tax thereon.

For these reasons I agree that these appeals should be dismissed.

Appeals dismissed.

Solicitors: *Michael Abrahams, Sons & Co.*; *Solicitor of Inland Revenue.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

LUIPAARD'S VLEI ESTATE AND GOLD MINING CO., LTD. *v.* INLAND REVENUE COMMISSIONERS

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Greer, L.JJ.), February 6, 1930]

[Reported [1930] 1 K.B. 593; 99 L.J.K.B. 330; 142 L.T. 589; 46 T.L.R. 204; 15 Tax Cas. 573]

Income Tax—Annual payments—Deduction of tax—Accumulated profit written off—Company paying debenture interest in subsequent year—Claim to treat payment as made out of profit written off—Liability of company to account for income tax deducted from debenture interest—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *All Schedules Rules*, *r.* 19 (1).

Before the commencement of the year of charge to tax, a company wrote off against depreciation of assets a large sum of accumulated individual profits. In the year of charge, the company paid interest on its debentures and deducted income tax at the standard rate. The company claimed to withhold from the Crown the amount deducted on the ground that the interest was paid out of profits or gains brought into charge to tax within the Income Tax Act, 1918, All Schedules Rules, r. 19 (1), namely, out of the accumulated profits previously written off.

Held: the accumulated profits could not be taken into account for the purposes of r. 19 because they were not brought into charge in the year of assessment in which the interest was paid.

A.-G. v. *Metropolitan Water Board* (1), [1928] 1 K.B. 833, applied.

Notes. The Income Tax Act, 1918, All Schedules Rules, r. 19, was replaced by the Income Tax Act, 1952, s. 169.

Applied: *Central London Railway* v. *I.R. Comrs.*, *London Electric Railway* v. *I.R. Comrs.*, *Metropolitan Railway* v. *I.R. Comrs.* (1934), 151 L.T. 333. Referred to: *Neumann* v. *I.R. Comrs.* (1933), 49 T.L.R. 212; *Trinidad Petroleum Development Co., Ltd.* v. *I.R. Comrs.*, [1936] 3 All E.R. 801; *Re Sebright, Public Trustee* v. *Sebright*, [1944] 2 All E.R. 547.

As to payments out of profits brought into charge, see 20 HALSBURY'S LAWS (3rd Edn.) 368, paras. 673 et seq.; for the Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.); and for cases on the subject, see 28 DIGEST 73, *392–397*.

Cases referred to:

(1) *A.-G.* v. *Metropolitan Water Board*, [1928] 1 K.B. 833; 97 L.J.K.B. 214; 138 L.T. 346; 44 T.L.R. 135; 72 Sol. Jo. 30; 13 Tax Cas. 294, C.A.; Digest Supp.

(2) *L.C.C.* v. *A.-G.*, [1901] A.C. 26; 70 L.J.Q.B. 77; 83 L.T. 605; 65 J.P. 227; 49 W.R. 686; 17 T.L.R. 131; 4 Tax Cas. 265, H.L.; 28 Digest 73, *392*.

A (3) *Bowles* v. *A.-G.*, [1912] 1 Ch. 123; 81 L.J.Ch. 155; 105 L.T. 870; 76 J.P. 57; 28 T.L.R. 137; 56 Sol. Jo. 176; 5 Tax Cas. 685; 28 Digest 965, *577*.

Appeal by the taxpayer from a decision of ROWLATT, J., on a Case Stated by Special Commissioners of Income Tax. The taxpayer, Luipaard's Vlei Estate and Gold Mining Co., Ltd. (hereinafter called "the company") appealed from the B decision of the Income Tax Commissioners made in pursuance of their meeting held on July 17, 1928, whereby they dismissed the appeal of the company against assessments to income tax in the sums of £1,005, £1,851, £2,467 and £589 for the years ending April 5, 1924, April 5, 1925, April 5, 1926, and April 5, 1927, respectively, made under s. 26 of the Finance Act, 1927, and the Income Tax Acts. The above four sums represented the respective assessments on the interest which the C company respectively paid to debenture holders after Feb. 22, 1924, during the above four years. The amount of profits of the company after the said date during each of such years amounted to £50 only, which represented war loan interest paid to the company in respect of an investment made by the company. The following table shows how the assessments were made:

D

Income Tax Year	*Payments made of Interest from which Tax deducted*	*Total Taxed Profits of the Appellant Company*	*Assessment*
1923–4	£1,055	£50	£1,005
1924–5	£1,901	£50	£1,851
1925–6	£2,517	£50	£2,467
1926–7	£639	£50	£589

E

F

On Feb. 22, 1924, an order of the court was registered with the Registrar of Joint Stock Companies sanctioning a certain reduction of capital, and in pursuance of such sanction, the company wrote off and reduced to nil a credit balance of the profit and loss account which credit balance amounted to £68,929. The said balance of £68,929 represented the credit balance of the profit and loss account G calculated under ordinary principles of commercial accounting, and did not represent the balance which would have been standing to the credit of the profit and loss account, if such balance had been ascertained and adjusted in accordance with the principles applicable for the purposes of assessment to income tax in which case the said balance would have amounted to £99,584.

Rule 19 of the All Schedules Rules to the Income Tax Act, 1918, provides inter H alia that where any interest of money is payable yearly, half-yearly, or otherwise, and is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made on the person entitled to such interest, but the whole of such profits or gains shall be assessed and charged with tax, which shall be a tax on the person liable to pay the interest without distinguishing such interest, and the person so liable shall be entitled on making such payment of interest, to deduct and retain I thereout a sum representing the tax thereon at the rate or rates in force during the period through which the said payment was accruing due. Rule 21 provides, inter alia, that on payment of any interest of money charged with tax under Sched. D not payable or not payable wholly out of profits or gains brought into charge, the person by or through whom such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of such payment, and that any such person shall forthwith render an account to the Inland Revenue Commissioners of the amount so deducted or of the amount deducted out of so much of the interest as is not paid out of the profits or gains brought into charge as the case may be, and every such amount shall be a debt from him to the Crown and shall be recoverable as such.

The company when it paid the debenture interest as aforesaid deducted the tax therefrom at the standard rate. The company claimed that it was entitled to retain the tax so deducted on the ground that notwithstanding that the balance to the credit of the profit and loss account had been written off, the company must still be treated as having £68,929, or alternatively £99,584, available as taxed profits for the payment of the interest.

It was contended before the commissioners on behalf of the company as follows: (a) the profits and gains referred to in r. 19 (1) of the General Rules were profits and gains computed in accordance with the provisions of the Income Tax Acts relating to the computation of assessable profits and not profits and gains ascertained in accordance with ordinary commercial accounting principles; (b) where any deduction is made by the taxpayer against assessable profits, and such deduction is one which is not admissible as a proper deduction for the purposes of income tax, then, except in so far as such deduction is itself an annual payment within the meaning of r. 19 (1) of the General Rules, such deduction must be ignored; (c) the amount of depreciation written off in the profit and loss account as at June 30, 1923, namely, the said sum of £68,929, must, for the purpose of this case, be disregarded and the said balance of £68,929 regarded as still existent for income tax purposes, and, in particular, for the purposes of r. 19 (1) of the General Rules; (d) the writing off of the said depreciation was a mere cash entry and involved no actual change in the assets of the company representing such balance of accumulated profits amounting to the said sum of £68,929; (e) the only effect of writing off such depreciation was to render such balance of £68,929 no longer available so long as such depreciation remained written off; (f) the fact that such balance of £68,929 became non-available for distribution as dividend was immaterial; (g) any annual payment must, for the purposes of r. 19 (1) of the General Rules, be deemed to be payable wholly out of the profits and gains brought into charge to tax, if the amount of such profits and gains (together with the unexhausted balance of profits and gains brought into charge to tax in previous years) is greater than the amount of such annual payment and if, but for the provisions of such r. 19 (1), such annual payment is of such a nature as would constitute it an admissible deduction in computing such profits and gains for the year in which such annual payment is made, and that the debenture and other interest the subject of this appeal was such an annual payment; (h) the profits and gains referred to in r. 19 (1) of the General Rules are the profits and gains actually brought into charge to tax for the year in which such annual payment was actually made and/or any unexhausted balance of profits and gains actually brought into charge to tax in previous years, and the true balance of such profits and gains of the appellant company which for the purposes of such r. 19 (1) must be treated as an available fund out of which the said debenture and other interest must be deemed to be wholly payable was the said balance of £68,929, or, alternatively, the sum of £99,584; (i) that the effect of what was done by the appellant company was not to capitalise the said balance of £68,929; (j) that on these contentions the assessments must be discharged.

On behalf of the Crown it was contended: (a) that apart from the sum of £50 war loan interest for which credit had been given in arriving at the amount of the assessments, the interest payments in question were not made and could not be treated as made out of profits and gains brought into charge; (b) that the assessments were correct and should be confirmed.

The commissioners held that the debenture interest paid after Feb. 22, 1924, was not paid out of profits or gains brought into charge to tax within r. 19, and that the sum of £68,929 as a result of it having been written off by the company was not available either for distribution as dividend or for the payment of debenture interest. They therefore confirmed the assessments.

A ROWLATT, J., dismissed the company's appeal.

Raymond Needham, K.C., and *J. Millard Tucker* for the company.

The Attorney-General (*Sir William Jowitt, K.C.*) and *R. P. Hills* for the Crown.

LORD HANWORTH, M.R.—In this case the Luipaard's Vlei Estate and Gold Mining Co., Ltd., appeals from a decision of ROWLATT, J., who confirmed the B assessments made upon it for the years 1924 to 1927. The company was incorporated on April 10, 1896, and is a gold mining company. In 1923 it was realised that there had been a severe capital loss suffered by the company through the depreciation of its fixed assets, and the amount of that depreciation was £474,675. By 1923 it had accumulated from past profits £68,929. That figure is arrived at on what is called a commercial basis, but if the principles of the Income Tax Acts C had been applied the balance would have been, at that date, £99,584. When, in 1923, it was found that the severe capital loss of nearly £475,000 had been suffered, an extraordinary general meeting of the company was held in order to deal with the situation, and at that meeting it was resolved to reduce the share capital by writing down the £1 shares by 16s. per share. That gave £377,610 for the purpose of setting off against this depreciation of assets of nearly £475,000. But it will D be observed that that was short by something like £97,000 of meeting the situation, and so the company brought in the £68,929 and made use of that sum, which represented their accumulation of past profits. If that figure had not been brought into the accounts, and had not been treated as a means of reducing this depreciation, the company would have had to write down its shares, not merely by 16s., but by something like 19s., leaving the shares at 1s. and not 4s. But, probably by E a very wise and prudent system of finance, it brought in this sum accumulated from past profits. When that had been done, if one turns to the balance sheet of 1924 one sees the entry made that the share capital authorised is the capital as reduced by special resolution and confirmed by the court, 911,952 shares of 4s. each, £1 shares reduced by 16s. Then it was able to go on trading. In the course of the trading it had to pay the interest on debentures, and had paid that interest before F 1923 and paid it afterwards. The assessment made on the company is for the years 1924 to 1927. The company says that the £68,929, which was brought into the account for the purpose of reducing the capital loss, ought to be treated as still existent for income tax purposes, and in particular for the purpose of r. 19 (1) of the General Rules. The reason why it makes that claim is this: Under that rule, which I will come to, a company that has made payments of interest to debenture G holders and has deducted from those payments, as it is required to do, certain sums, is entitled to reimburse itself for the payments that it has made in respect of income tax by treating the sums which it has not paid over to the holders of the debentures as a reimbursement of the sums which they have paid out, and this company says now: "Well, this £68,929 which was accumulated profits, was profits which had paid income tax duly according to law, in the several years in which it was accumu- H lated; it exists somehow and somewhere in our company, and we are entitled to treat the interest that we have paid in these years of charge, 1924 to 1927, as if the interest was paid out of that, and, because that has suffered the charge to tax, we are entitled to use the sum which has been stopped in our hands as money to reimburse ourselves." The question that comes to be determined, therefore, is: Is the company entitled to take into account the £68,929 as a sum on which pay- I ment of income tax has been duly made, although at some distance in the past, and to use that as a part of their existing funds for the purpose of the relief or right which is given to a company or other person paying an annual sum under s. 19 (1)?

First let me see what the purpose of this rule is. The Attorney-General has quite rightly stated that the income tax is an annual tax. It is imposed by an annual Act. Unless the annual Act were passed, the powers in relation to income tax would lie dormant. Income tax, although now it is brought into operation year by year, and for a year, was not always an annual tax or for one year only.

The Act of 1842 granted the duties for three years, and I give as another illustration the Act of 1853, which imposed the tax for seven years. It is useful to look at s. 59 of the Act of 1853, which provides:

> "This Act shall commence and take effect from and after April 5, 1853, and . . . shall continue in force until April 6, 1860; provided always, that this Act and the said duties shall not then cease with respect to any assessment which ought to have been made before the said last mentioned day, but which shall not then have been made and completed."

A contrast between the Act of 1842 and the Act of 1853, and the present system and several successive Acts that are passed, emphasises the point that the income tax is still charged as an annual tax, year by year, and not for longer. It is quite true that there is machinery, as there was in the Act of 1853, for dealing with the matters which had not been cleared up in the course of the twelve months; and the Act of 1918 is an Act which gives the powers, and prescribes the method under which the income tax is to be collected if and when that Act, with such amendments as may be made, is brought into operation by the passing of a Finance Act in each year. The tax, however, remains a tax for a year, for the financial twelve months, repeated in every twelve months, but not the less a tax which is imposed for twelve months.

Rule 19 of the General Rules provides:

> "Where any yearly interest of money, annuity, or any other annual payment . . . is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest, annuity, or annual payment, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing the same."

It is quite clear that the purpose of that rule is to impose the duty of collection on the person who is making the payment, and it provides definitely that "no assessment shall be made upon the person entitled to such interest, annuity, or annual payment" and that is the interest or annual payment which is "payable wholly out of profits or gains brought into charge to tax." That duty, under r. 19, is one which is imposed on the person who has to make the payment of the interest or annual payment. Rule 19 was originally found in s. 102 of the Act of 1842, and s. 40 of the Act of 1853, and r. 21 is derived from s. 24 (3) of the Customs and Inland Revenue Act, 1888. Lord Macnaghten, in *L.C.C.* v. *A.-G.* (2) ([1901] A.C. at p. 40) says of that duty imposed, as it was, by the Act of 1888:

> "It is no longer optional for a person who has to make an annual payment to deduct income tax. He is bound to make the deduction, and bound to pay over to the Crown the amount deducted unless the payment comes out of income which has already paid the duty."

Lord Macnaghten there emphasises that these two rules, r. 19 and r. 21, reimpose the general duty which previously was imposed by the three statutes to which I have referred, and that is a duty imposed on the person who makes the payment at the same time that it prevents any assessment being made on the person entitled to such interest. Rule 19 goes on:

> "But the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing the same, and the person liable to make such payment, whether out of the profits or gains charged with tax or out of any annual payment liable to deduction, or from which a deduction has been made, shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates in force during the period through which the said payment was accruing due";

then there is the provision that the deduction shall be allowed as if it were a payment, and when that rule is contrasted with r. 21 one sees that if the money out of which the payment is made has already been brought into charge to tax, then there is no account to be rendered by the person paying the money, for he has already made a payment to the Crown of the sums which he has collected or will collect from the payee. On the other hand, under r. 21, if he has not made any such payment, then he has to render an account to the Crown, and I stand by the words which I used in *A.-G.* v. *Metropolitan Water Board* (1) where I said ([1928] 1 K.B. at p. 843):

> "There is in my judgment good ground for the Attorney-General's argument that in r. 19 the words 'payable wholly out of profits or gains brought into charge or tax' do not mean payment out of a fund that may be brought into charge, or is, or will be, a factor for the purpose of charge, but refer to a fund brought into charge out of which tax is payable and to be paid. So that is an account between the Crown, the appellants, as tax collectors for the Crown, and the stockholders, it would be clearly seen that the sum deducted from the payments to the stockholders was passed on to and reached the Crown."

In other words, it appears to me that what is contemplated being stopped from payment over to the payee is the sum for which both the payer and the payee are liable under the Income Tax Act for the year which has imposed the tax. Rule 19 presupposes that the payer and the payee are both liable to pay the tax and that the payee might have been assessed to the tax if that method of assessment were appropriate in his case. The rule does not take into account questions which the payee may, at a later stage, take advantage of, such as that his total income is below the standard of liability, or that he would be entitled to some deduction of tax, with the consequence that he may be able to establish a right to repayment. It is dealing with the annual tax. The rule contemplates a liability of payer and a primâ facie liability of the payee to the same tax. That is the interpretation which is to be placed on r. 19 with its corresponding or ancillary rule, r. 21.

In the present case it is suggested that by reason of the fact that at some time, under some different Income Tax Acts, there has been paid some tax to the Crown, in the several years in question, which are 1924 to 1927, the company may take advantage of that historical fact, may pray-in-aid those payments made some years ago, and claim that it is entitled to take that into account in respect of the sums which are retained in its hands in the course of its duty under r. 19. I do not find any justification for that course. It appears to me that r. 19 contemplates that the liability of the payer and the payee is to the same tax, and that r. 19 imposes a duty on the payer and is not intended to inure to his profit unless the terms of the rule are complied with and justify his reimbursing himself what he has paid in respect of the tax to which both he and the payee have become liable.

On the second point, it appears on the facts of this case that the £68,929 has been finally and irrevocably capitalised so as to disentitle the company ever afterwards from restoring it to reserve and from dealing with it as profits. But in view of the fact that there may be cases in which that final destination of these accumulated profits is not so clear, I prefer to put my judgment on the interpretation to be placed on r. 19 and r. 21.

With regard to the facts of this case, which appealed to the commissioners, I agree with them. I think that there has, on the facts of this case, been an irrevocable capitalisation or definitive determination of how those profits are to be used, but in the view that I take of the interpretation to be placed on the rules themselves, that point really is not essential to this case.

I agree with the view that ROWLATT, J., has put on the rules themselves, and I do not think that the immunity sought by the company can be rightly claimed. For these reasons the appeal must be dismissed with costs.

LAWRENCE, L.J.—I agree. The solution of the first question in this case turns on the true meaning of the expression "profits or gains brought into charge" contained in the sentence "is payable wholly out of profits or gains brought into charge to tax" in r. 19 of the All Schedules Rules to the Act of 1918. In my opinion the Attorney-General is right in describing the Income Tax Act, 1918, as a "Finance Clauses Act." It has been said over and over again that income tax is a tax for the year only. What that means is explained by PARKER, J., in *Bowles* v. *A.-G.* (3). He there states ([1912] 1 Ch. at p. 132):

> "It is desirable to consider the history of the income tax as well as the precise terms of the statutory provisions in question. It appears certain that the income tax was originally imposed as, and was intended to be, a temporary tax only, and the Acts regulating its collection have always been so drawn as to expire automatically (except as to arrears) at the end of the period of such imposition. If reimposed at the end of this period, the Acts were revived and continued by the Act reimposing the tax, but again only for the period of reimposition."

As the Master of the Rolls has already explained, for a very long time past the Finance Acts have been annual Acts, and have only imposed the tax for a period of a year, and hence the expression that income tax is income tax for a year.

If one takes as an example the first of the years in question in this case, the year 1923 to 1924, that was governed by the Finance Act, 1923, and s. 1 of that Act, so far as it is material, is: "Income tax for the year 1923–4 shall be charged at the rate of four shillings and sixpence." It then deals with the supertax, but that is immaterial, and then sub-s. (2) provides:

> "All such enactments relating to income tax . . . as were in force with respect to the duties of income tax and supertax granted for the year 1922–3 shall . . . have full force and effect with respect to the duties of income tax . . . granted by this Act."

The effect of that is that the Act of 1918 and all its provisions, including those contained in the schedules, must be read as if they had been re-enacted by the Act of 1923 with regard to the income tax imposed by that Act of that year. The result of construing them in that way is that in r. 19 the expression "profits or gains brought into charge to tax" must necessarily mean those profits and gains brought into charge to the tax for 1923–4. Section 1 of the Act of 1918 provides:

> "Where any Act enacts that income tax shall be charged for any year at any rate, the tax at that rate shall be charged for that year in respect of all property, profits, or gains respectively described or comprised in the schedules marked A, B, C, D and E, contained in Sched. I to this Act and in accordance with the rules respectively applicable to those schedules."

Then, in order to collect the tax so charged, s. 2 provides that:

> "Every assessment and charge to tax shall be made for a year commencing on April 6 and ending on the following April 5, except where under the provisions of this Act weekly wage-earners are to be assessed and charged half-yearly."

Treating these sections as having been re-enacted for the year 1923–4, and as only applicable to that year, we get to this, that the only relevant charge to tax within the meaning of the expression "profits or gains brought into charge" in r. 19 is the charge to the tax of 4s. 6d. imposed by the Act of 1923 for the year 1923–4, with the result that the company paying interest to its debenture holders during that year can only retain the income tax which it has deducted in so far as that income tax is covered by the income tax paid by the company in respect of its profits and gains brought into charge to tax in the same year of assessment.

I ventured to express the same opinion in *A.-G.* v. *Metropolitan Water Board* (1), which opinion, I think, agreed with that expressed by SARGANT, L.J. I appreciate the comment made by Mr. Needham, that it was not really necessary in that case to deal with the precise question which has arisen in this case. It was sufficient in that case to decide that the actual income of the year was income which would not be brought into charge to tax until the following year, but my judgment in that case was undoubtedly based on the view which I adhere to, that the charge referred to in r. 19 is the charge for the year of assessment only. I there stated, and desire now to repeat, that the expression "profits or gains brought into charge to tax" in r. 19 means "profits or gains brought into charge to tax in the year of assessment," and that it follows that under r. 19 and r. 21 no taxpayer can retain against the Crown any more income tax deducted by him in any year of assessment than he has himself paid or become liable to pay to the Crown for that year. SARGANT, L.J., after referring to the opinions of LORD MACNAGHTEN and LORD DAVEY in *L.C.C.* v. *A.-G.* (2), states that:

> "It is impossible to read the judgments in that case, and particularly those of LORD MACNAGHTEN and LORD DAVEY, without observing that attention is throughout directed to the actual sums paid in or for the year of assessment,"

and a little later he states that the attitude adopted by the Metropolian Water Board is, in his judgment, inconsistent with the view that in making these deductions, it is acting as the tax collector for the Crown, and that

> "if that is so, it is strange that his obligation to pay what he has collected should be cancelled to any extent exceeding his actual payment on income tax (including an accrued obligation to pay) for the same period."

In view of the opinion thus expressed, and of my own opinion, I think that the first point fails and that the learned judge came to a right conclusion. As this disposes of the appeal, I prefer not to express any concluded opinion on the second point though, as at present advised, I agree with what the Master of the Rolls said about it.

GREER, L.J.—I agree that this appeal should be dismissed, and if it were not for the fact that it seems to me desirable to give such authority as can be given by a judgment of one member of the court to the convincing argument put forward by the Attorney-General on behalf of the Crown, I should not have added any words of my own. But I think that it is desirable to accentuate, by reference to the sections of the Act of 1918 and the words of the Finance Acts which impose the tax the view that those sections make it quite clear that what both the incorporating statute and the incorporated statute are dealing with when they refer to tax is the tax imposed by the Finance Act. In my view the meaning of the word "tax," wherever it occurs, apart from questions as to the effect of any context, is "the tax imposed by the Finance Act which imposes the tax," and it has no reference to anything but income tax; it has no reference to any tax except a tax imposed by the Finance Act, which is the Act compelling the taxpayer to pay the tax; putting the obligation on the taxpayer. When I look at these words in r. 19 which we have to construe, namely, "profits or gains brought into charge to tax," and the words of r. 21, referring to the payment of the tax, "out of profits or gains brought into charge to tax," I think that has reference only to such profits and gains as are brought into charge to the tax imposed by the Finance Act for the particular year with regard to which the question occurs. If that is right, that disposes entirely of the first point made in the argument for the appellants.

With regard to the second point, at one period of the argument it seemed to me to put in the way of the company a greater difficulty than the first point. I am not satisfied that that primâ facie view was right, and inasmuch as the question may, some day, arise when the profits made in the year of tax are used by a company for the purpose of transferring them to capital account—the question may arise whether it is entitled to regard those for the purposes of the deductions it is permitted to make under r. 19 and r. 21, I think it better in this case to express no opinion on that point.

Appeal dismissed.

Solicitors: *Julius Edwards & Julius*; *Solicitor of Inland Revenue.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re VANDER BYL. FLADGATE *v.* GORE

[CHANCERY DIVISION (Luxmoore, J.), October 16, 1930]

[Reported [1931] 1 Ch. 216; 100 L.J.Ch. 108; 144 L.T. 401;
74 Sol. Jo. 770]

Power of Appointment—General power—Intention to make property appointor's own—Property passing as if appointor had died intestate.

By his will, made in 1889, the testator, after appointing executors and trustees and bequeathing legacies, gave the residue on trust for sale, and after payment of debts, funeral and testamentary expenses and legacies to invest the remainder and stand possessed for all his children equally at twenty-one or marriage, daughters' shares to be settled, and after the death of any one of them for her children or remoter issue as she should by deed or will appoint, and equally between them in default, and if no children for such persons as she should by will appoint, and in default for those entitled under the statutes of distribution, as if she had died a widow domiciled in England and intestate. In 1890 the testator died, having married twice, and had four children by each wife, all of whom survived him. A.B., one of the daughters, by her will in 1927, gave her residue, subject to certain legacies, to her sister I.G., with power to dispose of the same as she should think fit after her (the testatrix's) decease. No reference was made to the power. In 1929 she died a spinster. The husband of I.G. having attested the will, the gift to her failed. The trustees took out this summons asking whether A.B. had exercised her power so as to make that property hers for all purposes or only to a limited and what extent, or whether the share devolved in default, and who were entitled.

Held: I.G. had shown an intention to take the property subject to the general power of appointment out of the instrument creating that power and making it her own so that it passed as if it had been her own property and she had died intestate in respect of it.

Re Davies' Trusts (1) (1871), L.R. 13 Eq. 163, distinguished.

Notes. As to the operation of an appointment, see 25 HALSBURY'S LAWS (2nd Edn.) 556 et seq.; and for cases see 37 DIGEST 462 et seq.

Cases referred to:

(1) *Re Davies' Trusts* (1871), L.R. 13 Eq. 163; 41 L.J.Ch. 97; 25 L.T. 785; 20 W.R. 165; 37 Digest 441, *452*.

(2) *Re Sutcliffe, Sutcliffe* v. *Robertshaw*, [1929] 1 Ch. 123; 98 L.J.Ch. 33; 140 L.T. 135; 72 Sol. Jo. 384; Digest Supp.

(3) *Re Ickeringill's Estate, Hinsley* v. *Ickeringill* (1881), 17 Ch.D. 151; 50 L.J.Ch. 364; 29 W.R. 500; 37 Digest 463, *644*.

(4) *Re Dumble, Williams* v. *Murrell* (1883), 23 Ch.D. 360; 52 L.J.Ch. 631; 48 L.T. 661; 31 W.R. 605; 23 Digest (Repl.) 417, *4873*.

(5) *Williams* v. *Williams, Re Hartley, Williams* v. *Jones*, [1900] 1 Ch. 152; 69 L.J.Ch. 79; 81 L.T. 804; 48 W.R. 245; 37 Digest 475, *733*.

(6) *Re Boyd, Kelly* v. *Boyd*, [1897] 2 Ch. 232; 66 L.J.Ch. 614; 77 L.T. 76; 45 W.R. 648; 37 Digest 464, *647*.

(7) *Re Seabrook, Gray* v. *Baddeley*, [1911] 1 Ch. 151; 80 L.J.Ch. 61; 103 L.T. 587; 37 Digest 441, *453*.

(8) *Re Russell Skinner, Marriott* v. *Ensor* (1924), 68 Sol. Jo. 440; [1924] W.N. 65; 37 Digest 464, *649*.

(9) *Re Marten, Shaw* v. *Marten*, [1902] 1 Ch. 314; 71 L.J.Ch. 203; 85 L.T. 704; 50 W.R. 209; 46 Sol. Jo. 163, C.A.; 37 Digest 464, *652*.

By his will, dated Sept. 11, 1889, the testator appointed executors and trustees and devised his freehold property at Cannes to his trustees for the benefit of his wife and unmarried daughters and directed that from and after the death or second marriage of his wife the said freehold property should fall into and form part of his residuary estate. He bequeathed £5,000 on trust for his wife for life and then for his children by his late or then present wife as therein mentioned, and a further £8,000 upon trust to divide equally between his children by his first wife who survived him, with special provision as to the share of his daughter Euphemia Lady Heath. He gave, devised and bequeathed unto his trustees all the rest and residue of his estate upon trust for sale and conversion, and, after payment thereout (inter alia) of the two sums of £5,000 and £8,000, upon trust for investment, and to stand possessed of the said trust moneys, or the stocks, funds and securities representing the same—thereinafter called his residuary trust estate—upon trust for all his children by either his first or second wife as therein mentioned in equal shares. And he declared that the share of each daughter of his—other than Lady Heath—in his residuary trust estate and in the said two legacies should be held by his trustees upon trust to pay the annual income thereof to such daughter during her life for her separate use without power of alienation and immediately after the decease of the daughter her share and the annual income thereof should be held in trust for all or any one or more exclusively of her children and remoter issue generally in such manner as she should by deed or will appoint, with provision for hotchpot. In default of and subject to appointment the share was to be held in trust for her child, if only one, or all the children if more than one, in equal shares, but if there should be no such child then

> "in trust for such persons for such interests and generally in such manner in all respects as such daughter, whether covert or sole, shall by will appoint. And in default of appointment and subject to any partial appointment in trust for the person or persons who at the decease of such daughter would have been entitled thereto under the statutes for the distribution of intestates' effects if she had died a widow domiciled in England and intestate such persons if more than one to take in the proportions prescribed by the same statutes."

The testator died on March 9, 1890, and the will was proved in the Principal Probate Registry on July 22, 1890. He was married twice. There were four children of the first marriage: (a) Euphemia Lady Heath, who died on Aug. 21, 1921, leaving an only child, the defendant, Hylda M. Bates; (b) Pieter G. V. Vander Byl, who died on Nov. 7, 1921, leaving three children—the defendants Aimee Irene Vander Byl, Voltelin St. John Vander Byl, and Fleming V. Vander Byl; (c) the defendant, Isabella Lady Gore; (d) Aimee E. Vander Byl. There were four children of the second marriage—the defendants Anna H. M. Mussa, John Vander Byl, Albert M. Vander Byl, and Yvonne A. de Clermont. All had attained the age of twenty-one years.

By her will, dated Dec. 1, 1927, Aimee Vander Byl appointed her sister Lady Gore executrix and made certain bequests to two of her nephews, a niece and her half-sister Anna Mussa, and gave "all the remainder of my property to my sister Isabella Charlotte Gore, to be disposed of as she thinks fit at my death." She died a spinster on Feb. 15, 1929, and her will was proved by Lady Gore on June 6, 1929. This will having been witnessed by the husband of Lady Gore, the residuary gift was invalid by reason of the Wills Act, 1837, s. 15.

The surviving trustees of the will of the testator took out this summons to determine the question whether the testatrix, Aimee Vander Byl, (a) effectually executed the general testamentary power of appointment exercisable by her in the events which happened over the legacies and share of the residuary trust estate of the testator settled upon trust for herself for life with remainders over so as to make the legacies and share part of her own estate for all purposes, or (b) executed such power to a limited, and if so what, extent only, or whether the said legacies and share devolved as in default of appointment.

C. R. R. Romer, for the plaintiffs, referred to *Re Sutcliffe, Sutcliffe* v. *Robertshaw* (2).

R. H. Hodge, for Lady Gore, referred to JARMAN ON WILLS (7th Edn.), pp. 780 et seq.; *Re Davies' Trusts* (1); and *Ickeringill's Estate, Hinsley* v. *Ickeringill* (3).

Galbraith, K.C., and *Vanneck*, for Aimee I. Vander Byl, Voltelin St. John Vander Byl, and Fleming V. Vander Byl, referred to *Re Dumble, Williams* v. *Murrell* (4); *Williams* v. *Williams* (5); FARWELL ON POWERS (3rd Edn.), p. 270; and *Re Boyd, Kelly* v. *Boyd* (6).

LUXMOORE, J., referred to *Re Seabrook, Gray* v. *Baddeley* (7).

T. A. C. Burgess for Hylda M. Bates.

A. G. Coulson (*G. D. Johnston* with him), for the defendants Anna H. M. Mussa, John Vander Byl, and Albert M. Vander Byl, referred to *Re Russell Skinner, Marriott* v. *Ensor* (8); *Re Marten, Shaw* v. *Marten* (9).

J. Neville Gray for the defendant Mrs. Yvonne A. de Clermont.

LUXMOORE, J.—The question which I have to determine is whether the late Aimee Ernestine Vander Byl effectually exercised the general testamentary power of appointment which she had under her father's will so as to make the subject-matter of that general testamentary power of appointment her own property and go with the rest of her own estate.

By s. 27 of the Wills Act, 1837, the general bequest of property by a testator includes property over which he has a general power of appointment, so that the property is included under the will. One of the questions here is whether the final gift of the remainder of her property which the testatrix made in favour of her sister has failed by reason of the fact that the sister's husband was one of the attesting witnesses to the will. Section 15 of the Wills Act, 1837, makes that an invalid disposition of the property and to that extent there is a failure of her testamentary disposition and an intestacy. The question, therefore, arises whether the property which is subject to the general power of appointment passes as part of the property of the testatrix or goes under the will of her father Pieter G. Vander Byl, as not having been taken out of those trusts.

The question that always arises in cases of this kind is whether the testatrix or the person purporting to exercise the power has intended by the exercise of the power to take the appointed property out of the instrument creating the power for all purposes or only for the limited purpose of giving effect to the disposition which she has made. There are, I think, a very large number of authorities with regard to it, but, as was pointed out in FARWELL ON POWERS, there are certain rules which guide the court in discovering the intention of the person who is said to have exercised the power. The rules are stated in FARWELL ON POWERS (3rd Edn.) at pp. 269 and 270. I need not refer to the first or second of those rules but the third, which is the one really of importance. It says:

> "If there be an appointment to A, who dies before the testator [I mean by 'testator' the person making the appointment], no inference can be drawn from the mere appointment by itself of an intention to make the property the testator's own for all purposes. . . ."

The well-known case of *Re Davies' Trusts* (1) is referred to for that proposition. The rule then proceeds:

> "But there may be other indicia, such as treating the appointed fund and the testator's own property as one mass, and charging the entirety with debts and expenses and appointing executors, which will enable the court so to hold."

It is worthy of note that in *Re Davies' Trusts* (1) the executrix by the will in question declared that all her just debts, funeral and testamentary expenses should be paid and discharged. She then gave pecuniary legacies and bequeathed

> "all the rest, residue, and remainder of my moneys in the funds [i.e., what remained of her own property after the debts, funeral and testamentary expenses had been paid out of it] and all moneys due to me on mortgage or otherwise, and all my personal estate wheresoever and whatsoever of which I shall die possessed, or have any title to or interest in, unto"

—the beneficiaries. It is plain that she was dealing with her own property and the property which was the subject of the power as two quite separate things. There was no massing of the two classes of property together so as to make them equally liable for the payment of the debts, funeral and testamentary expenses and legacies. If there had been, the decision would have been the other way. That is the element which has been pointed out as distinguishing *Re Davies' Trusts* (1) in many of the subsequent cases. I think it was, perhaps, most clearly pointed out by Romer, L.J., in *Re Marten* (9), to which I was referred.

In my judgment, the case before me does not fall within the decision of *Re Davies' Trusts* (1) at all. No one suggests, and I certainly would not dream of suggesting, that *Re Davies' Trusts* (1) was incorrect in any way—I agree with every word of the decision—but this case is quite different. Here the testatrix has dealt with the whole of her property as one mass, including in it, by reason of s. 27 of the Wills Act, 1837, the property which was subject to the general power of appointment. She has not distinguished between her own property and that subject to the general power in any way. The debts, funeral expenses and legacies are all to be paid out of a combined mass. There is no priority of one part of the estate and no liability of one part of the estate coming before another part of the estate. In my judgment, the testatrix has made both the property subject to the power and her own property one mass for the whole purpose of her will. In those circumstances I am satisfied that she has shown an intention of taking the property subject to the general power of appointment out of the instrument creating that power and making it her own so that it passes by reason of the events that have happened as if it had been her property and she had died intestate in respect of it, i.e., it goes to her next-of-kin, and according to the law as altered by the Administration of Estates Act, 1925.

Solicitors: *Fladgate & Co.*; *Radcliffes & Hood*, *St. Barbe Sladen & Wing*; *Holloway*, *Blount & Duke*, and *Maples*, *Teesdale & Co.*

[Reported by A. W. Chaster, Esq., *Barrister-at-Law.*]

BIRMINGHAM CORPORATION *v.* INLAND REVENUE COMMISSIONERS

[House of Lords (Lord Buckmaster, Lord Sumner, Lord Dunedin, Lord Blanesburgh and Lord Atkin), December 9, 10, 12, 1929; February 27, 1930]

[Reported [1930] A.C. 307; 99 L.J.K.B. 299; 142 L.T. 633; 94 J.P. 123; 46 T.L.R. 262; 28 L.G.R. 201; 15 Tax Cas. 172]

Income Tax—Annual payments—Deduction of tax—Retention by payer of amount deducted—Housing scheme of local authority—Finance raised by loans—Deficit on scheme covered by government grant—Gross interest on loans included in deficit—Right of local authority to retain tax deducted from interest paid—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules*, *r.* 19—*Housing*, *Town Planning*, *&c.*, *Act*, 1919 (9 *&* 10 *Geo.* 5, *c.* 35), *s.* 7.

A local authority worked public undertakings such as gas, water, electricity and tramways, making considerable profits which bore income tax and which, under private Acts of Parliament, were paid, together with money raised by rates, into one fund called the borough fund. Under the Housing, Town Planning, &c., Act., 1919, s. 7, it was provided that in the case of a re-housing scheme carried out pursuant to its provisions by a local authority, the Local Government Board should pay to the local authority such part of any loss incurred by the local authority as might be determined in the manner there specified. Regulations made under s. 7 required the local authority to keep separate accounts relating to its housing scheme in a prescribed form. The local authority raised loans in order to finance its housing scheme, and in paying interest it deducted income tax. The question arose whether the local authority could retain the amount of tax so deducted under the Income Tax Act, 1918, All Schedules Rules, r. 19, or was bound to account for it to the Crown. The subsidy payable by the Local Government Board was assessed according to the deficit shown in the prescribed accounts. The said accounts included on the debit side (as required by regulations made under the Act of 1919) the gross amounts paid by the local authority as interest on loans and the Board paid the deficit disclosed. During the relevant years the total taxed profits of the local authority from its property and undertakings paid into the borough fund exceeded the aggregate amount of the interest on loans payable by it under the housing scheme.

Held: the corporation could not be deemed to have paid the interest out of profits brought into charge because the scheme of the Act of 1919 and the regulations under which the gross interest was properly shown as a debit in the prescribed accounts was inconsistent with the application of r. 19, and the corporation had no right to retain the tax deducted.

Notes. The Income Tax Act, 1918, All Schedules Rules, s. 19, was replaced by the Income Tax Act, 1952, s. 169.

Considered: *Fenton's Trustee* v. *I.R. Comrs.*, [1936] 1 All E.R. 116; *Scarborough Corpn.* v. *I.R. Comrs.* (1947), 28 Tax Cas. 147; *Hutton* v. *I.R. Comrs.*, [1953] 2 All E.R. 93. Referred to: *Birmingham Corpn.* v. *Barnes* (1935), 19 Tax Cas. 195; *Allchin* v. *Coulthard*, [1943] 2 All E.R. 352; *Newcastle-upon-Tyne Corpn.* v. *Beak* (1947), 27 Tax Cas. 480; *British Electricity Authority* v. *Exeter Corpn.*, [1953] 1 All E.R. 502.

As to payments by a local authority out of profits or gains brought into charge, see 20 Halsbury's Laws (3rd Edn.) 370 et seq.; and for cases on the subject, see 28 Digest 73, *392–397*.

Cases referred to:

(1) *Dickson* v. *Hampstead Borough Council* (1927), 91 J.P. 146; 43 T.L.R. 595; 25 L.G.R. 402; 11 Tax Cas. 691; Digest Supp.

(2) *L.C.C.* v. *A.-G.*, [1901] A.C. 26; 70 L.J.Q.B. 77; 83 L.T. 605; 65 J.P. 227; 49 W.R. 686; 17 T.L.R. 131; 4 Tax Cas. 265, H.L.; 28 Digest 73, *392*.

(3) *A.-G.* v. *L.C.C.*, [1907] A.C. 131; 76 L.J.K.B. 454; 96 L.T. 481; 71 J.P. 217; 23 T.L.R. 390; 51 Sol. Jo. 372; 5 L.G.R. 465; 5 Tax Cas. 242, H.L.; 28 Digest 73, *393*.

(4) *Sugden* v. *Leeds Corpn.*, [1914] A.C. 483; 83 L.J.K.B. 840; 108 L.T. 578; 77 J.P. 225; 29 T.L.R. 402; 57 Sol. Jo. 425; 11 L.G.R. 662; 6 Tax Cas. 211, H.L.; 28 Digest 74, *397*.

Appeal from a decision of the Court of Appeal (Lord Hanworth, M.R., Lawrence and Sankey, L.J.) ([1929] 2 K.B. 187) on a Case Stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The Case Stated was as follows:

1. At a meeting of the commissioners for the Special Purposes of the Income Tax Acts, held on July 11, 1928, the Corporation of Birmingham, hereinafter called the corporation, appealed against assessments to income tax made upon them in the sums of £83,433, £125,731, and £110,434, for the years ending April 5, 1922, April 5, 1923, and April 5, 1924 respectively. These assessments were made under the provisions of r. 21 of the General Rules applicable to Scheds. A, B, C, D and E of the Income Tax Act, 1918, as amended by s. 26 of the Finance Act, 1927, in respect of certain sums of interest paid on money borrowed by the cor-

poration for the purpose of its assisted housing scheme undertaken in pursuance of the provisions contained in the Housing, Town Planning, &c., Act, 1919. On making payments of such interest the corporation had deducted tax, and the question for the opinion of the court is whether, upon the facts of the case (as hereinafter set out) and the law applicable thereto, the corporation is liable to account to the Inland Revenue Commissioners for the tax so deducted. No dispute as to figures arises in this case, and it is agreed that if the corporation is so liable to account the assessments will stand, and if the corporation is not so liable, that the assessments will require to be discharged.

2. A charter of incorporation was granted to Birmingham in the year 1838. Since that date the funds and rating powers of the corporation have been regulated by a series of public and local Acts. Since the passing of the Local Government Board's Provisional Orders Confirmation (No. 8) Act, 1913, the corporation has had one fund only, the borough fund, and any deficiency in that fund is met by raising a borough rate. The general expenses of its execution of the Public Health Acts are paid from that fund. The balance of profits of the corporation's markets, gas, water, electricity supply and tramway undertakings are under the provisions of the relevant Acts paid into the borough fund.

3. In the year ending April 5, 1920, the corporation prepared and undertook a housing scheme under the provisions of the Housing, Town Planning, &c., Act, 1919. The relevant sections of that Act are as follows:

> "Section 1 (1). It shall be the duty of every local authority within the meaning of Part III of the Housing of the Working Classes Act, 1890 (hereinafter referred to as the principal Act), to consider the needs of their area with respect to the provision of houses for the working classes, and within three months after the passing of this Act, and thereafter as often as occasion arises, or within three months after notice has been given to them by the Local Government Board, to prepare and submit to the Local Government Board a scheme for the exercise of their powers under the said Part III.
>
> Section 7 (1). If it appears to the Local Government Board that the carrying out by a local authority, or by a county council to whom the powers of a local authority have been transferred under this Act, or any scheme approved under s. 1 of this Act, or the carrying out of a re-housing scheme in connection with a scheme made under Part I or Part II of the principal Act, including the acquisition, clearance, and development of land included in the last-mentioned scheme, and whether the re-housing will be effected on the area included in that scheme or elsewhere, or the carrying out of any scheme approved by the Board for the provision of houses for persons in the employment of or paid by a county council or a statutory committee thereof, has resulted or is likely to result in a loss, the Board shall, if the scheme is carried out within such period after the passing of this Act as may be specified by the Board with the consent of the Treasury, pay or undertake to pay to the local authority or county council out of moneys provided by Parliament such part of the loss as may be determined to be so payable under regulations made by the Board with the approval of the Treasury, subject to such conditions as may be prescribed by those regulations. (2) Such regulations shall provide that the amount of any annual payment to be made under this section shall (a) in the case of a scheme carried out by a local authority, be determined on the basis of the estimated annual loss resulting from the carrying out of any scheme or schemes to which this section applies, subject to the deduction therefrom of a sum not exceeding the estimated annual produce of a rate of one penny in the pound levied in the area chargeable with the expenses of such scheme or schemes; and (b) in the case of a scheme for the provision of houses for persons in the employment of or paid by a county council, or a statutory committee thereof, be an amount equivalent to thirty per centum of the annual loan charges as calculated in accordance with the regulations on the total capital expenditure incurred by the county council for the purposes of the scheme: provided that the regulations

> shall include provisions (i) for the reduction of the amount of the annual payment in the event of a failure on the part of the local authority or county council to secure due economy in the carrying out and administration of a scheme to charge sufficient rents or otherwise to comply with the conditions prescribed by the regulations; (ii) for the determination of the manner in which the produce of a rate of one penny in the pound shall be estimated; and (iii) for any adjustment which may be necessary in consequence of any difference between the estimated annual produce and the actual produce of the said rate of one penny in the pound. . . .
>
> Section 40. This part of this Act shall be construed as one with the principal Act (the Housing of the Working Classes Act, 1890), and any provisions of this part of this Act which supersede or amend any provisions of the principal Act shall be deemed to be part of that part of the principal Act in which the provisions superseded or amended are contained, and references in this part of this Act to the principal Act or to any provisions of the principal Act shall be construed as references to that Act or provisions as amended by any subsequent enactment, including this part of this Act . . .''

The relevant provisions of the Housing of the Working Classes Act, 1890, as to the defraying of expenses and the powers of borrowing in connection with schemes for the housing of the working classes are as follows:

> ''Section 65. All expenses incurred by a local authority in the execution of this part of this Act shall be defrayed (i) in the case of an authority in the administrative county of London, out of the Dwelling House Improvement Fund under Part I of this Act; (ii) in the case of an urban sanitary authority, as part of the general expenses of their execution of the Public Health Acts.
>
> Section 66. The London County Council and the Commissioners of Sewers may borrow for the purpose of the execution of this part of this Act, in like manner and subject to the like conditions as they may borrow for the purposes of Part I of this Act, and a sanitary authority may borrow for the purpose of the execution of this part of this Act in like manner and subject to the like conditions as for the purpose of defraying the above-mentioned general or special expenses.''

The corporation is an urban sanitary authority and accordingly the following provisions of the Public Health Act, 1875, relating to expenses and borrowing powers are material:

> ''Section 207. All expenses incurred or payable by an urban authority in the execution of this Act, and not otherwise provided for, shall be charged on and defrayed out of the district fund and general district rate leviable by them under this Act, subject to the following exceptions; (namely): that where at the time of the passing of this Act the expenses incurred by an urban authority in the execution of certain purposes of the sanitary Acts were payable out of the borough fund and borough rate, and the expenses incurred by such authority in the execution of the other purposes of the said Acts were payable out of a rate or rates leviable by that authority throughout the whole of their district for paving, sewering or other sanitary purposes, then the expenses incurred by that authority in the execution of the same or similar purposes respectively under this Act shall respectively be charged on and defrayed out of the borough fund and borough rate, and out of the rate or rates leviable as aforesaid.
>
> Section 233. Any local authority may, with the sanction of the Local Government Board, for the purpose of defraying any costs, charges and expenses incurred or to be incurred by them in the execution of the sanitary Acts or of this Act, or for the purpose of discharging any loans contracted under the sanitary Acts or this Act, borrow or re-borrow, and take up at interest, any sums of money necessary for defraying any such costs charges and expenses, or for discharging any such loans as aforesaid. An urban authority may borrow or re-borrow any such sums on the credit of any fund or all or any rates or rate

out of which they are authorised to defray expenses incurred by them in the execution of this Act, and for the purpose of securing the repayment of any sums so borrowed, with interest thereon, they may mortgage to the persons by or on behalf of whom such sums are advanced any such fund or rates or rate. A rural authority may borrow or re-borrow any such sums, if applied or intended to be applied to general expenses of such authority, on the credit of the common fund out of which such expenses are payable, and if applied or intended to be applied to special expenses of such authority on the credit of any rate or rates out of which such expenses are payable, and for the purpose of securing the repayment of any sums so borrowed, with interest thereon, they may mortgage to the persons by or on behalf of whom such sums are advanced any such fund rate or rates."

4. In order to raise money for the purpose of their housing scheme the corporation issued stock and local bonds and also borrowed on mortgage. In each case the loan was secured on all the rates, revenues and property of the corporation and in the case of the local bonds, the rates, revenues and property of the corporation were expressed to include "the grant to be paid by the government in aid of the housing scheme." The houses built by the corporation under its assisted housing scheme were completed by the year 1924.

5. In accordance with the powers contained in s. 7 of the Housing, Town Planning, &c., Act, 1919, regulations were made by the Minister of Health and became S.R. & O., 1919, No. 2047. In 1925 further regulations amending those above referred to were made by the Minister of Health and became S.R. & O., 1925, No. 778. The following are among the material regulations: S.R. & O., 1919, No. 2047:

Article IV. (1) The local authority shall for the purposes of an assisted scheme, or a scheme which, in the opinion of the Minister, is likely to become an assisted scheme, keep separate accounts, to be called "The Housing (Assisted Scheme) Accounts," including a separate revenue account, to be called "The Housing (Assisted Scheme) Revenue Account." (2) They shall cause to be credited to the Housing (Assisted Scheme) Revenue Account in each financial year: (a) the produce of a rate of one penny in the pound levied in the area chargeable with the expenses of the assisted scheme, or such less amount as may be necessary to meet the deficit for the financial year; (b) the rents (inclusive of rates where rates are payable by the owner) in respect of any houses provided or acquired by them under the assisted scheme; and (c) any other income which, in the opinion of the Minister, may properly be credited to the said account. (3) They shall cause to be debited to the Housing (Assisted Scheme) Revenue Account in each financial year: (a) the sums required for interest and repayment of principal in respect of all moneys borrowed by them for the purposes of the assisted scheme (including moneys borrowed for the purchase of land which is approved by the Minister as part of the assisted scheme) which in the opinion of the Minister may properly be debited to the said account; (b) the rates, taxes, rents or other charges payable by them in respect of any land or houses acquired, leased or provided by them under the assisted scheme, including any sums payable by way of rent, with the approval of the Minister, to any other account of the local authority, in respect of land acquired by them for some other purpose and appropriated for the purposes of the assisted scheme; (c) the annual premium payable by them in respect of the insurance against fire of any houses acquired or provided by them for the purposes of the assisted scheme; (d) the expenditure incurred in respect of supervision and management of the houses acquired or provided by them under the assisted scheme; (e) the expenditure incurred by them in and about the repair or maintenance of any property acquired or provided by them for the purposes of the assisted scheme, whether such expenditure is incurred by way of a fixed annual contribution to a repairs fund or otherwise; and (f) any other expenses which, in the opinion of the Minister, may properly be debited to the said account. (4) (a) In the case of the council of a borough whose accounts under the Housing Acts are not otherwise subject to audit by the district auditor, the Housing (Assisted Scheme) Accounts shall be made up and shall be audited by the district auditor in like manner, and subject to the same provisions, as the accounts of an urban district council, and for this purpose enactments relating to the audit by district auditors of those accounts, and to all matters incidental thereto and consequential thereon, shall apply, so far as necessary, in lieu of the provisions of the Municipal Corporations Act, 1892, relating to accounts and audit. (b) In every case as soon as practicable after the conclusion of each financial year the local authority shall forward to the Minister a copy of the Housing (Assisted Scheme) Revenue Account, certified by the district auditor. A B

Article V. Except with the approval of the Minister, the local authority shall not borrow moneys for the purposes of an assisted scheme, or a scheme which, in the opinion of the Minister, is likely to become an assisted scheme, at a higher rate of interest than that fixed for the time being in the case of loans by the Public Works Loan Commissioners to local authorities for the purposes of assisted schemes. C

Article VI. Subject to the provisions of these regulations and provided that these regulations are complied with the annual payment to be made by the Minister to the local authority out of moneys provided by Parliament (hereinafter referred to as "the Exchequer subsidy") shall be determined by the Minister as follows: (a) During the period before any part of the assisted scheme has been carried into effect the Exchequer subsidy shall be an amount equivalent to the deficit in the Housing (Assisted Scheme) Revenue Account made up at the conclusion of each financial year, in accordance with the provisions of art. IV of these regulations. [By the Amendment Regulations, 1925, this provision applies during the period up to and including Mar. 31, 1927.] D E

Article VII. (1) In any determination of the amount of the Exchequer subsidy, whether based on an estimate or otherwise, such deductions may be made from the amount of the deficit upon which the Exchequer subsidy is calculated as will in the opinion of the Minister represent: (a) an item of expenditure or estimated expenditure which is excessive or not properly chargeable to the debit of the assisted scheme; or (b) the omission from the account or estimate of any item of income which should be included therein; or (c) any deficiency of income or estimated income which is due to the insufficiency of the rents charged or proposed to be charged by the local authority; or (d) any deficiency of income or estimated income which is due to the failure of the local authority to secure due economy in the carrying out or administration of the scheme. F G

Article IX. The Exchequer subsidy shall be payable in such instalments as the Minister may think fit (including payments on account, during the periods mentioned in paras. (a) and (b) of art. VI of these regulations, based on the probable deficit for the year as certified by the local authority), but the Minister may, if he thinks fit, withhold payment of the final instalment of the Exchequer subsidy until the provisions of sub-division (4) (b) of art. IV of these regulations have been complied with. H

During each of the three years to which the appeal related the corporation had a deficit on its Housing Scheme Revenue Account, and under the Housing, Town Planning, &c., Act, 1919, and the regulations made thereunder as above mentioned, was entitled to an Exchequer subsidy equal to the amount of the deficit for each of the three years, subject however to the terms of the regulations and, in particular, to disallowances and discontinuance at the instance of the Minister of Health. For the year 1921–22 the deficit was £115,808 18s. 3d., of which amount £1,002 was disallowed by the Minister. For the year 1922–23 the deficit was £178,374 9s. 7d., of which amount £2,708 was disallowed by the Minister. For the year 1923–24 the deficit was £156,480 8s. 4d., of which amount £2,639 was disallowed by the Minister. I

The amounts of the Exchequer subsidy payable to the corporation for the three years were based on the deficits in the revenue account for the housing scheme, and the interest on the loans was only a factor in determining the amounts of the deficits. In arriving at the amount of the Exchequer subsidy, no sums of interest paid by the corporation on loans raised for the purpose of the scheme were disallowed by the Minister as inadmissible items of expenditure. The sums disallowed were for the most part in respect of general management expenses.

The dates of payment of the instalments of the subsidy did not correspond with the dates of payment of interest on the loans. Some instalments of the subsidy were paid long subsequent to the payment of interest, and certain small amounts of the subsidy were still outstanding for each year.

During each of those years the total taxed profits of the corporation's property and undertaking paid into the borough fund exceeded the amount of the aggregate interest on loans payable by the corporation including the interest on loans under the housing scheme.

7. It was contended on behalf of the corporation: (i) That the Exchequer subsidy was paid to the corporation to make good generally the loss to the borough fund occasioned by the housing scheme. (ii) That by reason of the difference between the borrowing powers conferred on the local authorities in London and those outside, the facts of this case differed from those in *Dickson* v. *Hampstead Borough Council* (1). (iii) That the interest on the loans for the housing scheme was a charge on and lawfully payable and, in fact, paid out of the taxed income of the borough fund, and that such interest was wholly payable and paid out of profits and gains brought into charge to income tax; and (iv) that the assessments appealed against should be discharged.

8. It was contended on behalf of the Crown: (i) That for the reasons advanced by the Crown in the case of *Dickson* v. *Hampstead Borough Council* (1), and for other reasons, the interest payable by the corporation upon loans raised for the purpose of its assisted housing scheme, in so far as such interest exceeded the taxed income from the said scheme, was not payable out of profits and gains brought into charge. (ii) That the present case was indistinguishable from *Dickson* v. *Hampstead Borough Council* (1); and (iii) that the assessments should be confirmed.

The commissioners held that this case was indistinguishable from that of *Dickson* v. *Hampstead Borough Council* (1), and accordingly confirmed the assessments under appeal.

The Court of Appeal held, affirming the decision of ROWLATT, J., that the interest on the loans for the assisted housing scheme was payable out of the receipts of the housing scheme plus the Exchequer subsidy and the Exchequer subsidy did not go as a subvention to the borough fund as a whole, the interest on the loans for the scheme was not payable effectively or operatively out of any of the other profits or gains of the corporation and whether or not the ultimate security for the repayment of the capital sum lent for the scheme was the borough fund was immaterial, therefore the case fell within r. 21 of the All Schedules Rules and the corporation were bound to return the income tax deducted from the interest.

The Birmingham Corporation appealed.

H. P. Macmillan, K.C., and *Latter, K.C.* (*G. R. Blanco White* with them), for the appellants.

The Attorney-General (*Sir William Jowitt, K.C.*) and *R. P. Hills* for the respondents.

The House took time for consideration.

Feb. 27. The following opinions were read.

LORD BUCKMASTER.—The Attorney-General stated in his argument that this case could be confined in a nutshell. This may be true, but it is certain that when once liberated it assumed the dimensions of an afrit and was equally difficult to recapture. The issue arises out of an assessment to income tax of the Corporation of Birmingham, and for its explanation it is necessary to refer to a few facts which can be briefly stated.

The Corporation of Birmingham owns and successfully works certain public undertakings such as gas, water, electricity, tramways, &c., the profits from which are considerable; by virtue of some private Acts of Parliament all such profits are carried into one fund known as the borough fund, into which also are paid moneys levied by rates. The Housing and Town Planning Act, 1919, provided by s. 7 that in the case of a re-housing scheme carried out pursuant to its provisions by a local authority, the Local Government Board should on certain conditions, all of which are satisfied in the present case, with the consent of the Treasury, pay to the local authority out of moneys provided by Parliament

> "such part of the loss as may be determined to be so payable under regulations made by the Board with the approval of the Treasury, subject to such conditions as may be prescribed by those regulations."

The section continued to define the scope of these regulations as follows:

> "Such regulations shall provide that the amount of any annual payment to be made under this section shall—(a) In the case of a scheme carried out by a local authority, be determined on the basis of the estimated annual loss resulting from the carrying out of any scheme or schemes to which the section applies, subject to the deduction therefrom of a sum not exceeding the estimated annual produce of a rate of one penny in the pound levied in the area chargeable with the expenses of such scheme or schemes. . . ."

The regulations made under this section threw on the local authority (see art. IV) the duty of keeping separate accounts to be called the Housing (Assisted Scheme) Accounts, including a separate revenue account to be called the Housing (Assisted Scheme) Revenue Account, and directed that such accounts should be prepared so that they should cause to be debited in each financial year:

> "(a) The sums required for interest and repayment of principal in respect of all moneys borrowed by them for the purposes of the assisted scheme (including moneys borrowed for the purchase of land which is approved by the Minister as part of the assisted scheme) which in the opinion of the Minister may properly be debited to the said account, . . ."

The corporation for the three years 1921–22, 1922–23, 1923–24 prepared accounts on this basis showing serious deficits which were paid by the Exchequer and it is in respect of the sums so paid that the claim for income tax has arisen. The case of the Inland Revenue depends on the following facts: The corporation raised loans to assist the scheme, and in their accounts each year brought forward as a debit item the gross amount of the interest they had paid on such loans, a sum which in each case was larger than the ultimate deficit. In fact, of course, they paid the interest after deducting the tax, and the Inland Revenue authorities contend that measured on the amount of the deficit the tax so retained must be paid over to them. The commissioners, the learned judge who heard the appeal from their decision, and the Court of Appeal have all supported this contention. The corporation argue that these decisions are wrong, because in their borough fund, out of which the payments for interest were made, there were large sums representing the profits on their undertakings which had already paid tax and that out of these sums they paid, as they were entitled to do, the interest on the loans. By this means the income tax in respect of the interest on the loans was discharged, because the moneys used for its payment had already paid tax under Sched. D. They say therefore that they thus properly paid the gross amount of the interest and were entitled to bring in the full sum as a debit in their accounts.

The right of the corporation to pay interest on loans out of taxed profits and to deduct the tax in so doing is established by authorities that cannot be disputed and need not be discussed. For the curious in such matters *L.C.C.* v. *A.-G.* (2), *A.-G.* v. *L.C.C.* (3), *Sugden* v. *Leeds Corpn.* (4), may be referred to. But admitting this does not appear to me to solve the difficulty. The persons to whom the interest was payable are the persons whose income is to be taxed. If paid without deduction they could be assessed for the amount. If, however, paid out of profits taxed under Sched. D, the debtor can get a full discharge by paying the sum less tax. In such a case it is assumed he has paid the tax on behalf of his creditor, and the creditor where entitled to abatement can recover on this hypothesis. In the present case, if the accounts had brought in the actual sum paid no question would have arisen, but the accounts were prepared for a department of the Crown to whom, acting through another department, the tax was payable, and so regarded were prepared on the footing that the tax was unpaid, with the result that either the creditor was still liable for the tax or that, if it had been deducted, it was retained to satisfy his liability in that respect. The first hypothesis was not accurate and the other is the only one tenable.

The position may be put in other words. The corporation by the accounts put forward for the purpose of obtaining and measuring the subsidy represented that the sum required for interest was the gross sum. If the interest was paid out of moneys already taxed, this was not the sum required; they only required the lower figure. The statement therefore was equivalent to saying that the interest had not been paid out of moneys which had already paid tax. They cannot therefore now set up the contrary, but if not so paid the tax is still undischarged, and it is in their hands for payment.

It is unnecessary to dwell on the results of the other contention, but it would appear and was indeed accepted that if it were correct the effect of the Act, the regulations and the circumstances were such as might cause part of the sum provided by the subsidy to be used in relief of the general rates. No doubt such a conclusion might be contained in words aptly devised for the purpose, but it can hardly have been the intention of the Act, and I can find nothing in this case to point to the conclusion that it was its consequence.

LORD SUMNER.—If the interest on the housing bonds now in question was not payable or not wholly payable by the appellants out of profits or gains brought into charge, they were bound to deduct the tax, and thereupon they owed the sum so deducted to the Crown. If, on the other hand, it was so payable, then by reason of having paid it out of profits already brought into charge, the appellants would be entitled to keep the sum deducted. They did deduct it as tax gatherers for the Inland Revenue, and they did keep it for themselves. The first question, therefore, is whether the interest was payable out of their taxed profits; the second whether they did so pay it. If it was not so payable, their present claim does not arise; if it was, but they did not so pay it, the obligation to deduct and to account for the sum deducted remains, for otherwise the interest would escape tax altogether. So far r. 19 and r. 21 of the All Schedules Rules govern the matter.

The appellants make their recurring payments out of their statutory general fund, which is a common account in and out for all their receipts and payments. Enough money, received as taxable profits and so charged, had been previously paid in to enable the interest payments in question to be made out of it, but of course no actual destination of particular incoming sums to the satisfaction of particular payments out was feasible. The appellants now claim to be entitled to treat their payments of interest as if they had in fact ear-marked enough of their chargeable profits, when received into the general fund, to satisfy the payments of interest falling due and to be thereafter paid. A series of decisions in your Lordships' House had laid down, not it is true in any case precisely the same as this, the conditions under which payments, neutrally made in fact, may be deemed to have been so made for income tax purposes and the effect of this assumption upon the disposal of the sums deducted from the payments of interest. I will spare your Lordships any citation of them, but they lay down a limitation on the right to do this, depending on its being lawful or legitimate to have made the payments out of such chargeable profits, if this had actually been done. This makes it necessary to consider the housing scheme, the Housing and Town Planning Act, 1919, under which the scheme was prepared and the regulations duly made thereunder.

The appellants contend that there is nothing in this Act to defeat their right as generally laid down in the above decisions. It is true that no express words take the particular right away, and it is their argument that nothing less than express words will do; but alternatively, they say also that there is no inconsistency between their enjoyment of this right and the scheme, provisions and purpose of the legislation in question. The scheme seems to contemplate that the houses, when built, may not and probably never will pay their way. There is no provision at any rate for such an event on the face of the Act. On the other hand, careful provision is made as to the extent of the Ministry's liability in terms which are vital on this appeal. The obligation under which a subvention is to be paid out of moneys to be provided by Parliament is contained in s. 7. If it appears that the carrying out of the scheme "has resulted or is likely to result in a loss" the Board is to pay such part of the loss as may be determined to be so payable under regulations made by the Board, and these regulations are required to provide, that the amount of any annual payment shall be "determined on the basis of the estimated annual loss resulting from the carrying out" of the scheme, "subject to the deduction therefrom of a sum not exceeding the estimated annual produce of one penny in the pound levied in the area chargeable," and in the regulations, which were made under the Act, art. IV, bound the appellants to keep separate accounts to be called "The Housing (Assisted Scheme) Accounts," including a separate revenue account to be called "The Housing (Assisted Scheme) Revenue Account." The form of this account was prescribed, the credit side containing the proceeds of the penny rate, and the rents collected with some smaller matters, and the debit side "the sums required for interest and repayment of principal in respect of all moneys borrowed by the appellants for the purposes of this scheme, the rates, taxes and rents payable by them in respect of any land or houses acquired," and sundry items of expenditure further specified.

I think the scheme prescribed is clear. The housing undertaking is to be carried on by the appellants, though under ministerial supervision, and such efforts as there may be to make it pay must be made by them. The money required to finance the scheme is to be borrowed on their credit, but, when the results of working are gathered in, they are to pay in the proceeds of the penny rate and the subsidy does the rest. As it seems to me, this express contribution out of public moneys by an actual subsidy must be exclusive of any implied right to lay hands on other public moneys by way of further contribution, in the form of a notional attribution of a particular part of their own undivided fund to the payment of this particular interest charge. The undertaking is at the risk of two parties, of whom the Ministry which pays the subsidy bears the less limited share, whether or not it eventually bears the greater amount of the loss, and the loss is one ascertained in the prescribed way on a particular undertaking, which is their joint concern and is isolated from all other concerns by keeping the prescribed accounts separate from all other undertakings and concerns of the appellants. It is the amount required for interest and for repayment of principal that is to be debited, that is, the interest in full and not the sum actually paid to the bondholders, when adjusted to discharge what is in substance the bondholders' debt to the Inland Revenue. The regulations are not concerned with the appellants' functions as tax gatherers nor do they make any provision for the possible case of payment of the money in a manner specially beneficial to themselves. Suppose that the small incomings and the penny rate were just to balance the items on the other side. On the scheme there would then be no subsidy payable, but on the appellants' contention, if there was an apparent loss, due to and not exceeding the amount of the tax deducted, the subsidy would have to be called on to the extent of that loss, and yet the Crown would not receive the sums so deducted. I can find nothing in the Act consistent with this, yet this would be the result if this separate undertaking is to be influenced by rights, which arise partly under fiscal legislation that has nothing to do with the housing scheme, and partly under the mode in which, again under wholly independent legislation, the corporation keeps its accounts.

I put aside two matters of detail, which, as I think, cannot affect this wide distinction. In practice the corporation pays the interest when due, and subsequently completes the housing account and claims the subsidy over. I think, as ROWLATT, J., thought, that this is a mere financial accommodation, which cannot affect the Case. Further, the accounts, when prepared, have to pass certain examinations and audits, for which the Act provides, and these accounts did so pass without objection. I can find nothing which, either by statute or common law, ousts the Crown from its right to the tax, if the right is otherwise complete. I am further of opinion that the comprehensive form in which the corporation's bonds are expressed is not sufficient to make the interest an effective charge on the corporation's general incomings within the cases that have been cited.

I think that the whole scheme of the Housing Act, under which the Treasury participate with the corporation in the ultimate outlay on working the scheme on a method of calculation, which involves a debit on the gross interest paid, is inconsistent with the application of the income tax rules, which the appellants assert, and it is therefore unlawful, in the sense of being negatived by the whole tenor of the Act, to retain the tax deducted. It is true that no words in the Housing Act expressly forbid it, for the settlement of other matters and accounts arising between the corporation and the Inland Revenue was not within the purview of the Housing Act, but I know of no authority for saying that this right of attribution can be defeated only by express words or for excluding from the exceptions out of this privilege something that is contrary to the general intention of a statute.

It is true that under the All Schedules Rules in question the tax must be paid as well as payable, but I hesitate in this case to say that it has not been paid within the meaning of the rule, if the right of attribution referred to in your lordships' decisions is applicable to the case. Neither as a matter of handing over identical currency nor of making specific appropriations in the books beforehand has there been any actual payment of the interest out of profits, but the decisions, I think, clearly contemplate that a mere attribution ex post facto, as part of a contention as to their rights, will serve the corporation's turn without even an ultimate attribution in their books. Nor again do I see why the form of the housing accounts in any way closes the corporation's mouth. They have not made a misrepresentation, for they have only made an entry which the regulation required them to make, nor do I suppose that anyone ever was or ever was meant to be hoodwinked as to the facts. The question, I think, turns upon a claim of right. One statute directed the corporation to deduct the interest, and in fact they did so; another directed them to bring the interest item into account at the gross amount, and so they did. Then came the present question—a separate one, as I venture to think—can they successfully assert that they must be deemed to have paid the interest out of profits already brought into charge? In view of the Housing Act, I do not think that they must be deemed to have done so, for that neither squares with the statutory relations resulting from this Act nor is consistent with any tolerable working of it. I think that the appeal should be dismissed.

LORD ATKIN.—I agree that this appeal should be dismissed, but I desire to add a few words to define my reasons for coming to this decision. The Case turns on the words of r. 19 and the amended r. 21 of the General Rules in the Income Tax Act, 1918. I need not read them: their legal effect on such a claim as this is to give rise to two questions which I will state as formulated by LORD ATKINSON in *Sugden* v. *Leeds Corpn.* (4).

> "(1) Have the interest and the annuities been, in fact, paid, or must they, in the circumstances of the case, be taken to have been, in fact, paid out of 'profits or gains brought into charge'—i.e., out of the so-called 'taxed fund'? (2) Was it lawful to pay them out of that fund?"

ROWLATT, J., and the members of the Court of Appeal have, as it appears, answered both questions in the negative; but they have rather stressed the second question.

They have accepted the contention of the Crown, that the effect of the Housing Act and the regulations made thereunder was to create a fund of which the subsidy formed an integral part, and that the payment of interest could only be made out of that fund. Alternatively, it was said that the subsidy was "ear-marked," or appropriated by statute to the payment of interest, so that it was unlawful to use it for any other purpose. I am not prepared to accept either view. I think that there was no fund created, certainly not actually, for by law there could be no fund except the borough fund, nor notionally, for the account to which so much importance is attached is an account and not a fund; a calculation and not a source of payment. In fact, the loss was incurred and in practice had to be incurred before the amount of the subsidy could even be ascertained, much less paid. Nor was there any ear-marking. The statutory power to grant the subsidy is in the Housing, Town Planning, &c., Act, 1918, s. 7 (1), which, omitting immaterial words, provides:

> "If it appears to the Local Government Board that the carrying out by a local authority of any approved scheme has resulted or is likely to result in a loss, the Board shall pay such part of the loss as may be determined to be payable under regulations."

Such an obligation is common among individuals. A. promises B. expressly or impliedly that if B. will embark on a particular venture, A. will repay him the whole or part of his loss. In ordinary circumstances no legal obligation rests on B. to apply the money so paid to him by A. in any particular way. The result and the intended result is that A.'s own resources, from which he has met or is bound to meet the loss, shall be restored to the extent of the agreed payment. I see no reason for imposing any further obligation on the parties in the present case. In view of the terms of payment in practice an obligation to pay only out of the subsidy seems impossible to carry out. If the case, therefore, turned only on the second question, I should have come to the conclusion that it was lawful for the corporation to pay out of their taxed funds. But the first question remains, Did they in fact do so? As it was lawful for them to pay out of their taxed funds, so it was lawful for them to pay out of their untaxed funds. In both cases they must deduct the income tax; in the former case they could put it in their pocket, in the latter case they must account to the Crown. In the former case their loss caused by payment of interest would be limited to the net amount paid; in the latter case it would extend to the full amount. But in preparing the account for the subsidy under the regulations they return the amount required for interest as the full amount without deduction; and they give no credit for and make no reference to the deduction. The account is prepared for the purpose of ascertaining the loss on the housing scheme, and in these circumstances it must, I think, be taken that the corporation are representing that they are out of pocket the full amount of the interest, or in other words, that they have no right to keep for themselves the income tax deducted. This can only be on the footing that they have in fact paid the interest out of their untaxed funds. I do not think it is necessary to involve the principles of estoppel, even if the necessary conditions for an estoppel exist, as to which I say nothing. The effect of the form of the account, charging the gross amount of interest as an element of loss intended to result in receipt of a subsidy and followed by the actual receipt of the money based on the representations contained in it, is to afford to my mind conclusive proof that the corporation in fact paid the interest out of untaxed funds. If so, the assessments in question were correctly made. I think therefore that their appeal should be dismissed.

LORD DUNEDIN.—I have had the advantage of reading the opinion of my noble and learned friend LORD SUMNER which has just been read; it exactly expresses the view I have formed of the Case, and I concur in it. My noble and learned friend **LORD BLANESBURGH** desires me to say that he concurs in the judgments just delivered.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, for *F. H. C. Wiltshire*, Town Clerk, Birmingham; *Solicitor of Inland Revenue.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re LOUCH

[CHANCERY DIVISION (Luxmoore, J.), April 1, 1930]

[Reported [1930] 2 Ch. 63; 99 L.J.Ch. 421; 143 L.T. 469; 74 Sol. Jo. 387]

Solicitor—Costs—Percentage increase—Solicitor's right to increase—No claim for increase in bill.

A solicitor is entitled to be allowed on taxation the increased fees prescribed by R.S.C., Ord. 65, r. 10 (2)–(5), and the Solicitors' Remuneration Order, 1944, although he has not claimed it in his bill.

Per LUXMOORE, J.: Even if that were not so, the court has power to allow the original bill to be amended by the presentation of a supplemental bill.

Notes. The percentage increase was increased to 50 by the order of 1944 except as to business transacted or undertaken before Mar. 1, 1944.

As to solicitor's remuneration, see 31 HALSBURY'S LAWS (2nd Edn.) 139 et seq.; and for cases see 42 DIGEST 157–159, 232 et seq.

Cases referred to:

(1) *Re Thompson* (1885), 30 Ch.D. 441; 55 L.J.Ch. 138; 53 L.T. 479; 34 W.R. 112, C.A.; 42 Digest 159, *1594*.

(2) *Re Grant, Bulcraig & Co.*, [1906] 1 Ch. 124; 75 L.J.Ch. 106; 93 L.T. 760; 54 W.R. 165; 22 T.L.R. 96; 50 Sol. Jo. 96; 42 Digest 155, *1545*.

Summons to review taxation.

The respondents, Salisbury and Fordingbridge Drainage District Board, retained the applicant, a solicitor, to act for them in a matter in which they were the plaintiffs. The litigation was settled, and the Board obtained a common order to tax the applicant's bill. It consisted of two parts—(i) work done by him in the country, and (ii) work done in London by his agents. There was no mention in the first part as to the $33\frac{1}{3}$ per cent. increase allowed by the Solicitors' Remuneration Rules, 1920. On the taxation objections were submitted by him, one being that he should be allowed to add this percentage to the bill. This was opposed by the clients and was disallowed by the taxing master. The applicant then took out this summons.

L. W. Byrne for the applicant.
H. Buckmaster for the respondents.

LUXMOORE, J.—Apparently the taxing master has decided this case on the ground that there is no power to amend the bill as delivered. During the course of the hearing I was told that the taxing master's note embodied what was the actual practice of the taxing office in cases where the Solicitors' Remuneration Rules, 1920, applied, and I stood the matter over, in order that I might get a report from the chief taxing master as to the practice. He has now made the report. It is before me, and he says:

> "I understand that my report is required only on the point whether any practice has been established in the taxing office affecting the question whether the court is precluded from allowing to a solicitor who has delivered a bill without charging the increase of 33⅓ per cent. sanctioned by the Solicitors' Remuneration Rules, 1920, any remedy for the omission. No such practice has been established and if the question had arisen before me to-day I should have treated it as res integra. So far as I can learn, since 1918, when it first became capable of arising, the question has been contested in the taxing office only two or three times, and in each instance the decision of the taxing master was accepted as final."

There being no practice relating to this question, I must consider the matter on general principles. It is well settled that after a bill of costs has been delivered to the client, and certainly where a common order for taxation has been obtained, no alteration is to be allowed except by leave of the court, and the reason is obvious. It is because in common order cases the incidence of the costs of taxation depends automatically on the answer to the question whether one-sixth or more has been taxed off the bill. The reason is stated clearly by Cotton, L.J., in *Re Thompson* (1). I am reading from *Re Grant, Bulcraig & Co.* (2), where Farwell, J., quoted what Cotton, L.J., said in *Re Thompson* (1), and said ([1906] 1 Ch. at p. 128):

> "The reason for the rule is stated by Cotton, L.J., in *Re Thompson* (1):
>
> > 'It was laid down to prevent any attempt being made by solicitors to impose on clients who did not know what the proper charges were by sending in a bill which could not stand taxation and then, when taxation was insisted on, or threatened, sending in another bill which they knew could stand taxation.' "

This has no application to the percentage allowed under the Solicitors' Remuneration Rules, 1920. Those rules are embodied in r. 10B of R.S.C., Ord. 65 [see now R.S.C., Ord. 65, s. 10 (2)]. The rule provides:

> "The total in any bill of costs of the fees prescribed by this order (as distinct from payments) shall in respect of business done in any cause or matter in the Supreme Court after Aug. 31, 1917, be increased . . . by 33⅓ per cent.; and any such increase shall be allowed upon any taxation of costs in respect of any such business, as well between party and party as between solicitor and client, and in taxations under or pursuant to the Solicitors Act, 1843."

Then there is a provision [see now r. 10 (5)] that the rule is to apply to all references to arbitration, and it goes on [see now r. 10 (4)]:

> "The increase hereby authorised shall not affect the question whether a bill of costs when taxed is or is not less by one-sixth part than the bill delivered sent or left."

It is material to note the form of the rules in question. The direction as to the adding of the 33⅓ per cent. is peremptory in form: the "increase shall be allowed upon any taxation of costs." The rule does not say that the increase shall be allowed if claimed in the bill or anything of that sort. It says that the profit charges in the bill "shall be increased"—not "may be increased"—and "such increase shall be allowed," and the rule goes on to provide in the clearest terms that the increase

> "shall not affect the question whether a bill of costs, when taxed, is or is not less by one-sixth part than the bill delivered, sent or left."

That is, the addition of 33⅓ per cent. is not to have any bearing on the incidence of the costs of taxation. There can in such a case be no magic in putting at the end of the bill a claim to 33⅓ per cent. of the total profit costs as shown by the bill. The sum ultimately allowed must necessarily depend upon the total amount allowed on taxation for profit costs, and can be ascertained with certainty only after the bill has been taxed and at no other time.

In my view, the court in taxing the bill is bound to allow the 33⅓ per cent. increase if asked for, even although no claim to it is made in the actual bill of costs, and I hold that the taxing master was wrong in refusing to allow the 33⅓ per cent. on the profit charges as ascertained by his taxation. But even if I am wrong in this view, I undoubtedly have power to allow the original bill to be amended by the presentation of a supplemental bill, and if and so far as is necessary in the circumstances of this case, I am ready to give, and in fact do give, such leave. In the result, the application by the solicitor succeeds and the matter being a matter of principle and having been raised by the respondents entirely as a matter of principle, I think the ordinary course must be followed and the respondents must pay the costs of this application.

Solicitors: *Woodcock, Ryland & Parker*; *Batchelor, Foord & North.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* MILLER

[HOUSE OF LORDS (Lord Buckmaster, Lord Dunedin, Lord Blanesburgh, Lord Warrington and Lord Tomlin), November 25, 26, 1929, February 6, 1930]

[Reported [1930] A.C. 222; 99 L.J.P.C. 87; 142 L.T. 497; 46 T.L.R. 207; 74 Sol. Jo. 138; 15 Tax Cas. 25]

Surtax—Occupation of land—Life tenant—Rates payable by trustees—Assessment under Sched. A and Sched. B—Benefit to life tenant by virtue of occupation—Liability to supertax.

By his trust disposition and settlement dated Dec. 4, 1901, a testator directed his trustees to hold lands and estates to pay all duties and burdens and the cost of repairs and maintenance and to "allow his . . . wife to occupy and possess during her lifetime free of rent or taxes (both landlord's and tenant's), the said mansion house of [M.] and offices and furniture and other effects therein . . . and . . . other subjects. . . ." In 1906 the testator died and his widow occupied the mansion house and lands of M. during the year ending on April 5, 1920. Assessments under Sched. A and Sched. B of the Income Tax Act, 1918, were made in respect of the house and lands of M. and the trustees paid the rates on the property. An assessment made on the widow for supertax for the year 1920–21 included as part of her total income the amounts at which the house and lands were assessed for the purposes of tax under Sched. A and Sched. B, and the amount of the rates.

Held: the annual value of the widow's benefit as occupier of the house and lands was income for the purposes of income tax, and, therefore, the inclusion of the Sched. A and Sched. B assessments and the rates as part of the widow's total income for the purposes of supertax was correct.

I.R. Comrs. v. *Wemyss* (1), 1924 S.C. 284, and *M'Dougall* (*or Inland Revenue*) v. *Sutherland* (2) (1894), 21 R. (Ct. of Sess.) 753, overruled.

Tennant v. *Smith* (3), [1892] A.C. 150, explained and distinguished.

Shanks v. *I.R. Comrs.* (4), [1929] 1 K.B. 342, approved.

Notes. Distinguished: *Reed* v. *Cattermole*, [1936] 2 All E.R. 526. Considered: *Fry* v. *Salisbury House Estate, Ltd.*, ante, p. 538; *Reed* v. *Cattermole*, [1937] 1 All E.R. 541. Referred to: *Sutton* v. *I.R. Comrs.* (1929), 14 Tax Cas. 662;

I.R. Comrs. v. *Scottish Central Electric Power Co.*, [1931] All E.R.Rep. 746; *Lord Wolverton* v. *I.R. Comrs.* (1931), 16 Tax Cas. 467; *Neumann* v. *I.R. Comrs.* (1933), 49 T.L.R. 212; *Brodie* v. *I.R. Comrs.* (1933), 17 Tax Cas. 432; *I.R. Comrs.* v. *Wilson's Executors* (1934), 18 Tax Cas. 465; *Nicholl* v. *Austin* (1935), 19 Tax Cas. 531; *I.R. Comrs.* v. *Leckie* (1940), 23 Tax Cas. 471; *I.R. Comrs.* v. *City of London Corpn.* (*as Epping Forest Conservators*), [1953] 1 All E.R. 1075.

As to assessment of tax on the occupier of land, see 20 Halsbury's Laws (3rd Edn.) 410, para. 759, 760.

Cases referred to:

(1) *I.R. Comrs.* v. *Wemyss*, 1924 S.C. 284; 8 Tax Cas. 551; 28 Digest 106, *p.*

(2) *M'Dougall* (*or Inland Revenue*) v. *Sutherland* (1894), 21 R. (Ct. of Sess.) 753; 31 Sc.L.R. 630; 3 Tax Cas. 261; 28 Digest 86, *m.*

(3) *Tennant* v. *Smith*, [1892] A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327; 56 J.P. 596; 8 T.L.R. 434; 3 Tax Cas. 158, H.L.; 28 Digest 17, *87.*

(4) *Shanks* v. *I.R. Comrs.*, [1929] 1 K.B. 342; 98 L.J.K.B. 341; 140 L.T. 157; 73 Sol. Jo. 76; 45 T.L.R. 28; 14 Tax Cas. 249, C.A.; Digest Supp.

(5) *I.R. Comrs.* v. *Fargus* (1926), 10 Tax Cas. 665; Digest Supp.

(6) *Mackenzie* v. *Johnstone*, [1912] A.C. 743; 107 L.T. 473; 1912 S.C. (H.L.) 106; 49 Sc.L.R. 986; 44 Digest 956, *g.*

(7) *Corke* (*or Inland Revenue*) v. *Fry* (1895), 22 R. (Ct. of Sess.) 422; 3 Tax Cas. 335; 28 Digest 87, *n.*

(8) *L.C.C.* v. *A.-G.*, [1901] A.C. 26; 70 L.J.Q.B. 77; 83 L.T. 605; 65 J.P. 227; 49 W.R. 686; 17 T.L.R. 131; 4 Tax Cas. 265, H.L.; 28 Digest 73, *392.*

(9) *Re Menzies* (1877), 5 R. (Ct. of Sess.) 531; 15 Sc.L.R. 285; 1 Tax Cas. 148; 28 Digest 4, *a.*

Appeal against an interlocutor pronounced by the First Division of the Court of Session as the Court of Exchequer in Scotland (the Lord President, Lord Sands and Lord Blackburn; Lord Morison dissenting), dated July 7, 1928, on appeal from a determination of the commissioners for the Special Purposes of the Income Tax Acts at Edinburgh relative to an additional assessment to supertax on the sum of £1,500 made on the respondent, Lady Miller, for the year ending April 5, 1921, under the provisions of the Income Tax Acts.

The Case Stated was as follows:

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held at Edinburgh on July 1, 1927, for the purpose of hearing appeals, the Hon. Lady Miller of Manderston (hereinafter called the appellant) appealed against an additional assessment to supertax on the sum of £1,500 made upon her for the year ending April 5, 1921.

I. The following facts were admitted or proved:

(1) The appellant is the widow of Sir James Miller of Manderston, Bart., who died without issue on Jan. 22, 1906.

(2) Sir James Miller, by a trust disposition and settlement, dated Dec. 4, 1901, which, together with a codicil, dated Dec. 26, 1901, was recorded in the Books of Council and Session on Jan. 26, 1906, gave (inter alia), the following directions:

(i) He directed his trustees in the event of his being survived by his wife and a son, to hold and retain his lands and estate of Manderston and other lands and heritages in the county of Berwick belonging to him at the time of his death, and out of the income of his estate generally (including the said lands and estate of Manderston and others) to make payment, and that preferably to an annuity or jointure bequeathed by him to his said wife, of (first) all feu, blench, and teind duties, and all public parochial and local burdens of every kind exigible furth of his heritable estate: (second) all sums that should appear to them to be proper and necessary to be expended from time to time for putting or keeping in repair the said mansion house of Manderston, and offices, gardens, policies, and pleasure grounds thereof, and for adding to the furniture and other effects in the said mansion house, and for keeping up the game on his said lands and estate, all which it was his desire that his trustees should keep up and maintain at their discretion during the subsistence of the trust: (third) in the absolute and uncontrolled discretion of his trustees, all sums which should appear to them to be necessary or proper to be expended in keeping up and maintaining the buildings, fences, drains, roads, and plantations on the said lands of Manderston and others, and his other heritable estate in good condition and repair, and for erecting any additional buildings, or making any additional fences, drains, roads, or plantations, or executing any other works of any kind on the said lands and others which they might consider necessary for the improvement, management, cultivation or letting of the same, or for the working or letting of the stone quarries or minerals therein; and until a son attained the age of twenty-five years to allow his said wife to occupy and possess, free of rent or taxes (both landlord's and tenant's), the said mansion house of Manderston, and furniture and other effects therein, and stables, coach-houses, and other offices, policies (including grass parks within the same), gardens and pleasure grounds pertaining thereto, as also the dairy and other buildings at Buxley and the pertinents thereof, and whole fittings therein, whether fixed or moveable, and the dairy utensils, with the free use and enjoyment of the game on his said lands and estate of Manderston and others; and during the liferent of his said wife to pay the wages of the gamekeepers, gardeners, and foresters employed in connection with the said establishment.

(ii) He gave very similar directions for the case of his being survived by his wife and a daughter, together with the liferent use of certain silver plate, of which in the former case she was only given the liferent use for a limited period.

(iii) In the case, which in fact happened, of his dying without issue and being survived by his wife alone, he directed his trustees to hold and retain his said lands and estate of Manderston and others, and out of the income of his estate generally (including the said lands and estate of Manderston and others) to make the various payments before provided for in the event of his death leaving a son: (seventh) To allow his said wife to occupy and possess during her lifetime, free of rent or taxes (both landlord's and tenant's), the said mansion house of Manderston and offices and furniture and other effects therein, and the game on his said lands of Manderston and others, and the other subjects of which he had directed his said wife to have the liferent in the event of his death survived by a daughter: And he directed his trustees during the liferent of his said wife to pay the wages of the foresters employed in connection with the said establishment, the wages of the gamekeepers and gardeners to be paid by his said wife.

(3) The appellant did, in fact, as contemplated in the said trust disposition and settlement, occupy and possess the mansion house and lands at Manderston during the year ending April 5, 1920, and for the said year the assessments under Scheds. A and B, of the Income Tax Act on the house and lands so occupied by her were:

Policy Parks, Sched. A	£165 10 0
Policy Parks, Sched. B	£452 0 0
Part Farm, Briery Hill, Sched. B ...	£89 5 0
Mansion House, Sched. A	£319 10 0

No question arises as to the appellant's liability in respect of the Briery Hill subjects which were rented by the appellant from the trustees.

(4) The trustees under the authority, above set out, of the trust disposition and settlement, paid the following sums during the said year out of income received by them under deduction of income tax:

Forester's Wages	£60 0 0
Rates on Mansion House	£65 0 0
Rates on Policy Parks	£32 0 0

(5) The appellant had been assessed to supertax for the year ending April 5, 1921, without the inclusion of any amount to represent either the above assessments

under Scheds: A and B, or the above sums paid by the trustees. The additional assessment appealed against was made in an estimated amount to make good this omission, and it is admitted that (with the addition of income tax to the sums paid by the trustees) the correct amount in figures of such additional assessment should have been £1,250.

II. On behalf of the appellant it was contended: (1) that under the terms of the trust disposition and settlement the appellant's occupation of the mansion house and lands did not amount to a liferent use; (2) that the sums expended by the trustees should not be regarded as money expended on her behalf; and (3) that there was no ground for making an additional assessment.

III. On behalf of the Commissioners of Inland Revenue it was contended: (1) that the appellant had a liferent use of the mansion house and lands; (2) that the sums paid by the trustees were paid for her benefit; and (3) that the additional assessment should be fixed at £1,250.

The commissioners held that the appellant had a liferent use of the property, and that the sums paid by the trustees were paid for her benefit, and they accordingly amended the additional assessment to £1,250, and determined the appeal accordingly. On behalf of the appellant dissatisfaction was expressed with the finding of the commissioners as being erroneous in point of law, and a case for the opinion of the Court of Session as the Court of Exchequer in Scotland was stated.

The questions of law for the opinion of the court were: (1) whether the appellant had a liferent use of the said mansion house and lands, and was bound to include in calculating her liability to supertax the assessments made thereon under Scheds. A and B of the Income Tax Act; and (2) whether she was also bound so to include the sums mentioned as paid by the trustees, together with the income tax applicable thereto.

The First Division, by a majority (Lord Morison dissenting), answered the questions of law in the Case both in the negative and allowed the appeal.

The commissioners appealed.

The Attorney-General (*Sir William Jowitt, K.C.*), *Latter, K.C.*, *R. P. Hills* and *A. N. Skelton* (of the Scottish Bar) for the appellants.

Douglas Jamieson, K.C., *Neil A. MacLean* (both of the Scottish Bar) and *A. Ralph Thomas* for the respondent.

The House took time for consideration.

Feb. 6. The following opinions were read.

LORD BUCKMASTER.—The circumstances that have given rise to this appeal are special and need to be summarised in order that the point at issue may be made plain. Sir James Miller, by a trust disposition and settlement dated Dec. 4, 1901, directed his trustees to hold his lands and estates at Manderston in the County of Berwick to pay all duty and burdens and the cost of repair and maintenance and in the event of his death without issue to:

> "allow his said wife to occupy and possess during her lifetime free of rent or taxes (both landlord's and tenant's), the said mansion house of Manderston and offices and furniture and other effects therein, and the game on his said lands of Manderston and others, and the other subjects of which he had directed his said wife to have the liferent in the event of his death survived by a daughter: And he directed his trustees during the liferent of his said wife to pay the wages of the foresters employed in connection with the said establishment, the wages of the gamekeepers and gardeners to be paid by his said wife."

Sir James Miller died in 1906 without issue, and Lady Miller, by virtue of her rights under the trust disposition, occupied and possessed the mansion house and lands at Manderston during the year ending April 5, 1920. For the said year the assessments under Sched. A and B of the Income Tax Acts were as follows:

Policy Parks, Sched. A	£165 10 0
Policy Parks, Sched. B	£452 0 0
Part Farm, Briery Hill, Sched. B ...	£89 5 0
Mansion House, Sched. A	£319 10 0

No question arises as to the liability in respect of the Briery Hill subjects which were rented by Lady Miller from the trustees.

The trustees under the authority, above set out, of the trust disposition and settlement, paid the following sums during the said year out of income received by them:

Forester's Wages	£60 0 0
Rates on Mansion House	£65 0 0
Rates on Policy Parks	£32 0 0

In assessing Lady Miller for supertax for the year ending April 5, 1921, none of the items above mentioned under Scheds. A and B were included, nor any of the above payments, and an additional assessment was made for that purpose. Lady Miller appealed against such additional assessment to the Commissioners for Special Purposes, who rejected her appeal, but on further appeal to the Court of Session she was more successful, for they reversed the decision of the commissioners, LORD MORISON dissenting, and from their interlocutor of July 7, 1928, the Inland Revenue Commissioners have come before this House.

That the original assessments for income tax under Scheds. A and B were correct was not originally disputed, though it is doubted by the Lord President, but it is urged that Lady Miller's right to occupy is no part of her income and that its equivalent in money value cannot be regarded for supertax. This argument has found favour with the Court of Session, but their judgments are in part influenced by decisions some of which do not bind this House, in part by the consideration of whether Lady Miller's interest was that of a liferent, and partly by the view on more general grounds that her interest was not income, while in LORD BLACKBURN's opinion in determining liability to supertax "the question must always be whether the right of occupation gives the occupier any right to earn money from the subjects." I will reserve for the present the consideration of the various cases; it is well to examine this matter in the first place apart from their assistance.

The discussion as to whether the rent of the respondent can properly be called a liferent does not appear to me to help the solution and it is unfortunate that the Special Case defined the question under this head. It is not the name by which the estate is described that matters, nor its legal incidents except so far as they are relevant for the purposes of determining whether they are such as to involve the liability in dispute. Fortunately the Case was argued on the broader basis in the Court of Session though its more limited aspect received closer attention than in the circumstances it required. The real question is whether the assessable value of the property in question is to be regarded as income for the purposes of the tax.

So far as Sched. A is concerned the matter, but for the Lord President's judgment, seems reasonably plain. The tax is charged upon "hereditaments and heritages in the United Kingdom for every 20s. of the annual value thereof." As LORD MORISON points out, it is not a tax on the interests of the person in possession, but it is charged on and payable by the occupier for the time being and he, according to his interest, bears or passes it on by deduction pro tanto from the rent he pays. In the present case, that the respondent was the occupier and was consequently chargeable under the statute with the tax, though doubted by the Lord President, is found in the words of the Special Case "she did in fact occupy and possess the house for the year in question," and that she was entitled to have the taxes paid by the trustees does not affect her position in this respect. Her occupation was in her own right and she was not occupying as the representative of the trustees. This being so, the next question is whether the annual value of the house is to be brought into computation for purposes of supertax. The determination A of income for this purpose is, as is well known, to be

> "estimated in the same manner as the total income from all sources as required to be estimated in a return made in connection with a claim for a deduction from assessable income [and the] income arising from the ownership of lands be deemed to be the annual value thereof estimated in accordance with the B rules applicable to Sched. A."

In the case of a person occupying his own house, the annual value is income for purposes of the Act. If he occupies under a beneficial lease the difference between the rent he pays and the annual value is again his income and must be included in his supertax return (see *I.R. Comrs.* v. *Fargus* (5), and this is not because he could let or sub-let it, for, under a beneficial lease, he might be subject C to an absolute unqualified restriction against letting or assigning which until recent legislation would have deprived him of any means of obtaining income from the property without his landlord's consent. The same position would result, if without the intervention of trustees a house was devised by will to the use of a named beneficiary until he conveyed, let, or otherwise parted with the right to possession thereof and on the happening of such event or on his death whichever first occurred, D the house was devised to some other beneficiary. Unless it can be said that in such a case no one is liable for the tax, the liability must fall on the first devisee during his interest although he cannot make any profit out of it. Nor can the intervention of trustees alter the position of the beneficiary or devisee. If authority were needed for this view it is to be found in *Mackenzie* v. *Johnstone* (6). Again, even where trustees are legal owners not in occupation, they cannot be made charge- E able with the tax unless under r. 9 of No. VII of Sched. A they can establish their position as landlords and obtain the General Commissioners consent. Without such consent the occupier is chargeable with the tax.

It is true that the trustees may in the present case enter the house for purposes of repair or making additions to the furniture, and the grounds for other specified objects. Such powers might be reserved to a landlord under a beneficial lease, F but they could not enable a tenant to escape liability for the tax to the extent of his beneficial interest, and I cannot assent to the view that such powers render the trustees the occupier within the meaning of No. VII, r. 1 and r. 2. Unless, therefore, it could be said that in such instances there was no property to tax, the annual value of the lands must be the income taxable under Sched. A without regard to whether the occupier could receive that value by other means than G occupation and such income would properly be included in a claim for abatement.

The Lord President found himself unable to accept this view. In his opinion the body of Sir James Miller's trustees—and not the appellant—is

> "the 'occupier' of the mansion house and policy parks within the meaning of No. VII, r. 1 and r. 2 of Sched. A. The trustees, and not the appellant are H occupiers of those heritages, and have the right to 'occupy' and 'use' them for every possible purpose including that of allowing to the appellant the privilege of personal residence therein."

I find it difficult to agree with this conclusion as it appears to me to ignore Lady Miller's interests under the will, and these clearly include a right to occupy which the trustees would be compelled by the court to recognise. Occupation in the I ordinary sense could never be enjoyed by the trustees. A right to enter is not a right to occupy. The word occupier as used in the statute has its ordinary meaning and the ascertainment of whether a person is an occupier or not is a question of fact and not of law. In my opinion Lady Miller was rightly found to be the occupier and was rightly charged with tax as such occupier; the annual value of her beneficial enjoyment was income for the purposes of the Act—was of a nature to be included in a claim for abatement—and was liable to supertax. This appears to me to be the direct and natural conclusion from the words of the Act, but in course of time there have been many encrustations on the statute to which attention must be paid. No fewer than fifteen cases were quoted in the course of argument and some deserve attention.

The first and by far the most important is *Tennant* v. *Smith* (3). In that case Alexander Tennant, the agent for the Bank of Scotland at Montrose, resided on part of the bank premises which it was part of his duty to occupy. The whole of the bank premises were assessed under Sched. A as against the bank; neither the whole nor any part of the tax was, or was sought to be, recovered from Alexander Tennant under that schedule. His total income, excluding any advantage from residing on the premises, was £374, and he accordingly sought abatement on the ground that his income was under £400. This claim was refused on the ground that Tennant ought to be assessed either under Sched. D or Sched. E for a sum of £50 as representing the value of his residence on the bank premises. It was this claim on the part of the Inland Revenue authorities that was refused by this House. It is impossible to examine the judgments closely without realising that they were based on the fact that, whatever advantage the agent might have enjoyed from his residence, it could not possibly be made the subject of assessment under Scheds. D and E. As Lord Watson said ([1892] A.C. at p. 158):

> "The appellant is not a proprietor neither is he an occupier within the meaning of Sched. B. The bank are the only occupiers . . . The appellant does, no doubt, reside in the building, but he does so as the servant of the bank and for the purpose of performing the duty which he owes to his employers. His position does not differ in any respect from that of a caretaker or other servant, the nature of whose employment requires that he should live in his master's dwelling-house or business premises instead of occupying a separate residence of his own."

Again, Lord Macnaghten says (ibid., at p. 162):

> "Property, therefore, in the house he has none, of any sort or kind. He has the privilege of residing there. But his occupation is that of a servant, and not the less so because the bank thinks proper to provide for gentlemen in his position in their service accommodation on a liberal scale. It is clear, therefore, that the appellant is not chargeable under Sched. A in respect of the bank house, or liable to pay the duty as occupying tenant. The bank and the bank alone is chargeable and liable to pay."

It is unnecessary to investigate this decision further, but it is well to add that, in referring to phrases used by the other members of your Lordships' house who heard the case, such as those relating to the inability of the agent to make a profit out of his occupancy, these phrases must all be read in relation to the central facts and features of the case to which I have referred. To my mind, therefore, this case in no way governs the present. But it is at least useful to keep in mind that Lord Macnaghten distinctly stated that income in the Income Tax Acts certainly means more than income properly so described; it includes more than profits and gains chargeable under the last three schedules of charge, it includes the annual value of property chargeable under Sched. A and the annual value of the occupation chargeable under Sched. B; while, finally, the Case shows that there is no distinction whatever between the meaning of income for the purposes of abatement and that for purposes of taxation—a matter of some importance since liability to supertax is determined with reference to claims for abatement.

The case that is closer to this and causes more difficulty is *I.R. Comrs.* v. *Wemyss* (1). In that case there was a right of occupation which arose in favour of the respondent if the testator's second wife released her liferent, and in that case it was provided that the respondent should during the subsistence of a trust made subject to certain conditions be entitled to occupy the castle so long as the trustees kept it unlet; and it was held by the Lord President that the trustees were, in the circumstances, the true owners and possessors and occupiers of the subjects. It is plain from the judgments that one of the circumstances that in-

A fluenced some of the learned judges in their opinion was the fact that the respondent had no power to let. This, however, did not convince LORD SANDS, who states definitely (8 Tax Cas. at p. 586):

> "I do not think that a tenant in personal possession could be heard to say, 'I am not the statutory occupier, I have not the use of the premises because I cannot sub-let them, I cannot collect civil fruits.'" B

I think it is plain that, had the learned judge been sitting alone, he would have come to a different conclusion to that which he reluctantly expressed. I think his hesitation was well justified and that the reasoning which he gives in its explanation is sound and ought to be followed. *Shanks* v. *I.R. Comrs.* (4) is indistinguishable from the present and the position is shortly and exactly stated in the judgment of RUSSELL, L.J. C

It does not appear to me necessary to consider closely further authorities. Those to which I have referred contain the substance of the decided matter on which the respondent chiefly relies, but for clearness it may be well to state that, in my opinion, *Corke (or Inland Revenue)* v. *Fry* (7) was right in the result but wrong so far as it made the power to let the rigid exclusive test of liability. *M'Dougall (or Inland Revenue)* v. *Sutherland* (2) was wrongly decided. The policy parks D under Sched. B stand in the same position and the rates and taxes follow the other property. With regard to the foresters' wages, there is not sufficient information to enable judgment to be passed on this claim and it was abandoned by the Inland Revenue.

On the whole, therefore, I am of opinion that the judgment of LORD MORISON is an accurate exposition of the law and this appeal must succeed. E

LORD DUNEDIN.—Much of the judgments of the Court of Session is occupied with the discussion of whether the right which Lady Miller took under the will of her husband as to the house, &c., of Manderston was a "proper" liferent. I do not think this discussion helps the question to be determined. I should be prepared to say that no liferent was a "proper" liferent which was not a feudal liferent, and that is not the quality of Lady Miller's right. But the question remains F whether what Lady Miller got, by whatever name one calls it, was or was not income in the sense of the Income Tax Act. Now that the benefit which a person derives from lands which, for taxation purposes, falls under Sched. A can be and is income was settled by the judgment of this House in *L.C.C.* v. *A.-G.* (8). That that income is not dependent on the fact whether hard cash comes to the holder of the property is apparent in every case where, e.g., a person G occupies a mansion house and grounds which, so far from bringing in money, cost much money to keep up and which are never let. Nor do I think can it possibly be dependent on the fact whether the person holding the property can or cannot turn it into a money-producing subject by letting it to others. The value for Sched. A is, in cases where the surveyor of public taxes is taken as the assessor under the Valuation Act, 1857, the value entered in the valuation roll, and in other cases H it is as the surveyor of taxes may fix, subject to appeal against his decision: *Re Menzies* (9). I am naturally speaking here of Scotland, as this is a Scottish case. The framer of the valuation roll only inquires whether the property is let, not whether it can be let, and that only to see if the rent for which it is let is a fair value. Take the case of a property let for a ridiculously small sum for a term of years. That is not, in the phraseology of the statute, let at a rack rent. That I sum would not be entered as the value in the valuation roll made up as aforesaid but a sum at which if it were free it might be let, and yet the owner in that case could not let it for that sum for he had already let it at the smaller sum. I am therefore of opinion that the distinction taken between what might be let and what might not be let is not a relevant distinction and the Free Church manse case (*M'Dougall (or Inland Revenue)* v. *Sutherland* (2)) which was distinguished from the Established Church manse case (*Corke (or Inland Revenue)* v. *Fry* (7)) on that ground was wrongly decided.

The whole argument of the respondent has depended on his introducing the word "owner" into the words of Sched. A. "Owner" is not mentioned in Sched. A, and one can see at least one very good reason why it should not be so. The Income Tax Act was framed to apply to England and Scotland alike, but if the word "owner" had been introduced it would have led at once to confusion. A person who, in London, holds a fifty years' lease from the Duke of Westminster is commonly called the owner of his house, but in Edinburgh a person in the same position would not be called the owner. That term is reserved for him who is infeft, ordinarily in Edinburgh the feuar, but equally, of course, the proprietor who holds from the Crown where there has been no sub-infeudation. The tax due under Sched. A is not imposed on the owner, it is imposed on the occupier. It is quite true that in certain cases he may have a right to relief by way of deduction from what he has to pay to the owner, but when he has no such right the tax remains where it falls. That is the case here. Lady Miller is occupier of the house, &c., and must pay tax under Sched. A for the subjects of her occupation. She has no right of relief against the trustees because she owes them nothing from which she can deduct what she has to pay, and therefore it is her income and must be taken in computo in measuring the amount on which her supertax is to be reckoned. The fact that under the provision of the will the trustees are then out of their general fund bound to recoup her, and that consequently for convenience sake the trustees may pay the tax direct makes no difference. The liability to the Crown is really her liability.

I have already said that I think *M'Dougall* (*or Inland Revenue*) v. *Sutherland* (2) ill decided. I think the same of *I.R. Comrs.* v. *Wemyss* (1). *Tennant* v. *Smith* (3), which was in this House, and therefore is binding on me has, I think, been only misunderstood. The whole point was that it was found as a fact that the occupation of the bank by the agent was not truly his occupation, but the bank's occupation, and the tax due under Sched. A was no more leviable on the agent than it would have been on a caretaker who lived on the premises to keep them clean.

I therefore concur in the motion made by the noble Lord on the Woolsack.

LORD WARRINGTON. But that we are differing from the views expressed by the majority of the judges in the First Division of the Court of Session, and are proposing to overrule certain previous decisions of the Court of Session, I should have contented myself with a simple concurrence with the opinion of my noble and learned friend on the Woolsack, but under the circumstances I think it desirable to state as briefly as possible the reasons for such concurrence.

The main question in the appeal is whether for the purposes of supertax the respondent is bound to include as part of her income for the year preceding the year of assessment the amounts at which she was assessed for income tax under Scheds. A and B of the Income Tax Act in respect of her occupation under the trust disposition and settlement of her deceased husband of a mansion house and lands at Manderston in the county of Berwick. A minor question is raised whether she is also bound to include certain payments for rates in respect of the same hereditaments made by the trustees of the disposition and settlement in pursuance of the provisions thereof. Both these questions were decided against the Crown by the majority in the First Division; the Inland Revenue Commissioners appeal.

By the said trust disposition and settlement, and in the event which has happened of the testator having died without issue leaving his wife surviving, the trustees were directed to hold and retain his lands and estates of Manderston and others and out of the income of his estate generally, including the said lands and estates, to make certain payments therein provided for, and in particular all public, parochial and local burdens of every kind exigible furth of his heritable estate, and to allow his wife the respondent to occupy and possess during her lifetime the mansion house of Manderston and the other subjects therein mentioned including in particular the policy parks in respect of which the assessments to income tax under Scheds. A and B respectively were made and he directed his trustees "during the liferent" of his said wife to pay the wages of the foresters employed in connection with the establishment. Under these trusts the respondent did in fact during the year ending April 5, 1920, being the year preceding the year of assessment occupy and possess the mansion house and lands the subject of the assessments to income tax under Scheds. A and B now in question.

It is unnecessary to repeat the several statutory provisions relating to the income tax under Scheds. A and B and to supertax, and I propose to state what in my view, bearing in mind the several authorities on the subject, is the true result of those provisions. Income tax under Sched. A is a tax not on rent but on the annual value of the hereditaments in respect of the property on which it is charged. If lands are let at a rack rent the annual value is measured by such rent, in other cases by the rack rent at which they are worth to be let by the year. The tax is to be charged on and paid by the occupier, namely, the person having the use of the hereditaments. If the hereditaments are held by the occupier at a rack rent he is entitled to deduct the amount of the tax on payment of his rent. If they are held at a rent less than a rack rent he is entitled to deduct from such rent the proportionate part of the tax appropriate thereto. If they are not subject to any rent then the occupier bears and pays the entire tax. He does so because in such case he is the only person in enjoyment of the annual value. On this point I entirely agree with the opinion expressed by Lord Sands. It seems to me to follow on principle, and for the moment without reference to authority, that in the Case last mentioned the annual value is, for the purposes of the Income Tax Act, to be treated as income of the occupier, and I feel sure that on this point also I am in agreement with Lord Sands. He seems to have come to a conclusion to the contrary only because he felt himself bound by authority to do so.

The majority of the judges in the Court of Session appear to have based their conclusion on the view that unless the annual value is capable of conversion into actual money, either by letting or otherwise, it cannot be treated as income of the occupier, and further that in the present case on the construction of the settlement it was not capable of such conversion. Thinking as I do that there is no ground in law for their general proposition, I do not think it necessary to decide the point on the construction of the particular settlement, and so far as I am concerned the point remains open. Independently of authority, therefore, I should come to the conclusion that so far as the assessment under Sched. A is concerned the contention of the Crown is correct. As to the assessment under Sched. B, I can find no material distinction and the same result follows.

I now turn to the authorities. It is admitted by counsel for the respondent that there is no authority in England which supports his contention. But I think that the English authorities not only do not support but directly negative his contention. The most recent case is that of *Shanks* v. *I.R. Comrs.* (4), a decision of the Court of Appeal. I refer particularly to the judgment of Russell, L.J., which in my opinion concisely and correctly states the law on the subject.

The respondent, however, relies on certain Scottish cases, and it is, therefore, necessary to consider these. The first is *Tennant* v. *Smith* (3). I cannot help thinking that the decisions in the subsequent Cases are to some extent the result of an erroneous view as to the nature of this Case. The question there was whether the income from all sources of a servant of a bank includes as part of his emoluments under Sched. E the annual value of a portion of the bank premises in which as a servant of the bank he was required to reside. The bank itself was assessed in respect of the whole of the premises under Sched. A and paid the tax. It was held that nothing in respect of the annual value of the portion occupied by him of the bank premises could be treated as income under Sched. E. This Case had nothing to do with Sched. A and in addressing this House Lord Macnaghten recognised that income from all sources includes the annual value under Sched. A, and the annual value chargeable under Sched. B. This Case is no authority in support of the respondent's Case.

The next Case is *M'Dougall* (*or Inland Revenue*) v. *Sutherland* (2). The question there was whether the annual value of the manse occupied by a Free Church minister by virtue of his office ought to be included in his income from all sources for the purposes of a claim to an abatement. It was held that it ought not, the decision being determined by the view that, inasmuch as in the opinion of the court the minister could not let the manse, or otherwise turn the annual value thereof into money, such annual value was not part of his income. In my opinion this Case was incorrectly decided. I have already pointed out that in my view the annual value is taxed as against the occupier, in cases where he has no recourse to any other person, not as a mere collector but as a taxpayer, and that such annual value is, therefore, necessarily treated for the purposes of the Act as his income though he may not actually receive any money in respect thereof. In *Corke* (*or Inland Revenue*) v. *Fry* (7) a similar case in reference to a manse of the Established Church, the decision was in favour of the Crown, but it was based on the view that the minister was entitled to let the manse. While, therefore, the decision was in my opinion correct, the point relied on was irrelevant.

Lastly there is *I.R. Comrs.* v. *Wemyss* (1). This was a decision that in a case somewhat similar to the present, the assessments under Sched. A and Sched. B were properly excluded in estimating the amount of income for purposes of supertax. The right of occupation in that case was in the discretion of the trustees and was in other respects of a restricted character, and it might be enough to say that the Case was decided on its own facts and is not an authority in the present case, but I feel bound to say that in my opinion the special facts there relied upon were irrelevant; the taxpayer was in actual occupation of the hereditaments, the assessment was properly made upon him as the person in the enjoyment, so to speak, of the annual value the subject of taxation, and he had not under the Act any right of recourse to another person in respect of the tax or any part thereof. I do not think the decision in the case of *Wemyss* (1) can stand with the present judgment.

On the minor point I think that the rates were paid by the trustees for the benefit and on behalf of the respondent and that the amount so paid must be treated as part of her income. The figures are agreed.

I concur with the reasons given by the noble and learned Lord on the Woolsack and agree to the order proposed by him.

LORD TOMLIN.—It is unnecessary for me to rehearse the facts of this Case which have been already sufficiently referred to by the noble and learned Lord upon the Woolsack. As, however, I have arrived at a conclusion which is not in accord with that of the majority of the judges of the First Division it is proper that I should state the reasons which have guided me, and this I think I can do briefly.

I will deal first of all with the items under Sched. A. The respondent's argument, as I understand it, is (i) that tax under Sched. A is charged in respect of "ownership" in lands; (ii) that the respondent's right "to occupy and possess" the mansion of Manderston and the policy parks was a personal right not in the nature of ownership because she could not turn it into money by letting the property or parting with her interest; and (iii) that as her occupation had not inherent in it this quality of ownership, she is not bound to include anything in respect of the annual value of the property under Sched. A in her return of total income for the purposes of supertax. In my opinion, upon the true construction of this Income Tax Act this argument is not well founded.

The nature of the tax under Sched. A was explained by Lord Macnaghten in his opinion in *L.C.C.* v. *A.-G.* (8) ([1901] A.C. at p. 36). The tax under that schedule is a tax "on profits and gains" just as under the other schedules. It is not a tax on ownership. The measure of the tax is annual value. The tax is cast on the occupier, i.e., on the person having "the use" of the lands. So far as the occupier is unable under the provision of the Act to pass on the tax to someone else he has to bear it as being the tax on the part of the annual value representing the extent of his use.

Supertax is an additional duty of income tax, and is levied in respect of income, the total of which from all sources exceeds £2,000. In *Tennant* v. *Smith* (3), Lord Macnaghten pointed out that total income from all sources means more than income properly so described. It includes the annual value of property chargeable under Sched. A, and the annual value of the occupation charged under Sched. B. In my judgment the respondent had the use of the property in question, and was the occupier thereof within the meaning of Sched. A, No. VII, r. 2. Accordingly, on the reasoning which I have indicated, the annual value of the property of which she had the use was part of her total income from all sources.

This conclusion accords with the decision of the Court of Appeal in England in *Shanks* v. *I.R. Comrs.* (4) and with other English decisions. It does not accord with the decision in Scotland in *I.R. Comrs.* v. *Wemyss* (1). This last-mentioned Case was, in my opinion, wrongly decided. It follows also in my view that such cases as *M'Dougall* (*or Inland Revenue*) v. *Sutherland* (2) are also wrong so far as they rest on the supposition that a money-producing quality is a necessary characteristic of an occupier's interest in order to render the annual value under Sched. A of the lands in which he has the interest part of his total income from all sources.

With regard to the items under Sched. B it is admitted that the tax is one on occupation, but it is urged on the respondent's behalf that here again unless the capacity to turn the interest into money can be found there is no obligation to include the annual value under Sched. B in the total income from all sources. Schedule A, No. VII, r. 1, r. 2, r. 3, r. 4, and r. 5 are made applicable to Sched. B. The respondent was, therefore, chargeable as occupier under this schedule as under Sched. A. I can find nothing in the Act to support the respondent's arguments or to justify the placing on the observations of Lord Macnaghten in *Tennant* v. Smith (3), to which I have already referred, a qualification which would exclude from total income the annual value under Sched. B because of some limitation on the occupier's powers of dealing with his interest.

Having regard to the view which I have taken of this matter it becomes unnecessary to express any opinion as to the precise nature of the interest under the trust disposition and settlement which gives the respondent her title to occupy the property. There remain the smaller items of charge to be considered.

The appellants at the bar of your Lordships' House abandoned the claims in respect of the forester's wages recognising that there was not before your Lordships material sufficient for the determination of the question. The rates fall primarily on the respondent as occupier and so far as the money for this liability is provided by the trustees it is, in my opinion, money paid for her benefit which, with the income tax on it, ought to be included in her total income for supertax purposes.

In the result, therefore, I think that this appeal should succeed so far as it has not been abandoned, and I concur in the motion proposed.

LORD BUCKMASTER.—I am desired by my noble and learned friend, **LORD BLANESBURGH,** to say that he concurs in the opinion that I have expressed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue*, England, for *Solicitor of Inland Revenue*, Scotland; *Grahames & Co.*, for *J. and F. Anderson*, W.S., Edinburgh.

[*Reported by* Edward J. M. Chaplin, Esq., *Barrister-at-Law.*]

WINDERMERE DISTRICT GAS AND WATER CO. *v.* WHITEHEAD

[CHANCERY DIVISION (Bennett, J.), October 21, 22, December 18, 1930]

[Reported [1931] 1 Ch. 558; 100 L.J.Ch. 147; 144 L.T. 636; [1929–30] B. & C.R. 276]

Company—Winding-up—Part II of Companies Clauses Act, 1863, *incorporated in company's special Act—Preference shareholders entitled to priority in repayment of paid-up preference capital—No further right to participation in surplus assets—Companies Clauses Act*, 1863 (26 *&* 27 *Vict*., *c*. 118), *s*. 13.

A company under its special Acts, with which Part II of the Companies Clauses Act, 1863, was incorporated, issued preference shares, the certificates of which contained conditions providing that, if the company was wound-up, the holders of the preference shares would be entitled to be repaid in full the amount paid up on the preference shares held by them respectively out of any surplus assets before any other shareholders were paid, but would not be entitled to any other participation in such assets.

Held: under s. 13 of the Companies Clauses Act, 1863, the company was authorised to attach to their preference shares the privilege of priority as regards the repayment of capital in a winding-up, and the further condition restricting the rights of the preference shareholders in a winding-up to that repayment was intra vires the company and valid.

Notes. As to distribution of assets among contributories, see 6 HALSBURY'S LAWS (3rd Edn.) 678–682; and for cases see 10 DIGEST (Repl.) 1008–1012. For Companies Clauses Act, 1863, see 3 HALSBURY'S STATUTES (2nd Edn.) 335.

Cases referred to:

(1) *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 653; 44 L.J.Ex. 185; 33 L.T. 450; 24 W.R. 794, H.L.; 9 Digest (Repl.) 648, *4309*.

(2) *Collaroy Co., Ltd.* v. *Giffard*, [1928] Ch. 144; 97 L.J.Ch. 69; 138 L.T. 321; [1927] B. & C.R. 217; 10 Digest (Repl.) 1072, *7426*.

(3) *Birch* v. *Cropper, Re Bridgewater Navigation Co., Ltd.* (1889), 14 App. Cas. 525; 59 L.J.Ch. 122; 61 L.T. 621; 38 W.R. 401; 5 T.L.R. 722; 1 Meg. 372, H.L.; 10 Digest (Repl.) 1065, *7391*.

(4) *Re Home and Foreign Investment and Agency Co., Ltd.*, [1912] 1 Ch. 72; 81 L.J.Ch. 364; 106 L.T. 259; 56 Sol. Jo. 124; 19 Mans. 188; 10 Digest 1067, *7399*.

Originating Summons.

The plaintiff company was incorporated by the Windermere District Gas Act, 1862, with a capital of £10,000 divided into 1,000 shares of £10 each with the object of supplying gas within certain townships in the parish of Windermere. In the year 1869 they were empowered by the Windermere District Waterworks Act, 1869, to sell and supply water within the limits within which they had been authorised to supply gas. Section 6 of that Act was as follows:

> "The capital of the company for the purposes of the waterworks shall be £7,500, subject to augmentation as hereinafter provided, and the company may from time to time raise, by the creation and issue of new ordinary shares of £10 each, any sums not exceeding in the whole the amount of the said capital, and the new shares so from time to time created shall be called, and the certificates for the same shall be marked, 'Windermere District Waterworks Shares.' "

Section 10 provided:

> "In addition to the capital of £7,500 by this Act hereinbefore authorised to be created by shares, and when the same is fully paid up, it shall be lawful for

> the company, with the consent of three-fifths of the votes of the shareholders present in person or by proxy at any general meeting of the company specially convened for the purpose, from time to time to raise, by the creation and issue of new ordinary or preference shares, any further sum or sums of money not exceeding in the whole the sum of £7,500; and all the provisions of this Act with respect to the Windermere District Waterworks shares, and the holders thereof, shall extend and apply to the last-mentioned new shares and the holders thereof; and Part II (relating to additional capital) of the Companies Clauses Act, 1863, is incorporated with and forms part of this Act, so far as relates to the additional capital by this section authorised to be created: Provided always, that the expression 'the ordinary shares,' in s. 17 of the said Act, shall be deemed and construed to mean the ordinary shares created under the authority of this Act."

Section 18 provided:

> "The company shall from time to time keep a separate account, to be called the gasworks account, and all moneys which shall come to the hands of the company in respect of gas supplied by them, or of coke or other residuum disposed of by them, or from any other source whatever connected with or relating to the gasworks, or payable to the gasworks account, or from any penalties recovered by them under the provisions of the Gasworks Clauses Act, 1847, shall fall into and form part of the gasworks account, and shall, except as regards capital, be applicable as part thereof."

Section 19 provided:

> "The gasworks account shall be applied and disposed of as follows: that is to say, First, in payment of all expenses exclusively relating to the gasworks: Secondly, in payment of such proportion of the general expenses of the company as the directors of the company shall from time to time think proper to charge to the gasworks account: Thirdly, in payment of the interest on the moneys from time to time borrowed by the company under the authority of the Act of 1862: Fourthly, in or towards payment of dividends on the capital of the company created under the authority of the Act of 1862, in accordance with the provisions of the Gasworks Clauses Act, 1847, and in making up the deficiency of any previous dividend on the gas shares, and in providing a reserved fund in accordance with the provisions of the last-named Act: And, lastly, the balance (if any) shall be carried to the waterworks account."

Section 20 provided for keeping a separate account to be called the waterworks account, and s. 21 provided that

> "the waterworks account shall be applied and disposed of as follows: (that is to say), First, in payment of all expenses exclusively relating to the waterworks: Secondly, in payment of such proportion of the general expenses of the company as the directors of the company shall from time to time think proper to charge to the waterworks account: Thirdly, in payment of the interest and dividend on the mortgages and debenture stock from time to time granted and issued by the company on the waterworks under the authority of this Act: Fourthly, in or towards payment of dividends on the capital of the company raised for waterworks purposes, in accordance with the provisions of the Waterworks Clauses Act, 1847, and in making up the deficiency of any previous dividends on the waterworks shares, and in providing a reserve fund, in accordance with the provisions of the last-named Act: Lastly, the balance (if any) shall be divided equally between the gasworks account and the waterworks account, subject to the liability of the company to make such a rateable reduction in the rates chargeable by the company for the supply of gas and water as is provided for in that behalf by the Gasworks Clauses Act, 1847, and the Waterworks Clauses Act, 1847, respectively."

In 1889 the Windermere District Gas and Water Act, 1889, was passed. By s. 3 thereof it was provided, among other things, that Part II of the Companies Clauses Act, 1863, was to be incorporated with and form part of the Act. Section 7 of the Act provided:

> "The company may from time to time raise (in addition to their present capital) any further capital for the gas undertaking of the company not exceeding in the whole £17,500 and any further capital for the water undertaking of the company not exceeding in the whole £15,000 by the creation and issue of new ordinary shares or stock or new preference shares or stock or wholly or partially by one or more of those modes respectively but the company shall not issue any shares of less nominal value than £10 nor shall any such share or stock vest in the person or corporation accepting the same unless and until the full nominal amount of such shares or stock (if such shares or stock be issued at or above par) together with any premium obtained upon the sale thereof shall have been paid in respect thereof. Provided that it shall not be lawful for the company to create and issue under the powers of this Act any greater nominal amount than shall be sufficient to produce including any premiums which may be obtained on the sale thereof the sum of £17,500 for the gas undertaking or the sum of £15,000 for the water undertaking."

In 1912 the Windermere District Gas and Water Act, 1912, was passed, and again Part II of the Companies Clauses Act, 1863, was incorporated in the Act. Section 5 of the Act gave power to the company to raise additional capital for the water undertaking of the company not exceeding in the whole £7,500 by the creation or issue of new ordinary shares or stock or new preference shares or stock or wholly or partially by one or more of those modes respectively with a provision that the company shall not issue any share of less nominal value than £10. Section 6 provided:

> "Subject to the provisions of this Act the additional capital created by the company under this Act shall be part of the waterworks capital of the company and the new shares or stock therein and the holders thereof respectively shall be subject and entitled to the same powers, provisions, liabilities, rights, privileges and incidents whatsoever in all respects as if such additional capital were part of the now existing waterworks capital of the company and the new shares or stock were shares or stock in that capital Provided that except as otherwise expressly provided by the resolution creating the same no person shall be entitled to vote in respect of any new shares or stock to which a preferential dividend shall be assigned."

Section 7 provided:

> "Subject to the provisions of this Act every person who becomes entitled to any such new shares or stock shall in respect to the same be a holder of shares or stock in the company and shall be entitled to a dividend with the other holders of shares or stock of the same class or description proportioned to the whole amount of such new shares or stock."

In 1928 the Windermere District Gas and Water Act, 1928, was passed. That Act contained in the preamble a recital that a statement of the authorised share and loan capital of the company is set forth in Sched. I to the Act, and also that it was expedient to raise further capital for the general purposes of the undertaking of the company. It incorporated Part II of the Companies Clauses Act, 1863. By s. 82 it was provided that:

> "The company may from time to time raise additional capital for the water undertaking not exceeding in the whole £12,000 by the creation and issue of new ordinary shares or stock or new preference shares or stock or wholly or partially by one or more of those modes respectively."

By s. 83:

> "Except as is by this Act provided the capital in new shares or stock created by the company under this Act and the new shares or stock therein and the holders thereof respectively shall be subject and entitled to the same powers provisions liabilities rights privileges and incidents whatsoever in all respects as if that capital were part of the now existing capital of the company of the same class or description and the new shares or stock were shares or stock in that capital."

Section 98 amended s. 19 of the Act of 1869 by providing that

> "section 19 (Application of Gasworks Account) of the Act of 1869 shall be read and have effect as if the following paragraph were substituted for the last two paragraphs of that section namely: 'Fourthly—In or towards payment of dividends at the authorised rates on the capital of the gas undertaking of the company as from time to time existing' and the said section as so amended shall apply in relation to all the gasworks of the company as from time to time existing and in respect of all moneys from time to time borrowed or raised by the company for the purposes of the gas undertaking."

By s. 127:

> "(1) If the urban district council of Windermere (in this section referred to as 'the council') shall introduce in the next session of Parliament a Bill for an Act to empower them to purchase the undertaking of the company and shall bona fide promote the same the company shall not oppose such Bill except in so far as they may deem necessary in order to secure the insertion therein of provisions in accordance with this section to protect their interests with respect to the sale and purchase provided for by this section and to provide for the winding-up of the company. (2) If the council obtain such an Act authorising such purchase they shall as from the quarter day next after the expiration of four months after the passing of such Act purchase and the company shall sell and transfer to the council for the price or for the consideration of £74,000 the undertaking of the company freed from any then existing debenture mortgage or other debts or similar liabilities of the company but subject to any other obligations of the company under the Acts of Parliament relating to the company. (3) The said Bill shall provide that as from the said quarter day all obligations of the company with reference to the supply of gas and water shall cease and determine."

In Sched. I is a statement in tabular form of the then issued capital of the company, the table specifying the preference and ordinary shares authorised and issued and referring to the particular Act under the authority of which the shares had been issued.

In 1929 the Windermere Urban District Council Act, 1929, was passed, which provided by s. 5 as follows:

> "(1) The company shall sell and the council shall purchase as a going concern as from the appointed day the undertaking of the company freed from any then existing debenture mortgage or other debts or similar liabilities of the company. (2) The consideration for the sale and purchase shall be (i) the payment by the council to the company on the appointed day of the sum of £74,000; (ii) the repayment to the company of any capital expenditure in respect of the works of the company incurred after the 24th day of April, 1928, with the consent of the council; (iii) the repayment to the company of any sums paid for the purchase of the waterworks lands and appurtenances thereto described in the schedule to the agreement or set forth in Sched. II to the Act of 1928 (in this section referred to as 'the scheduled agreement'); and (iv) the assumption by the council of any obligations of the company under the Acts of Parliament relating to the company other than debenture mortgage or other debts or similar liabilities."

Section 18 (1) provided:

> "From and after the transfer all obligations of the company with reference to the supply of gas and water shall cease and determine, and from and after the transfer the company shall continue to exist only for the purpose of receiving and recovering the sums payable to the company under this Act and distributing or otherwise applying the same and of winding-up the affairs of the company and carrying into effect the purposes of this Act so far as they relate to the company."

By s. 18 (2):

> "As soon as may be practicable after the transfer the directors of the company shall proceed to wind-up the affairs of the company and shall distribute the net moneys of the company after defraying the expenses of winding-up the company and any outgoings incidental thereto amongst the shareholders of the company and for that purpose the several persons whose names shall appear in the books of the company at the time of the transfer to be the proprietors of shares therein shall unless the contrary be proved to the satisfaction of the directors be considered to be shareholders of the company."

The company had received the consideration of £74,000 from the Windermere urban district council, and, in addition to that sum, had in hand certain other assets not included in the sale and amounting in respect of the gas undertaking to £3,838 12s., and in respect of the water undertaking to £1,625 18s. 8d. The issued share capital of the company was as follows: In respect of the gas undertaking £18,500 made up of 100 £10 fully-paid 4 per cent. preference shares; 500 £10 fully-paid 6 per cent. preference shares, and 1,000 £10 fully-paid ordinary shares, and 250 £10 fully-paid new ordinary shares. In respect of the water undertaking the share capital was £24,100 made up as follows: 150 £10 fully-paid 4 per cent. preference shares; 400 £10 fully-paid 6 per cent. preference shares; 863 £10 fully-paid ordinary shares; 637 £10 fully-paid ordinary shares, and 1,800 £2 new ordinary shares. There were two issues of preference shares for the purpose of obtaining new capital for the gas undertaking, one in 1910 and the other in 1925; and, at the same time, there were issues of preference shares in order to obtain new capital for the water undertaking. Upon the occasion of each issue resolutions were passed by the company creating the new preference shares, and by the directors authorising their issue.

As regards the gas undertaking the first issue of preference shares was created at an extraordinary general meeting of the company held on Aug. 30, 1910, and at that meeting it was resolved:

> "That under and by virtue of the powers conferred by the Windermere District Gas and Water Act, 1889, the capital of the water undertaking of the company be increased by the sum of £3,000 by the creation of 300 new shares of £10 each. That the new shares be called 'Windermere District Waterworks preference shares,' and that the holders thereof be entitled to a preferential dividend at the rate of £4 per centum per annum on the capital paid up thereon, payable as regards each year out of the profits of that year without any right in case of deficiency to resort to subsequent profits or to any other funds of the company. That in the event of the company being wound-up the holders of the said Windermere District Waterworks preference shares be entitled to have the surplus assets of the water undertaking of the company applied in the first place in repaying to them the amount paid up on the preference shares held by them respectively, but shall not be entitled to any further participation in such surplus assets. That all the said preference shares be issued at such time or times, in such manner, and upon such terms and conditions (subject to the provisions of the said Act) as the directors of the company may from time to time determine."

On the same day the directors passed a resolution that 100 gasworks preference shares of £10 each be offered for sale by tender at the minimum price of £10 per share. In the year 1925 the company passed a resolution creating 500 6 per cent. preference shares of £10 each. The resolution was:

> "That under and by virtue of the powers conferred by the Windermere District Gas and Water Act, 1889, the capital of the gas undertaking of the company be increased by the sum of £5,000 by the creation of 500 new preference shares of £10 each, that such new shares be called 'Windermere District Gasworks 6 per cent. preference shares,' and that the holders of the said preference shares be entitled, subject to the rights of the holders of the 100 4 per cent. £10 gasworks preference shares issued in 1910, to a preferential dividend at the rate of £6 per centum per annum on the capital paid up thereon, payable as regards each year out of the profits of that year without any right in case of deficiency to resort to subsequent profits or to any other funds of the company. That in the event of the company being wound-up the holders of the said Windermere District Gasworks 6 per cent. preference shares shall be entitled, subject to the rights of the holders of the 100 4 per cent. £10 Gasworks preference shares issued in 1910, to have the surplus assets of the gas undertaking of the company applied in repaying to them the amount paid up on their preference shares, but shall not be entitled to any further participation in such surplus assets."

On the same day the directors passed a resolution for the issue of 500 6 per cent. preference shares, that the minimum price below which no tender be accepted for the 500 Windermere Gasworks 6 per cent. preference shares be fixed at £10 per share.

The 4 per cent. Waterworks preference shares were created on Aug. 30, 1910, by the company, the rights attached to them being similar to the rights attached to the gasworks shares as regards the dividend and as regards their right to repayment of the capital in a winding-up, and on the same day the issue of 150 of the 4 per cent. preference shares of the waterworks was authorised by the directors. On July 7, 1925, the company created 400 6 per cent. preference shares in respect of their waterworks undertaking, and to those shares were attached the same rights as were attached to the 6 per cent. preference shares created for the purpose of the gasworks undertaking.

In respect of the waterworks preference shares and the gasworks preference shares the company issued certificates. The certificates for the 4 per cent. gasworks shares had endorsed upon them a statement in these terms:

> "The registered holders of these shares will be entitled to a preferential dividend at the rate of 4 per cent. per annum on the capital paid up thereon, payable as regards each year out of the profits of that year, without any right in case of deficiency to resort to subsequent profits or to any other funds of the company. In the event of the company being wound-up the registered holders of the said shares will be entitled to have the surplus assets of the gas undertaking of the company applied, in the first place, in repaying to them the amount paid up on the preference shares held by them respectively, but will not be entitled to any further participation in such surplus assets."

The certificates for the gasworks 6 per cent. preference shares had endorsed on them a statement in the same form. Similarly the certificates for the waterworks 4 per cent. preference shares and the certificates for the waterworks 6 per cent. preference shares had endorsed on them a statement to the same effect.

The originating summons by question 3 asked: "Whether on the true construction of the above-mentioned Acts and in the events which have happened, the holders of the preference shares in the said gas and water undertakings respectively are entitled to participate to any and what extent in the surplus sale assets."

By the Companies Clauses Act, 1863, s. 13:

> "Where any such company is authorised by any Special Act hereafter passed and incorporating this Part of this Act to raise any additional sum or sums by the issue of new preference shares, or by the issue of new preference stock, or (at the option of the company) by either of those modes, then and in every such case the company, with the like sanction as aforesaid, may for the purpose of raising such additional sum or sums from time to time create and issue (according as the authority given by the Special Act extends to shares only, or to stock only, or to both) such new shares or new stock, either ordinary or preference, and either of one class and with like privileges, or of several classes and with different privileges, and of the same or different amounts, and respectively with any fixed, fluctuating, contingent, preferential, perpetual, terminable, deferred, or other dividend or interest, not exceeding the rate prescribed in the Special Act, and if no rate is prescribed then not exceeding the rate of five pounds per centum per annum, and subject (as to any such new shares) to the payment of calls of such amounts and at such times as the company from time to time thinks fit; Provided always that any preference assigned to any shares or stock so issued under the Special Act shall not affect any guarantee, or any preference or priority in the payment of dividend or interest, on any shares or stock that may have been granted by the company under or confirmed by any previous Act, or that may be otherwise lawfully subsisting."

Section 14 is in the following terms:

> "The preference shares or preference stock so issued shall be entitled to the preferential dividend or interest assigned thereto, out of the profits of each year, in priority to the ordinary shares and ordinary stock of the company; but if in any year ending on the day prescribed in the Special Act, and if no day is prescribed, then on the 31st day of December, there are not profits available for the payment of the full amount of preferential dividend or interest for that year, no part of the deficiency shall be made good out of the profits of any subsequent year, or out of any other funds of the company."

Cecil Turner for the applicants.

C. R. R. Romer for the holders of gas preference shares.

Beebee, for the holders of water preference shares, referred to *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1).

Waite, for the holders of gas ordinary shares, referred to *Collaroy Co., Ltd.* v. *Giffard* (2).

Gerald Upjohn (*Wilfrid Hunt* with him), for holders of water ordinary shares, referred to *Birch* v. *Cropper* (3) and *Re Home and Foreign Investment and Agency Co., Ltd.* (4).

Cur. adv. vult.

Dec. 18. **BENNETT, J.,** read the following judgment.—The plaintiffs (hereinafter called "the company") have sold their undertaking to the Windermere Urban District Council in pursuance of the provisions of the Windermere Urban District Council Act, 1929, and have received the purchase money payable by the council under that Act, and are now in the process of winding-up their affairs in accordance with the provisions of s. 18 of that Act. It is estimated that, after all the liabilities of the company have been discharged and after there has been returned to all the holders of the company's shares the capital paid up on such shares, there will be a surplus amounting in round figures to £25,000 subject to the costs of winding-up, and the main question raised by the summons now before the court is as to how this surplus ought to be distributed, there being a contest between the preference shareholders, on the one side, and the ordinary shareholders, on the other, as to the right of the former to participate in the surplus.

The question, I think, turns entirely on whether the rights attached to the A
preference shares at the time of their issue were rights which the company had power to attach. If they were, then the holders of the preference shares, having had repaid to them all the capital paid up on such shares, have no right in respect thereof to participate in the surplus assets. [His Lordship stated the facts and the material statutory provisions, and continued:] The argument that the preference shareholders are entitled to participate in spite of the express terms of the resolution B
creating them and the terms endorsed on the certificates has as its foundation the provisions of s. 13 of the Companies Clauses Act, 1863, that section being one of the sections in Part II of that Act and so incorporated into the company's special Acts of 1869, 1889, 1912 and 1928. The argument for the preference shareholders is that the conditions attached to their preference shares giving them the right in a winding-up to have the surplus assets applied in the first place in repaying to C
them the amount paid up on the preference shares held by them respectively and excluding them from any right to participate further in the surplus assets are ultra vires and invalid, because the privilege is one which is not authorised by the special Acts or by Part II of the Companies Clauses Act, 1863.

The proposition is that the company, having been incorporated by special Act of Parliament, cannot issue their capital otherwise than upon terms or subject to D
conditions either expressly or by necessary implication authorised by their special Acts or the public Acts incorporated therewith. This proposition is, I doubt not, well established. But, in my judgment, the company were authorised by s. 13 to attach to their preference shares the privileges which have in fact been attached to them. The section enables a company authorised by any special Act thereafter passed and incorporating Part II of the Act to raise any additional sum or sums E
by the issue of new preference shares or preference stock, or by either of those modes, to do certain things. The company is such a company. The things such a company is authorised to do include a power to issue new preference shares with privileges the nature of which are not defined and also with any fixed, fluctuating, contingent, preferential, perpetual, deferred or other dividend or interest not exceeding the rate prescribed in the special Act, and if no rate is prescribed then F
not exceeding the rate of £5 per cent. per annum. Section 14 of the Act prevents a company from making the preference dividend a cumulative one. The sections, as it seems to me, draw a distinction between a privilege and a preferential dividend and limit a company to which Part II of the Act applies in respect of their powers to attach rights of dividend to their preference shares, but do not limit a company in respect of their powers to attach other privileges. It seems to me, G
therefore, that the privilege of having a priority as regards repayment of capital in a winding-up is a privilege which the company are entitled to attach to the preference shares, and, this being so, I can see no ground upon which I ought to hold that the further condition restricting the holder of a preference share in the case of a winding-up to repayment out of the surplus assets of the capital paid up on such shares is ultra vires and void. The result, therefore, in my judgment, is H
that the answer to question 3 [the question above set out] is in the negative.

Solicitors: *Gregory, Rowcliffe & Co.*, for *George Gatey & Son*, Windermere.

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law*.]

LAWRENCE *v.* CASSEL

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), April 9, 1930]

[Reported [1930] 2 K.B. 83; 99 L.J.K.B. 525; 143 L.T. 291;
74 Sol. Jo. 421]

Sale of Land—Collateral agreement—Breach by vendor—Remedy of purchaser—Stipulation as to quality of work to complete house—Stipulation not mentioned in conveyance.

By an agreement in writing the defendant agreed to sell to the plaintiff a freehold plot of land together with a dwelling-house then in course of erection thereon, and to complete the dwelling-house together with the necessary equipment and fittings in accordance with the plans of other houses on the estate. The conveyance of the land which was subsequently executed contained no reference to any work to be done in connection with the completion of the house. Soon after entering into possession the plaintiff found that the work had been badly done, whereupon he instituted the present action claiming damages for breach of the agreement, alleging that it was a term or condition of the agreement that the work should be carried out in a proper and efficient and workmanlike manner and that the materials used should be fit and proper for the purpose, and averring that none of these terms or conditions had been fulfilled.

Held: the stipulation in the contract regarding the work to be done to complete the house was collateral to the conveyance which was silent on that matter, and, therefore, the stipulation was not merged in the conveyance and the plaintiff could recover damages for its breach.

Quære: whether the contract to complete the house only applied to work to be done after the contract was made or whether it applied to all the work done in completing the house, only part of which was done at the time of the contract.

Notes. Followed: *Miller* v. *Cannon Hill Estates, Ltd.*, [1931] All E.R.Rep. 93. Referred to: *Bottomley* v. *Bannister*, [1931] All E.R.Rep. 99.

As to the right of a purchaser to recover damages after conveyance in respect of breach of a collateral contract, see 29 HALSBURY'S LAWS (2nd Edn.) 465, note (r); and for cases see 40 DIGEST (Repl.) 379 et seq.

Cases referred to:

(1) *Palmer* v. *Johnson* (1884), 13 Q.B.D. 351; 53 L.J.Q.B. 348; 51 L.T. 211; 33 W.R. 36, C.A.; 40 Digest (Repl.) 111, *856*.

(2) *Saunders* v. *Cockrill* (1902), 87 L.T. 30, D.C.; 40 Digest (Repl.) 380, *3051*.

Appeal from an order of SWIFT, J., in an action tried by the learned judge at Manchester without a jury.

By an agreement in writing, dated Jan. 20, 1928, the defendant agreed to sell to the plaintiff, subject to certain conditions, a freehold plot of land together with a dwelling-house then in course of erection thereon. Completion of the purchase was to take place within three months or within seven days after the house had been certified by the local authority to be fit for occupation. The agreement contained, inter alia, the following clauses:

> "4. The vendor will complete the said dwelling-house in accordance with the plans of other B-type houses on the estate, and the house will contain sanitary fittings similar in all material particulars to the houses of this type already erected on the estate. 5. Before completion the vendor will execute the following works . . ."

There followed particulars as to painting the woodwork, providing points for electric light and a meter and plugs for electric power, and fixing grates and mantelpieces.

The conveyance of the land in fee simple to the plaintiff was executed by the defendant on May 10, 1928, but it contained no reference either as to the building of the house or to any work done or to be done by the defendant as regards the completion of the house. On May 15, 1928, the plaintiff went into possession of the house, and within a week had to complain that the builders had done their work badly, and that his furniture and carpets were being damaged by water which came through the walls and windows. Accordingly, on June 14, 1929, he brought an action against the defendant claiming damages for breach of the agreement of Jan. 20, 1928, upon the ground that it was a term of the agreement that the work should be carried out in a proper, efficient, and workmanlike manner and that the materials used should be fit and proper for the purpose, and he alleged that none of those terms or conditions had been fulfilled. The defendant pleaded that the agreement of Jan. 20, 1928, with all its terms, express and implied, was merged in the subsequent conveyance, and was, therefore, no longer enforceable. SWIFT, J., gave judgment for the plaintiff for £150 damages. The defendant appealed.

Cyril Atkinson, *K.C.*, and *Lustgarten* for the defendant.
Eastham, *K.C.*, and *Bathin* for the plaintiff.

SCRUTTON, L.J.—I feel that this is not a satisfactory case. It seems to me that the substantial point which the defendant seeks to make is this. He says: "True it is that there is a contract in writing under which a house then in course of erection was to be sold by the defendant to the plaintiff, and there were express terms in the contract as to how the house was to be completed, but after the contract had been signed the plaintiff took a conveyance of the house and land and none of the express terms appeared therein. The contract is merged in the conveyance. The plaintiff is claiming damages in respect of the unfinished condition of the house and the breach of the terms contained in the agreement, but those terms are not to be found in the conveyance, and so there is no implied warranty."

I think that argument proceeds on a wrong view of the authorities. That appears to be quite clear from the judgment of FRY, L.J., in *Palmer* v. *Johnson* (1). In that case there was in the preliminary contract for the sale of real property a term that if any error, mis-statement, or omission in the particulars of sale should be discovered, it should not annul the sale, but compensation should be allowed by the vendor or purchaser as the case might require. There was no such term in the conveyance. FRY, L.J., after saying that when a preliminary contract is afterwards reduced into a deed and there is any difference between them, the mere written contract is entirely governed by the deed, went on:

> "But that has no application here, for this contract for compensation was never reduced into a deed by the deed of conveyance. There was no merger, for the deed was intended to cover only a portion of the ground covered by the contract of purchase."

Another illustration of the same principle is to be found in *Saunders* v. *Cockrill* (2). There the contract provided that the plaintiff should buy a house, then in the course of erection, from the defendant, and the defendant was to fix air bricks as per the contract and the byelaws of the borough, supply and fix stoves, drains, fixtures, find, supply, and fix all requisite good materials and all labour, and in all other respects to complete the house and outbuildings in a proper and workmanlike manner fit for habitation. There was nothing said about these matters in the conveyance which was subsequently executed. The plaintiff brought an action for damages for breach of the contract. The Divisional Court held that he was entitled to succeed although the stipulation in the contract upon which he was suing was not to be found in the deed, and they based their decision on the same ground as FRY, L.J., had put it in the former case—that the contract to do the work was collateral to the contract for the sale of the house in the course of erection, and, being collateral, was not a subject-matter of the deed of conveyance, and, consequently, was not merged in the deed, with the result that, on a breach of the contract, damages could be claimed for what had not been done.

In my opinion, the main reason for which the defendant in the present case fails is because there was in the contract a stipulation to do work which was collateral to the conveyance and was, therefore, not merged when there was executed the deed of conveyance which said nothing about the work which the defendant had undertaken to carry out. I agree that it might require very careful consideration whether the contract to complete the house only applied to work to be done after the contract was made or whether it applied to the whole of the work done in completing the house which was to be sold and which at the time of the contract was only partly completed. There is a good deal to be said for the view that a contract to complete a house in a workmanlike manner is not fulfilled by building a house full of defects, some of which have probably arisen in consequence of work badly done before the contract, and some of which are due to defects which have developed afterwards. But I do not deal with this question because no point was taken at the trial that cl. 4 of the contract only related to work which was to be done under cl. 5 before the completion of the sale, but did not apply to work done before the contract. That point never having been put, I do not think we ought to interfere even if we were prepared to decide that the contract had no relation to work done before it was entered into, a question which, as I have said, I am not going to decide. In these circumstances I am of opinion that the appeal on the main point fails and must be dismissed.

GREER, L.J.—I agree.

SLESSER, L.J.—I agree.

Appeal dismissed.

Solicitors: *Brooks, Hulme & Ruddin*, Manchester; *Charles Howard & Co.*, Manchester.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

CLAYTON *v.* CLAYTON

[CHANCERY DIVISION (Maugham, J.), March 20, 28, 1930]

[Reported [1930] 2 Ch. 12; 99 L.J.Ch. 498; 143 L.T. 696]

Settled Land—Title—Appointments of trustees—Appointment of new trustees of will—Equitable fee simple vested in tenant in tail on disentail—Settled legacies outstanding—Claim by freeholder to appointments of new trustees as forming part of title to land.

A testator by his will devised freehold property to the use of his wife for her life, and after her death to the use of his younger son for his life, and after the son's death to the use of every son of his (the son's) born in the testator's lifetime and his issue male, with remainder to the use of every son of the son born after the testator's death in tail male in succession. From time to time under the will persons were appointed to be trustees for the purposes of the Settled Land Acts and other purposes, and these included three by deeds made in 1902, 1904 and 1915. In 1924 the plaintiff, who was the eldest son of the testator's son, was appointed a trustee of the will jointly with the other trustees for the purposes of the Settled Land Acts, the appointment being limited to the freeholds. In 1928 the plaintiff disentailed the estates in such a manner as to vest them in him for an equitable estate in fee simple, subject to all estates, interests and charges having priority to the plaintiff's entailed interests. The trusts of some of the settled legacies under the will were still subsisting. The plaintiff claimed to be entitled to the custody of the appointments of 1902, 1904 and 1915 as forming part of his title to the freeholds.

Held: the right to title deeds did not necessarily go with the absolute ownership of land, and, therefore, the plaintiff was precluded from recovering possession of the deeds in question so long as the trustees had duties as trustees to perform.

Lord Buckhurst's Case (1) (1598), 1 Co. Rep. 1, applied.

Semble: The deeds did not assure or affect directly any estate or interest in any part of the land, and, therefore, were not title deeds in the legal sense.

Notes. Considered: *Lewis* v. *Plunket*, [1937] 1 All E.R. 530.

As to the custody of the title deeds by a tenant for life, see 29 HALSBURY'S LAWS (2nd Edn.) 633–634, paras. 915–917; and for cases on the subject, see 38 DIGEST 709, *532–537*.

Cases referred to:

(1) *Lord Buckhurst* v. *Fenner* (1598), 1 Co. Rep. 1; 76 E.R. 1; 2 And. 118; Moore 488; 40 Digest (Repl.) 325, *2667*.

(2) *Harrington* v. *Price* (1832), 3 B. & Ad. 170; 110 E.R. 63; sub nom. *Harrington* v. *Glenn and Price*, 1 L.J.K.B. 122; 40 Digest (Repl.) 325, *2671*.

(3) *Leathes* v. *Leathes* (1877), 5 Ch. 221; 46 L.J.Ch. 562; 36 L.T. 646; 25 W.R. 492; 40 Digest (Repl.) 766, *2509*.

(4) *Re Williams and Duchess of Newcastle's Contract*, [1897] 2 Ch. 144; sub nom. *Re Fuller and Leathley's Contract*, 66 L.J.Ch. 543; 76 L.T. 646; 61 J.P. 454; 45 W.R. 627; 13 T.L.R. 412; 41 Sol. Jo. 529; 40 Digest (Repl.) 326, *2683*.

(5) *Foster* v. *Crabb* (1852), 12 C.B. 136; 21 L.J.C.P. 189; 16 Jur. 835; 138 E.R. 853; 40 Digest (Repl.) 325, *2669*.

(6) *Re Lehmann and Walker's Contract*, [1906] 2 Ch. 640; 75 L.J.Ch. 768; 95 L.T. 259; 40 Digest (Repl.) 327, *2684*.

(7) *Lightfoot* v. *Keane* (1836), 1 M. & W. 745; 2 Gale, 138; Tyr. & Gr. 1004; 5 L.J.Ex. 257; 150 E.R. 634; 42 Digest 269, *3028*.

(8) *Garner* v. *Hannyngton* (1856), 22 Beav. 627; 52 E.R. 1250; 40 Digest (Repl.) 766, *2506*.

(9) *Kelsack* v. *Nicholson* (1596), Cro. Eliz. 496; 78 E.R. 746; 24 Digest (Repl.) 667, *6550*.

(10) *Ford* v. *Peering* (1789), 1 Ves. 72; 30 E.R. 236, L.C.; 40 Digest 766, *2503*.

(11) *Strode* v. *Blackburne* (1796), 3 Ves. 222; 30 E.R. 979, L.C.; 40 Digest (Repl.) 766, *2503*.

(12) *Malone* v. *Minoughan* (1862), 14 I.C.L.R. 540; 38 Digest 709, *a*.

(13) *Ex parte Holdsworth* (1838), 4 Bing.N.C. 386; 6 Scott, 170; 1 Arn. 189; 7 L.J.C.P. 225; 132 E.R. 836; 40 Digest (Repl.) 768, *2527*.

Action.

The following facts are taken from the judgment. The plaintiff, who was the absolute owner of extensive freehold estates in the county of Northumberland, claimed a declaration that he was entitled to the custody of three indentures dated April 30, 1902, Jan. 6, 1904, and April 28, 1915, being three appointments of new trustees of the will of his grandfather, Nathaniel George Clayton, and an order on the defendants, who were trustees of that will, to deliver them to the plaintiff. Nathaniel George Clayton, who died in 1895, by his will dated March 8, 1895, devised the estates—subject to certain uses not relevant to the present purpose—to the use of his wife, Isabel Clayton, for her life, and after her death to the use of his younger son, Edward Francis Clayton, for his life, and after his death to the use of every son born in the lifetime of the testator of the said Edward Francis Clayton and his issue male as therein mentioned, with remainder to the use of every son born after the death of the testator of the said Edward Francis Clayton in tail male in succession. By the will, certain persons were appointed to be executors and trustees for the purposes therein expressed, including the purposes of the Settled Land Acts. The plaintiff was born in 1902, and was the eldest son of Edward Francis Clayton, who died in 1922. Isabel Clayton died on April 27, 1928, after the Law of Property Act, 1925, had come into operation. By a disentailing deed dated Jan. 1, 1928, the plaintiff disentailed the estates in such a manner as to vest the same in him for an equitable estate in fee simple, subject to all estates, interests and charges having priority to the plaintiff's entailed interests. On March 8, 1929, probate of the will of Isabel Clayton, limited to the settled estates, was granted to the defendants and the plaintiff; and by vesting assent dated May 8, 1929, and made between the defendants and the plaintiff of the one part and the plaintiff of the other part, the defendants and the plaintiff, as personal representatives of Isabel Clayton, assented to the vesting in the plaintiff of the estates on the trusts declared by the will of Nathaniel George Clayton. In the year 1929 the estates were released from the jointure and portions charges which affected them, and, as a result, the plaintiff became beneficially entitled to the estates free from all incumbrances and charges. It was to be observed that the trustees of the will of Nathaniel George Clayton had no legal estate, since the limitations were legal. By the will, some large settled legacies were bequeathed to the trustees, and the trusts of three of such legacies were still subsisting. There had been a number of appointments of new trustees of the will from time to time, in particular the three appointments by the three indentures above referred to, namely, the appointments of April 30, 1902, Jan. 6, 1904, and April 28, 1915. By an appointment of Oct. 9, 1924, the plaintiff himself was appointed a trustee of the will, so far as regards the Clayton estates, jointly with the other trustees for the purposes of the Settled Land Acts, but not further or otherwise. By a deed of discharge dated July 10, 1929, the defendants and the plaintiff declared that they were discharged from the trusts of the will of Nathaniel George Clayton so far as regards all the lands subject to the settlement made by that will—see Settled Land Act, 1925, s. 17. The plaintiff, as the absolute owner, had recently sold divers parts of the estates and contemplated further sales. He claimed to be entitled to the custody of the three appointments of 1902, 1904, and 1915, which, he alleged, formed part of the title to the Clayton estates. The defendants contended that the three deeds related to the settled legacies, of which the defendants were trustees and of which the plaintiff was not and never had been a trustee, and that such deeds did not assure any estate or interest whatsoever in any part of the estates which remained vested in the plaintiff. There was no dispute as to the right of the plaintiff to production and to delivery of copies, that being provided for under a deed dated Aug. 12, 1929.

Co. Litt. 6A:

> "A man seised of land in fee has divers charters, deeds, and evidences, and maketh a feoffment in fee, either without warrantie, or with warrantie only against him and his heirs, the purchaser shall have all the charters, deeds, and evidences, as incident to the lands 'et ratione terræ,' to the end he may the better defend the land himself, having no warrantie to recover in value; for the evidences are, as it were, the sinewes of the land, and the feoffor not being bound to warrantie hath more use of them. But if the feoffor be bound to warrantie, so that he is bound to render in value, then is the defence of the title at his peril; and therefore the feoffee in that case shall have no deeds that comprehend warrantie, whereof the feoffer may take advantage. Also, he shall have such charter, as may serve him to deraigne the warrantie paramount. Also, he shall have all deeds and evidences, which are material for the maintenance of the title of the land; but other evidences which concerne the possession, and not the title of the land, the feoffee shall have them."

Manning, K.C., and *Greenland*, for the plaintiff, referred to *Harrington* v. *Price* (2); *Leathes* v. *Leathes* (3); and *Re Williams and Duchess of Newcastle's Contract* (4).

Morton, K.C., and *Wilfrid Hunt*, for the defendants, referred to *Foster* v. *Crabb* (5) and *Re Lehmann and Walker's Contract* (6).

Cur. adv. vult.

March 28. **MAUGHAM, J.**, stated the facts and continued: It is, perhaps, surprising that the solicitors for the parties have not been able to come to an amicable arrangement on the matter of custody; but since that has proved impracticable, it becomes necessary to determine the question as one of legal right. Title deeds, at any rate since the reign of Elizabeth, have been regarded from a somewhat singular standpoint in courts of law. They have been called the sinews of the land: see Co. Litt. 6A, where Sir Edward Coke is, apparently, stating, not with complete clearness, the effect of *Lord Buckhurst's Case* (1). An elaborate account of this report—in English—will be found in Dixon on Title Deeds (1826), at p. 13. The case is not without importance on the present occasion, and I will transcribe from Dixon the material part of the judgment (ibid. at p. 27):

> "Afterwards, and after long deliberation and conference had between the justices, they met, to deliver their opinions concerning the title deeds only, without discussing the title. And Popham, Chief Justice, in the name of himself and of the other Justices, said they had resolved, that all the title deeds of the land belong clearly to the feoffee, although there was no mention of them in his purchase, whether they contain warranty or not, unless the feoffor has bound himself to general warranty of the land to the feoffee and his heirs; and if he has, then all the title deeds material for the defence of any title paramount, whether they contained warranty or not, belonged to the feoffor and his heirs; and the reason he said was, because the agreement of the parties to the feoffment appears to be such, that the feoffee would rely upon his warranty of the land, and that the feoffor and his heirs should make continual defence thereof for the feoffee and his heirs; and when no grant is made of the deeds to the feoffee, it is to be understood that they shall remain with him who is to defend the land, and that is the feoffor and his heirs. Which diversity was the opinion of all of them, upon conference together, and consideration had of all the books and cases cited on both sides; and that, he said, reconciles all the diversities of opinions in the books."

From this it appears that the right of an absolute owner of land to the title deeds is not without exception: see also the report of the judgment in 1 Co. Rep. 1. Warranties (of which the curious will find an account in Sheppard's Touchstone, Chap. 8) of course have long fallen into disuse; but, as stated in Williams on Personal Property (12th Edn.), p. 11, the principle of the rule still applies when the grantor has any other lands to which the deeds relate or retains any legal interest in the lands conveyed. Apart from these, and, perhaps, other exceptions, it is no doubt true that the immediate freeholder has both in law and in equity a primâ facie title to the possession of the title deeds. He may maintain an action of detinue against any person who withholds them from him after demand made (*Lightfoot* v. *Keane* (7)), or he may maintain an action of trover (*Harrington* v. *Price* (2)), or he could file a bill for the recovery of them (*Garner* v. *Hannyngton* (8)). It is going too far, however, to suggest that the fee simple owner has always a right to the title deeds, for it appears to be settled that he may, if he pleases, give them away: per Gawdy, J., *Kelsack* v. *Nicholson* (9); Copinger on Title Deeds, p. 4. By parity of reasoning he could no doubt destroy them. It appears that, if in a settlement there is contained a grant of the deeds to the remaindermen, that would be good against the freeholder in whom by such settlement a life estate is vested: *Ford* v. *Peering* (10). The law is stated thus in *Strode* v. *Blackburne* (11) (3 Ves. at p. 225) by Loughborough, L.C.:

> "I have stated that the title deeds are incident to the possession. Primâ facie a person in possession of the estate under a title that gives a freehold interest at the least, has a right to the custody of them. They are not considered in law as chattels; but follow and are incident to the estate in the hands of the owner. At law they belong of right to the owner; and do not go to the executor."

In old days it seems to have been held that it was not larceny to steal title deeds: see Dixon on Title Deeds, p. 38. This, however, was before the time when deeds on parchment were commonly used for covering lampshades and for the tops of toy drums; and the quaint reason given for the view that there could be no felony in taking away such a thing as a paper or parchment containing an assurance concerning land was that

> "they being of no manner of use but to the owner, are not supposed to be in danger of being stolen, and therefore need not be provided for in so strict a manner as those things which are of a known price and everybody's money."

The law on this point was, however, altered—perhaps because deeds had become "everybody's money"—by the Larceny Act, 1861, s. 28. It was, of course, the owner of the legal estate who was entitled primâ facie to the possession of the title deeds; and there was a controversy which lasted for a hundred years whether, in the case of conveyances taking effect by force of the Statute of Uses, the feoffees or releasees were entitled to the possession or the cestui que use. The question was ultimately decided by the Court of Queen's Bench in Ireland (*Malone* v. *Minoughan* (12)), where on the grounds that the feoffee to uses had—as the effect of the then recent Act, the Law of Property Amendment Act, 1860, s. 7—no estate or interest, "nothing to assert and nothing to defend," it was held that the cestui que use, as the owner of the land, was entitled to the deeds. This decision has always been accepted as correct. On the other hand, the trustee who happens to have the legal estate in lands is primâ facie entitled to the custody of the title deeds, the cestui que trust having merely a right to inspect and take copies of the deeds: *Ex parte Holdsworth* (13). The question of the right to custody of title deeds was touched on in s. 2 of the Vendor and Purchaser Act, 1874, which (inter alia) provided that where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents. This provision came before the courts in *Re Williams and Duchess of Newcastle's Contract* (4), and North, J., after holding that the section applied only to lands—including leaseholds—went on to decide that when a mortgage comprised both lands and policies of insurance on the life of the mortgagor, on a sale of the land by the mortgagee, he retaining the policies, the purchaser was entitled to have the mortgage deed delivered to him. The decision, however, has not escaped criticism: see Williams on Vendor and Purchaser (1st Edn.), p. 604; (3rd Edn.), p. 640. I should add that I am not concerned to mention the numerous cases between tenant for life and remaindermen or between mortgagor and mortgagee.

The deeds of appointment in question may have to be produced, in the absence of a special condition of sale, to any purchaser in order to establish that the deed of discharge of July 10, 1925, was executed by persons who were the then trustees of the settlement created by the will. The vesting assent of May 8, 1929, was, in this case, the first vesting instrument executed for the purpose of giving effect to the settlement subsisting at the commencement of the Act, so that the proviso to s. 110 (2) of the Settled Land Act, 1925, operates, and a purchaser cannot, therefore, make the assumptions mentioned in the early portion of the subsection. I should add that it is provided by s. 45 (9) (b) of the Law of Property Act, 1925, that a vendor shall be entitled to retain a trust instrument or other instrument creating a trust which is still subsisting, or an instrument relating to the appointment or discharge of a trustee of a subsisting trust. This section, however, is applicable only between vendor and purchaser, and is not, I think, relevant to the present case. I do not think the solution of the present problem is to be found in any consideration of convenience as between the parties. The question is one of strict law, namely, whether the plaintiff is entitled in an action of detinue to recover the three deeds from the present trustees of the will on the ground that they originally were, or as the result of recent legislation have become, title deeds of the estates.

In my opinion, the right of the estate owner to the title deeds of his estates is not so absolute as the plaintiff contends. It is true that, if no one else has any legal interest in the subjects dealt with in a title deed, the estate owner is generally entitled to recover such a deed from a stranger. But there are, as appears from the authorities, numerous exceptions. The leading case decided as long ago as the reign of Queen Elizabeth shows clearly that, if a feoffor has good reason for wishing to retain a title deed, he may be justified in doing so: *Lord Buckhurst's Case* (1). If this is true in the case of a grantor who may not derogate from his grant, it must a fortiori be true in the case of trustees who have lawfully become possessed of deeds not directly relating to land, and claimed by an estate owner only because, as a matter of evidence, it may be necessary for him to give inspection of the deeds to a purchaser. I think, also, that the deeds of appointment in question, since they did not assure or affect directly any estate or interest in any part of the land, are not title deeds of the land in the legal sense; for, in my opinion, the old authorities refer only to title deeds by which the lands or some legal interest therein is assured or dealt with. It would be almost absurd to contend that the plaintiff, if he obtained possession of the three deeds, would be entitled to destroy them, though he could apparently do so if they are title deeds properly so called. But, on the supposition that they are in a general sense title deeds, I hold that the right or title of the defendants to them as trustees, so long as they have duties as trustees to perform, precludes the plaintiff in the circumstances from succeeding in an action of detinue to recover possession of the deeds. The action, therefore, fails, and must be dismissed with costs.

Solicitors: *Hasties*; *King, Wigg & Brightman*, for *Clayton & Gibson*, Newcastle-on-Tyne.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

A

ATTORNEY-GENERAL *v.* SHARP

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), June 26, 27, 1930]

B [Reported [1931] 1 Ch. 121; 99 L.J.Ch. 441; 143 L.T. 367; 94 J.P. 234; 46 T.L.R. 554; 74 Sol. Jo. 504; 28 L.G.R. 513]

Injunction—Restraint of statutory offence—Infringement, or threat of infringement, of public right—Penalty provided by statute—Persistent infringement of licensing enactment—Manchester Police Regulation Act, 1844 (7 *&* 8 *Vict., c. xl*).

C By the Manchester Police Regulation Act, 1844, a public Act, the Manchester Corporation were given powers to license hackney carriages and the Act provided penalties for plying for hire within the city of Manchester without a licence. The defendant, who was the owner or proprietor of motor omnibuses, applied to the corporation for a licence to ply for hire, and, this having been refused, continued to ply for hire with his motor omnibuses within the city. D On many occasions both he and his employees were fined for offences under the Act. In an action brought by the Attorney-General on the relation of Manchester Corporation for an injunction to restrain the defendant from plying for hire within the city of Manchester without a licence,

Held: where a public right had been or was likely to be infringed the Attorney-General, in his discretion, could bring an action, and the court had E jurisdiction to grant an injunction in such a case even though a penalty for breach of the right was provided by a public statute.

Notes. Considered: *A.-G.* v. *Premier Line, Ltd.* (1931), 48 T.L.R. 104.

As to the protection of public rights by proceedings by the Attorney-General, see 21 HALSBURY'S LAWS (3rd Edn.) 403–404, paras. 844–845; and for cases on the F subject, see 28 DIGEST 367–370, *36–49*. As to legal proceedings by a local authority, see 21 HALSBURY'S LAWS (2nd Edn.) 231–232, para. 428; and for cases on the subject, see 33 DIGEST 113–114, *762–773*.

Cases referred to:

(1) *A.-G.* v. *Wimbledon House Estate Co., Ltd.*, [1904] 2 Ch. 34; 73 L.J.Ch. 593; 91 L.T. 163; 68 J.P. 341; 20 T.L.R. 489; 2 L.G.R. 826; 28 Digest G 368, *42*.

(2) *L.C.C.* v. *A.-G.*, [1902] A.C. 165; 71 L.J.Ch. 268; 86 L.T. 161; 66 J.P. 340; 50 W.R. 497; 18 T.L.R. 298, H.L.; 16 Digest 482, *3637*.

(3) *A.-G.* v. *Merthyr Tydfil Union*, [1900] 1 Ch. 516; 69 L.J.Ch. 299; 82 L.T. 662; 64 J.P. 276; 48 W.R. 403; 16 T.L.R. 251; 44 Sol. Jo. 294, C.A.; 28 Digest 469, *785*.

H (4) *A.-G.* v. *Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101; 72 L.J.Ch. 67; 87 L.T. 561; 67 J.P. 73; 51 W.R. 125; 19 T.L.R. 39; 47 Sol. Jo. 50; 1 L.G.R. 145; 28 Digest 367, *36*.

(5) *Devonport Corpn.* v. *Tozer*, [1903] 1 Ch. 759; 72 L.J.Ch. 411; 88 L.T. 113; 67 J.P. 269; 52 W.R. 6; 19 T.L.R. 257; 1 L.G.R. 421; 28 Digest 369, *47*.

(6) *Rumball* v. *Schmidt* (1882), 8 Q.B.D. 603; 46 L.T. 661; 46 J.P. 567; 30 W.R. I 949, D.C.; 26 Digest 562, *2572*.

(7) *A.-G.* v. *Ely, Haddenham and Sutton Rail. Co.* (1869), 4 Ch. App. 194; 38 L.J.Ch. 258; 20 L.T. 1; 17 W.R. 356, L.C.; 10 Digest (Repl.) 1260, *8889*.

(8) *A.-G.* v. *Shrewsbury (Kingsland) Bridge Co.* (1882), 21 Ch.D. 752; 51 L.J.Ch. 746; 46 L.T. 687; 30 W.R. 916; 26 Digest 451, *1668*.

(9) *Stevens* v. *Chown*, *Stevens* v. *Clark*, [1901] 1 Ch. 894; 70 L.J.Ch. 571; 84 L.T. 796; 65 J.P. 470; 49 W.R. 460; 17 T.L.R. 313; 28 Digest 369, *45*.

(10) *Cooper* v. *Whittingham* (1880), 15 Ch.D. 501; 49 L.J.Ch. 752; 43 L.T. 16; 28 W.R. 720; 24 Sol. Jo. 611; 28 Digest 368, *39*.

(11) *Patent Agents Institute* v. *Lockwood*, [1894] A.C. 347; 63 L.J.P.C. 74; 71 L.T. 205; 10 T.L.R. 527; 6 R. 219, H.L.; 42 Digest 751, *1755*.

(12) *A.-G.* v. *Oxford, Worcester and Wolverhampton Rail. Co.* (1854), 2 W.R. 330; 38 Digest 356, *602*.

Appeal by the defendant from a decision of Farwell, J.

The facts appear in the judgment of Lord Hanworth, M.R.

J. W. Manning, K.C., and *R. W. Leach* for the defendant.

Alexander Grant, K.C., and *E. H. Longson* for the plaintiff.

LORD HANWORTH, M.R.—In the year 1844 an Act was passed called the Manchester Police Regulation Act. It was an Act "for the good government and police regulation of the borough of Manchester," and, by s. 282, it is made a public Act, and is to be judicially taken notice of as such. The Act was passed for the purpose of giving power to the proper local authority, which is now the Lord Mayor and corporation of the city of Manchester, to enforce those powers and regulations which are necessary for the good government of a large body of inhabitants such as are found resident within the boundaries of the city of Manchester. It covers all sorts of matters which are well known, sanitary matters and matters like the regulation of slaughter-houses, and all the usual subjects which must be dealt with in the interests of the community at large by a central authority. But, incidentally, it contains a power to license what are called hackney carriages or carts. There is a little fasciculus of sections dealing with those, beginning at s. 139, which gives power to the council from time to time to license "such number of hackney carriages and carts of any kind or description, to ply for hire within the borough, as they shall think fit," and to revoke the licence for misconduct. Section 141 illustrates the manner in which the licences are to be applied for, and s. 142 tells what is to be specified in the licences. The Act also provides that the persons who are driving shall themselves hold licences. The words "hackney carriage" are defined by the interpretation clause (s. 280) to include "any coach, omnibus, chariot, fly, car, cabriolet, gig, sociable, lorry or such like carriage." By s. 145, there is a penalty imposed on persons plying with hackney carriages without a borough or township licence.

What has happened is this. The defendant is the owner or the proprietor of motor omnibuses. He has two motor garages within the city of Manchester, the Lena Street garage and the Stockport Road garage. The defendant has also a garage within the area of Eccles, which is an area independent of the city of Manchester, and in that area he holds a licence to ply for hire with his motor omnibuses. He also has a garage within the area of Hazel Grove and Bramhall Urban District, and he also holds licences in that district for the purpose of plying for hire with his omnibuses. It appears that, as he is the holder of such licences, it is possible for him to start an omnibus containing some of the persons who get in at Eccles or who get in at Hazel Grove and Bramhall and to drive them into the city of Manchester, and, after they have spent such time as they are pleased to do within the city boundaries, to take them back again to Eccles or Hazel Grove, as the case may be. He also has ticket offices at these garages which are within the city of Manchester, the Lena Street garage and the Stockport Road garage, and he has from time to time issued tickets which enable persons who do not start either from Eccles or from Hazel Grove and Bramhall to take a seat in his motor omnibuses which are then within the boundaries of the city of Manchester.

Farwell, J., who had the facts before him, has held that the defendant was plying for hire with his omnibuses within the city of Manchester, and from that finding of fact counsel for the defendant has not urged any point for this Court of Appeal. The point, however, on the question of fact is, I understand, intended to be kept open by him should he require at any other time to argue it. The learned judge granted an injunction against the defendant plying for hire within the boundaries of the city of Manchester on the ground that he was, in what he was doing, acting in contravention of the Manchester Police Regulation Act, 1844, to which I have referred. From that injunction the defendant appeals, on the ground that no remedy lies by an injunction, but that the only remedies for the enforcement of the Act are those which are specially appointed as the appropriate remedies, namely, those which are indicated under s. 145 of the Act. The question that we have to determine, therefore, is whether or not it is possible to grant an injunction on these facts, or whether the defendant's point is good if the sole sanction for the enforcement of that remedy on which the Act rests is the penalty which is imposed by s. 145. There is one more fact to which I must call attention. It is admitted by the defendant that he has been convicted under the section which I have referred to, and a penalty imposed on him no less than forty-eight times. We are also told that his employees, who are the drivers of the buses, have been convicted or had penalties imposed on them on no less than twelve occasions. Added together, that shows that attempts have been made on sixty occasions to enforce compliance with the terms of this Act, but without effective result. The defendant still continues to act as he has done previously, and I understand that the position is this. The fines imposed are so much, and the business which the defendant does is so much; and it may well be that he can bear the burden of the fines which are imposed on him and yet continue to make a profit by his business while neglecting to observe the directions and regulations which are imposed by the Act.

In those circumstances, this action is brought. It is an action brought by His Majesty's Attorney-General on the relation of the Lord Mayor and aldermen and citizens of the city of Manchester. The nature of the action must not be overlooked, as was said by Farwell, J., in *A.-G.* v. *Wimbledon House Estate Co., Ltd.* (1) ([1904] 2 Ch. at p. 39), who said it was an action brought by the Attorney-General,

> "and it is not the less the Attorney-General's action because it is on the relation of the urban district council, who are joined as relators merely in order to hold them liable for costs."

An action by the Attorney-General has special characteristics. It is brought after a fiat has been obtained from the Attorney-General. He can refuse or grant his fiat at his discretion. It is an important discretion which is entrusted to him as the first Law Officer of the Crown. The nature of the jurisdiction which he exercises is referred to by Lord Halsbury, L.C., in *L.C.C.* v. *A.-G.* (2) ([1902] A.C. at p. 168), where he points out that it is for the Attorney-General and not for the courts to determine whether he ought to initiate litigation in respect of the matters submitted to him or not, and that his discretion cannot be canvassed in the court. Lord Halsbury says (ibid. at p. 169): "It is a question which the law of this country has made to reside exclusively in the Attorney-General." I have called attention to the observations of Farwell, J., and of Lord Halsbury for the purpose of emphasising the quality and nature of this action. The Attorney-General has a duty, if called on or matters are brought to his notice, to enforce public rights. I am reading from a passage which is to be found in 27 Halsbury's Laws (1st Edn.) at p. 191:

> "In addition to the common law remedy of indictment, and any specific remedies provided by the statute in question, the Attorney-General may at any time apply to the High Court to exercise its equitable jurisdiction of granting an injunction against the breach of a statutory duty or the infringement or threatened infringement of a public right, and an individual who, save as one of the public, has sustained no special damage can only do so in the Attorney-General's name."

I think that passage is correct. It is true, I think, that the Attorney-General can bring by his action before the court a case in which it is necessary to ask for the intervention of the court for the enforcement of public rights in addition to some procedure which the statute allows against individual breakers of the regulations. In the present case, the Attorney-General says that the sanction which has been given under this Act has proved wholly ineffective for the purpose of maintaining A the duty which the Act is intended to enforce. Where such is the case, as was pointed out by LINDLEY, M.R., in *A.-G.* v. *Merthyr Tydfil Union* (3), where there is no adequate remedy the jurisdiction of the High Court to grant an injunction cannot be doubted; the High Court will come to the assistance of the Attorney-General as a public authority to give the ancillary remedy which is necessary to enforce public rights. In *A.-G.* v. *Merthyr Tydfil Union* (3), the point was argued B that there was no power to grant an injunction because there were other remedies, and, as there was no power to grant an injunction, there could be no power to make a declaration. That point was definitely brought and fully argued before the court, but the court determined that it could make a declaration, just as it could have granted an injunction, because it was necessary that that injunction should be granted in order that there should be an adequate remedy. But the case does C not remain there. We are not dealing at all with private rights; we are dealing with the question of the public right brought to the attention of the court by the Attorney-General. In *A.-G.* v. *Ashborne Recreation Ground Co.* (4), BUCKLEY, J., as he then was, gives a judgment in which he definitely shows that the court has jurisdiction to enforce byelaws by an injunction in an action brought by the Attorney-General at the relation of the local authority. He says this ([1903] 1 Ch. D at p. 107):

> "The Attorney-General suing in respect of the invasion of public rights has at least as large a right to invoke the protection of the court as a private owner suing in respect of his rights,"

and he gives a number of cases as illustrations of the case where that procedure E has been regularly and properly followed. He adds this (ibid. at p. 108):

> "Moreover, there may be good reason why an injunction should be granted although a penalty is imposed. If there were no remedy except the statutory remedy, a public authority might by circumstances be rendered singularly impotent although it had made byelaws." F

The appropriateness of that observation would appear clear from the facts of the present case. That decision of BUCKLEY, J., was commented on in a case which came before the Court of Appeal, *Devonport Corpn.* v. *Tozer* (5). There COLLINS, M.R., says this ([1903] 1 Ch. at p. 762):

> "These proceedings are not taken for the penalty imposed by the byelaws. G They are taken on the general right of a public body who are trying to put in suit a claim for the breach of a statute. This point has been carefully considered by BUCKLEY, J., in a very elaborate judgment in the case of *A.-G.* v. *Ashborne Recreation Ground Co.* (4), in which he has covered the whole of the law, as it seems to me, upon this point. I do not think I could usefully add anything to the reasons there given, namely, that where there is a public H wrong, and where the local authority who have certain special rights to sue in their own name for certain special remedies, have not done so, and are trying to put in suit a public wrong, they must do it in the recognised way, namely, at the suit of the Attorney-General."

It is plain from those observations that COLLINS, M.R., is approving of the judgment—as he calls it, the "elaborate judgment"—of BUCKLEY, J., who had pointed I out the right of the Attorney-General to come to the court for the purpose of obtaining an injunction.

Another case must also be referred to: that is *A.-G.* v. *Wimbledon House Estate Co., Ltd.* (1). That action was an action by the Attorney-General, and it was for the purpose of enforcing a building line and preventing an infringement of it. FARWELL, J., pointed out that the defendants had been prosecuted before the magistrates and had been convicted and had been fined. Then he adds ([1904] 2 Ch. at p. 41):

> "There is, first of all, the statutory obligation not to build without the written consent, and if that is disobeyed—apart from any question of penalty—there is a remedy by injunction, because it is a public general Act prohibiting certain matters in the interests of public health and in order to preserve uniformity in the width of the public streets, and that is a matter for which the Attorney-General can sue. Then the next point taken is that, inasmuch as the defendants have already been fined by the magistrates, they cannot now be attacked by the Attorney-General. In my opinion, that is a misapprehension. The penalty imposed is a penalty which can be, and has been, according to one of the reported cases (*Rumball* v. *Schmidt* (6)), imposed time after time if the offence is continued."

Then he proceeds to say that, although that may be so, the Attorney-General is entitled, quite apart from that what I might call the individual remedy, to enforce the public rights which are enshrined in the Act which is the subject-matter of the proceedings.

There are one or two more cases to which reference has been made, but they all follow the same lines. Even in *A.-G.* v. *Ely, Haddenham and Sutton Rail. Co.* (7) LORD HATHERLEY says (L.R. 4 Ch. at p. 199):

> "The question is, whether what has been done has been done in accordance with the law; if not, the Attorney-General strictly represents the whole of the public in saying that the law shall be observed."

Again, in *A.-G.* v. *Shrewsbury (Kingsland) Bridge Co.* (8), the headnote says:

> "When an illegal act is being committed, which in its nature tends to the injury of the public . . . the Attorney-General can maintain an action on behalf of the public to restrain the commission of the act."

FRY, J., in his judgment, says (21 Ch.D. at p. 755):

> "This is clearly a case in which the defendant company without any power (for their powers had come to an end) thought fit to do certain acts which undoubtedly tended in their nature to interfere with public rights, and so tended to injure the public."

Then the Attorney-General, as he points out, can intervene and interfere. We are not considering cases such as those where private rights alone are concerned, but it may be pointed out that, in *Stevens* v. *Chown* (9), where, although there was a particular remedy imposed in respect of the infringement of a right of property created, still FARWELL, J., held that the jurisdiction of the High Court to protect that right by injunction was not excluded by the particular remedy provided, inasmuch as the statute had not expressly said that the duties imposed under the statute were to be enforced solely and exclusively by the particular remedy given.

Having regard to the terms of these cases which we have looked at, it appears quite clear that, in a case where a public right has been or is likely to be infringed, the Attorney-General can bring an action if, in his discretion, he thinks it is a right course to follow, and then he can apply in that action for the ancillary remedy of an injunction to be granted by the court in order that, by that powerful weapon, there may be steps taken which will enforce the public right, inasmuch as, without it, the particular sanction given as against the individual, as in this case under s. 145, would be, or has proved, insufficient. It appears, therefore, on the point which counsel for the defendant has taken—an interesting point, too—that we must hold that there is a remedy by injunction, and that the mere fact that the imposition of a fine is available under the statute does not exclude the right which is sought by the Attorney-General.

For these reasons, the appeal must be dismissed with costs.

LAWRENCE, L.J.—I agree. The only question which counsel for the defendant has asked this court to decide on the present occasion is whether FARWELL, J., had jurisdiction to grant an injunction to restrain the defendant from using his motor omnibuses as omnibuses plying for hire in the city of Manchester without being duly licensed for that purpose, in breach of the provisions of a public Act passed in the year 1844 entitled "An Act for the good government and police regulation of the borough of Manchester." The action is brought by the Attorney-General on the relation of the Corporation of Manchester, which happens to be both the licensing authority and the highway authority, although this fact is, in my opinion, immaterial. If the learned judge had jurisdiction, it cannot, I think, be reasonably open to doubt that it was rightly exercised in the circumstances of the present case. The defendant has deliberately and persistently committed breaches of the statutory obligations imposed on him for the benefit of the public. Before this action was brought, the defendant and his employees had, at the instance of the Corporation of Manchester, been summoned and fined no less than sixty times for breaches of these obligations, and it is plain that the defendant intends to pursue his illegal course of conduct unless restrained by injunction. Counsel contended that, as the Act created a new liability and prescribed the remedy, and as no interference with any right of property was involved, the court had no jurisdiction to grant an injunction. The cases relied on in support of this contention, such as *Cooper* v. *Whittingham* (10), *Stevens* v. *Chown* (9), and *Patent Agents Institute* v. *Lockwood* (11), are cases in which the action was brought, not by the Attorney-General suing on behalf of the public, but by some individual person or body aggrieved by the breach of the statutory obligation. In such cases no doubt the proposition relied on by counsel has an important bearing on the question whether or not the court has jurisdiction to grant an injunction, but, in my opinion, it has no application to a case where the Attorney-General is suing on behalf of the public. There is a large body of authority showing the distinction between the two classes of cases, and, without attempting to review all the decisions on this subject, I will refer briefly to some of the cases cited at the Bar which, in my judgment, are amply sufficient to show that it is firmly established that the court has jurisdiction to restrain an illegal act of a public nature at the instance of the Attorney-General suing on behalf of the public, although the illegal act does not constitute an invasion of any right of property, and although the Act imposing the new liability prescribes the remedy for its breach.

In *A.-G.* v. *Oxford, Worcester and Wolverhampton Rail. Co.* (12), LORD ROMILLY, M.R., granted an injunction, at the instance of the Attorney-General, to restrain the opening of a railway not authorised by the Board of Trade, and in the course of his judgment said that the Attorney-General

> "might apply to the court to restrain the execution of an illegal act of a public nature, provided it was established that the act was an illegal act, and it affected the public generally."

In *A.-G.* v. *Ely, Haddenham and Sutton Rail. Co.* (7), LORD HATHERLEY, L.C., in giving his judgment, said (L.R. 4 Ch. at p. 199):

> "The Attorney-General represents the whole public in this sense, that he asks that right may be done and the law observed. . . . The question is, whether what has been done has been done in accordance with the law; if not, the Attorney-General strictly represents the whole of the public in saying that the law shall be observed."

In *A.-G.* v. *Shrewsbury* (*Kingsland*) *Bridge Co.* (8), FRY, J., considered the last-mentioned two cases, and, following the dicta which I have quoted, held that an action by the Attorney-General for an injunction to restrain the defendants from proceeding with certain works contrary to their statutory authorisation would lie and, consequently, the relators were entitled to their costs. In *A.-G.* v. *Ashborne Recreation Ground Co.* (4) an injunction was sought by the Attorney-General to restrain the infringement of certain byelaws made by a local authority under the Public Health Act. The byelaws imposed a penalty for any breach, and the question arose whether an action could be maintained by the Attorney-General to

A restrain their infringement. BUCKLEY, J., after referring to some of the authorities, said ([1903] 1 Ch. at p. 107):

> "The Attorney-General suing in respect of the invasion of public rights has at least as large a right to invoke the protection of the court as a private owner suing in respect of his rights. Judges, both of first instance and of the Court B of Appeal, although the point has apparently not always been taken, have assumed and NORTH, J., has decided that in such cases the Attorney-General can sue."

The learned judge then instanced several cases in which the Attorney-General had sued, and proceeded ([1903] 1 Ch. at p. 108):

> "Moreover, there may be good reason why an injunction should be granted C although a penalty is imposed. If there were no remedy except the statutory remedy, a public authority might by circumstances be rendered singularly impotent although it had made byelaws."

Then, a little later, after referring by way of example to s. 23 of the Public Health Acts Amendment Act, 1890, under which byelaws might be made as to such things as the sufficient supply of water for flushing closets, the learned judge said (ibid. D at p. 109): "The Act did not intend that the public right to have these things done should be guarded only by a penalty in case they are not done."

The last-mentioned case was considered and approved by the Court of Appeal in *Devonport Corpn.* v. *Tozer* (5) ([1903] 1 Ch. at p. 762), the decision in which brings out clearly the distinction between actions brought by the Attorney-General suing on behalf of the public and actions brought by an individual person or body. E There the Devonport Corporation were the plaintiffs and the court, in refusing an injunction, pointed out that, if they had desired to obtain an injunction, they should have invoked the aid of the Attorney-General. COLLINS, M.R., says this:

> "These proceedings are not taken for the penalty imposed by the byelaws. They are taken on the general right of a public body who are trying to put in F suit a claim for the breach of a statute. This point has been carefully considered by BUCKLEY, J., in a very elaborate judgment in the case of *A.-G.* v. *Ashborne Recreation Ground Co.* (4), in which he has covered the whole of the law, as it seems to me, upon this point. I do not think I could usefully add anything to the reasons there given, namely, that where there is a public wrong, and where the local authority who have certain special rights to sue in G their own name for certain special remedies, but have not done so, and are trying to put in suit a public wrong, they must do it in the recognised way, namely, at the suit of the Attorney-General. In this case the plaintiffs have attempted to do it without the intervention of the Attorney-General, and, for the reasons given by BUCKLEY, J., in the case I have mentioned, I am of opinion that they cannot proceed in the absence of the Attorney-General."

H The last case to which I will refer is *A.-G.* v. *Wimbledon House Estate Co., Ltd.* (1). In that case, the defendants had infringed a byelaw by erecting a building which projected beyond the building line. They had been summoned and fined £20 in respect of that infringement. An action was then brought by the Attorney-General for a mandatory injunction to pull down the offending building. FARWELL, J., in granting the injunction, negatived the contention that, as the defendants I had been fined, no injunction ought to be granted, and decided that an action by the Attorney-General would lie, and was the appropriate remedy in the circumstances. Counsel for the defendant contended that that case was distinguishable from the present on the ground that there the illegal act had resulted in a permanent infringement of the statutory provisions, whereas in the present case the illegal acts of the defendant were merely temporary infringements of the Act in question. In my judgment, the distinction thus sought to be drawn does not assist the defendant. There is no ground for suggesting that FARWELL, J., intended to hold that the jurisdiction of the court to grant an injunction was confined to cases where the illegal act was complete and resulted in a permanent infringement of a statutory provision. In my opinion, the decision in that case shows that the learned judge recognised the jurisdiction and held that, in the circumstances, the court ought to exercise it. In the present case, moreover, the defendant is wilfully persisting in an illegal course of conduct which has become, and if no injunction is granted will continue to be, a permanent habit. In these circumstances I think that the only appropriate remedy is by way of injunction at the instance of the Attorney-General.

The cases to which I have referred—and there are many others—in my judgment negative the proposition submitted on behalf of the defendant that, in an action brought by the Attorney-General, the court has no jurisdiction to grant an injunction to restrain the breach of a public statute which creates a new obligation and prescribes the remedy unless it be shown that the breach is one which involves the invasion of some right of property.

I, therefore, agree that the appeal should be dismissed.

ROMER, L.J.—I agree and do not wish to add anything.

Appeal dismissed.

Solicitors: *Rochester, Pusey & Co.*, for *T. A. Needham*, Manchester; *Sharpe, Pritchard & Co.*, for *F. E. Warbreck Howell*, Town Clerk, Manchester.

[*Reported by* Geoffrey P. Langworthy, Esq., *Barrister-at-Law.*]

BARRATT *v.* RICHARDSON AND CRESSWELL

[King's Bench Division (Wright, J.), February 5, 17, 1930]

[Reported [1930] 1 K.B. 686; 99 L.J.K.B. 451; 142 L.T. 606; 46 T.L.R. 279]

Landlord and Tenant—Recovery of possession—Limitation of action—Breach of covenant—Non-payment of rent—Right of re-entry when rent in arrear for twenty-one days—Rent in arrear for fourteen years—Date of first accrual of right of re-entry—Tender of part arrears of rent—Amount to be tendered—Real Property Limitation Act, 1833 (3 *&* 4 *Will.* 4, *c.* 27), *s.* 3, *s.* 42—*Civil Procedure Act*, 1833 (3 *&* 4 *Will.* 4, *c.* 42), *s.* 3—*Common Law Procedure Act*, 1852 (15 *&* 16 *Vict.*, *c.* 76), *s.* 212—*Real Property Limitation Act*, 1874 (37 *&* 38 *Vict.*, *c.* 57), *s.* 1.

By an indenture of lease, the plaintiff's predecessor in title demised certain premises to R. for ninety-nine years at a yearly rent of £6 6s. payable quarterly. R. covenanted for himself and his assigns to pay the rent on the usual quarter days, and it was provided that, if and when any part of the rent should be in arrear for twenty-one days, whether it should have been legally demanded or not, it should be lawful for the lessor to re-enter on the premises. After 1914 R. paid no rent in respect of the premises. In 1924 R. assigned the residue of the term of the lease to C., who also paid no rent. In an action by the plaintiff for possession of the premises, begun on Jan. 28, 1928, C. tendered six years' rent as being the amount legally due from her, and contended that the claim for possession was barred since the right to possession accrued in 1914, more than twelve years before the commencement of the action.

Held: (i) on the terms of the lease, although the plaintiff's right to re-enter the premises first accrued in 1914, each failure to pay rent gave rise to a fresh cause of action, and, therefore, the plaintiff was entitled to rely on any and every non-payment of rent within the period of twelve years up to the date of the writ and the claim to possession was not barred by the Real Property Limitation Act, 1874, s. 1, and the Real Property Limitation Act, 1833, s. 3, as not having been made within twelve years next after the term at which the right to make such entry had first accrued.

Doe d. Mannion v. *Bingham* (1) (1841), 3 Ir.L.R. 456, not followed.

(ii) in order to satisfy the Common Law Procedure Act, 1852, s. 212, the amount of arrears to be paid or tendered by C. was all the arrears owing under the lease and not merely six years' arrears, the case being governed by the Civil Procedure Act, 1833, s. 3, and not by the Real Property Limitation Act, 1833, s. 42; and, therefore, the plaintiff was entitled to possession.

Notes. The Real Property Limitation Act, 1833, the Civil Procedure Act, 1833, s. 3, and the Real Property Limitation Act, 1874, were repealed by the Limitation Act, 1939, s. 34 (4) and Schedule. See now s. 2, s. 4 (3), s. 5, s. 6, s. 8 and s. 17 of the Act of 1939.

Referred to: *Sykes* v. *Williams*, [1932] All E.R.Rep. 884.

As to relief from forfeiture for non-payment of rent, see 23 HALSBURY'S LAWS (3rd Edn.) 681–683, paras. 1409–1411; and for cases on the subject, see 31 DIGEST (Repl.) 534–537, *6592–6612*. As to the period of limitation for arrears of rent, see 24 HALSBURY'S LAWS (3rd Edn.) 235, para. 438; and for cases on the subject, see 32 DIGEST 443–444, *1130–1133*. For the Common Law Procedure Act, 1852, s. 212, see 18 HALSBURY'S STATUTES (2nd Edn.) 416; and for the Limitation Act, 1939, see 13 HALSBURY'S STATUTES (2nd Edn.) 1159 et seq.

Cases referred to:

(1) *Doe d. Mannion* v. *Bingham* (1841), 3 Ir.L.R. 456.

(2) *Archbold* v. *Scully* (1861), 9 H.L.Cas. 360; 5 L.T. 160; 7 Jur.N.S. 1169; 11 E.R. 769, H.L.; 30 Digest (Repl.) 380, *231*.

(3) *Grant* v. *Ellis* (1841), 9 M. & W. 113; 11 L.J.Ex. 228; 152 E.R. 49; 32 Digest 429, *1037*.

(4) *Doe d. Davy* v. *Oxenham* (1840), 7 M. & W. 131; 10 L.J.Ex. 6; 4 Jur. 1016; 151 E.R. 708; sub nom. *Doe d. Davey* v. *Ockenden*, H. & W. 4; 32 Digest 447, *1157*.

(5) *Doe d. Boscawen* v. *Bliss* (1813), 4 Taunt. 735; 128 E.R. 519; 31 Digest (Repl.) 563, *6843*.

(6) *Spratt* v. *Sherlock* (1845), 3 I.C.L.R. 69.

(7) *Crosbie* v. *Sugrue* (1845), 9 I.L.R. 17; 32 Digest 429, *1037i*.

(8) *Owen* v. *De Beauvoir* (1847), 16 M. & W. 547; 9 L.T.O.S. 175; 11 Jur. 458; 153 E.R. 1307; affirmed sub nom. *De Beauvoir* v. *Owen* (1850), 5 Exch. 166; 14 L.T.O.S. 490, Ex. Ch.; 32 Digest 429, *1041*.

(9) *Hunter* v. *Nackolds* (1850), 1 Mac. & G. 640; 1 H. & Tw. 644; 19 L.J.Ch. 177; 14 Jur. 256; 41 E.R. 1413, L.C.; 32 Digest 418, *959*.

(10) *Darley* v. *Tennant* (1885), 53 L.T. 257; 32 Digest 408, *862*.

(11) *Donegan* v. *Neill* (1885), 16 L.R.Ir. 309; 32 Digest 429, *1037ii*.

(12) *Dingle* v. *Coppen*, *Coppen* v. *Dingle*, [1899] 1 Ch. 726; 68 L.J.Ch. 337; 79 L.T. 693; 47 W.R. 279; 32 Digest 423, *1003*.

Action tried by WRIGHT, J., without a jury.

The facts appear in the judgment.

H. G. Robertson for the plaintiff.

N. C. Armitage for the defendant, Mrs. Cresswell.

The defendant, Mr. Richardson, did not appear and was not represented.

Cur. adv. vult.

Feb. 17. **WRIGHT, J.**, read the following judgment.—The plaintiff in this action claims to be entitled to possession of certain premises known as 20, Beechcroft Road, Wandsworth. The premises were let to the defendant, Mr. Richardson, under an indenture of lease dated Feb. 9, 1909, for a term of ninety-nine years A from Dec. 25, 1908. On Dec. 28, 1914, the plaintiff became assignee of the reversion dependent on the term of the lease. The lease was subject to a yearly rent of £6 6s., payable on the usual quarter days, but by some oversight no rent was paid or received since the assignment to the plaintiff. Just before these proceedings a claim to the arrears was made. The defendant Mr. Richardson has not been served and has not appeared, and his whereabouts are unknown. The defendant B Mrs. Cresswell became assignee of the lease on April 30, 1924. The unpaid arrears of rent from Oct. 28, 1914, to the date of the writ amount (less tax) to £63 17s. 10d. These arrears as such are only claimable from the defendant Mrs. Cresswell as from the date of her interest commencing, the defendant Mr. Richardson being liable under his covenants for all the arrears. Possession is claimed by reason of these breaches of covenant to pay rent. C

The defendant Mrs. Cresswell resists the claim for possession on two grounds: (i) Because the claim to possession is barred by the statute of limitations, since the right to possession first accrued more than twelve years before the commencement of the action, which was by writ dated Jan. 28, 1928, that is, on the first breach of the covenant to pay rent in 1914. (ii) That, before action brought, she tendered six years' arrears of rent, £29 8s. 10d., and brought that sum into court, D that being all the arrears legally claimable by reason of the relevant period of limitation being six years.

No evidence was called, and no documents were put in save the lease. By the lease, the premises were demised to the defendant Mr. Richardson, who covenanted for himself and his assigns to pay the rent on the usual quarter days, and it was provided that, if and when any part of the rent should be in arrear for twenty-one E days, whether the same should have been legally demanded or not, it should be lawful for the lessor to re-enter on the premises.

On the first point, that the claim for possession is barred because the right of re-entry for non-payment of rent was not exercised until more than twelve years after the first breach of covenant to pay rent, the matter is agreed to depend on the true construction of s. 1 of the Real Property Limitation Act, 1874, which is F in the following terms:

> "After the commencement of this Act no person shall make an entry or distress, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person G through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

That section was in substitution for s. 2 of the Real Property Limitation Act, 1833, but must be read with s. 3 of the latter Act, which defines when the right to make H an entry shall be deemed, in the different cases set out, to have accrued. The relevant words of s. 3 are as follows:

> "and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken." I

On the construction of these statutory words, when read with the words of the proviso in the lease providing for the right of re-entry for breach of covenant to pay rent, I should hold, in the absence of authority binding me to the contrary, that the right of re-entry arose afresh, in the words of the lease, "if and when any part of the rent shall be in arrear for twenty-one days." The breach of covenant is a separate breach on each such occasion and a new right of re-entry occurs each time. When the writ claiming possession was issued on Jan. 28, 1928, there were a series of such breaches, many within the statutory period of twelve years, and I should hold that the plaintiff was entitled to rely on the last such breach of covenant or any other such breach within the period of twelve years. The writ merely claims possession for breach of covenant to pay rent, and the claim for arrears for thirteen and a quarter years is a money claim distinct from the claim for possession. The issue of the writ is an unequivocal claim to possession, and, if justified, puts an end to the relation of landlord and tenant and no waiver is possible either by the demand for, or receipt of, rent. The justification for the claim depends on proof of an enforceable forfeiture. The words of the Act are "such right shall be deemed to have first accrued when such forfeiture was incurred" and are not "when forfeiture shall have first been incurred by the first breach of the condition in question." The words "first accrued," in my opinion, are merely inserted to show the absolute identity in time between the right relied on as justifying the forfeiture and the commencement of the statutory period. These words do not, I think, in any way define or limit the actual forfeiture or the right on which it depends. It is clear that the right to rent continues as long as the relation of landlord and tenant exists: *Archbold* v. *Scully* (2). However long may be the period during which the reversioner has omitted to collect rent (assuming he has not been dispossessed), the right to rent at each stipulated period recurs, though arrears may cease to be recoverable, and the reversioner is entitled in respect of each unpaid instalment of rent to distrain, as was held in *Grant* v. *Ellis* (3), though for more than twenty years, as the period then was, previously he had failed to collect the rent. Similarly, on the term expiring, the reversioner, even though for more than the full statutory period he has received no rent, may maintain an action in ejectment and re-enter and, indeed, may re-enter at any time within the statutory period, which is now twelve years, after his estate became an estate in possession: see *Doe d. Davy* v. *Oxenham* (4).

No doubt these cases depend on the language of other parts of s. 3 of the Real Property Limitation Act, 1833, but it would indeed be curious if, in respect of a right to rent recurring quarterly so long as the lease lasts, the lessor were deprived of the right of re-entry for which he has expressly stipulated in respect of each failure to pay rent, merely because, in respect of previous failures, he has not thought fit to re-enter. By overlooking a former non-payment of rent, the lessor cannot, on principle, or apart from express words of enactment, be deemed to have waived the right of re-entry in respect of a subsequent failure to pay, any more than in the case of breach of a covenant against sub-letting or of a covenant to repair: *Doe d. Boscawen* v. *Bliss* (5). In my judgment, so long as the covenant to pay the rent continues, which it must so long as the relationship of landlord and tenant continues, the proviso giving the lessor a right of re-entry remains in force in respect of each breach of that covenant.

Counsel for the defendant Mrs. Cresswell, in his able argument, has contended that I am bound to construe the statute in his favour by reason of a decision of the Irish Court of Common Pleas in 1841 in *Doe d. Mannion* v. *Bingham* (1). The decision was under the repealed s. 2 of the Real Property Limitation Act, 1833, under which the statutory period was twenty years, though the wording was similar to that of the corresponding section of the Act of 1874. The Court of Common Pleas stated that the question was whether

> "a landlord, who has not received any rent from his tenant holding under a lease, for the space of twenty years, is barred by the late statute of limitations (Real Property Limitation Act, 1833) from recovering in an ejectment brought for the non-payment of rent."

It was held that the matter was determined by the express provisions of the statute and that the landlord was barred. The judges seemed to have been a little troubled by the results of the decision, which, applied to the present case, would, it seems, mean that the right of re-entry for non-payment of rent would be lost to the landlord for the remainder of the term of the ninety-nine years' lease, notwithstanding the clear words of that lease. Nor has the case been followed. On the contrary, in the Queen's Bench in Ireland in 1853, in *Spratt* v. *Sherlock* (6), the headnote states that it was there held that a right of re-entry accrued with each successive gale of rent, but the judgments do not justify this note, though observations of the judges in argument seem clearly to indicate that they were not prepared to follow the earlier decision. CRAMPTON, J., said (3 I.C.L.R. at p. 70): "Has the landlord not a new right every six months?" The court merely ordered a new trial, the judge having non-suited the plaintiff because he had not proved a payment of rent within twenty years. And in *Crosbie* v. *Sugrue* (7), ejectment was granted for non-payment of rent, though more than twenty years had elapsed from the last payment, apparently on the ground that the Real Property Limitation Act, 1833, s. 2, did not apply to conventional rent reserved under a demise. However that may be, it does appear that *Doe d. Mannion* v. *Bingham* (1) has not been followed nor has it been approved in Ireland. Nor in the English courts has it been followed or approved. It was, indeed, cited in argument in *Owen* v. *De Beauvoir* (8), where ALDERSON, B., said (16 M. & W. at p. 560):

> "They [i.e., the judges of the Irish Court of Common Pleas] in fact controverted *Doe d. Davy* v. *Oxenham* (4), though they are reported to have stated otherwise. What becomes of the last, or twentieth, year's rent?"

I think it is clear from the trend of the argument that ALDERSON, B., meant to say that, so long as the lease subsisted, the right of the lessor to avail himself of the right of re-entry in respect of even the last instalment of rent remained. Counsel for the defendant Mrs. Cresswell relied on the great authority of LORD ST. LEONARDS, who, in his work, SUGDEN'S NEW STATUTES RELATING TO PROPERTY (2nd Edn., 1862), p. 43, cites *Doe d. Mannion* v. *Bingham* (1) in the following terms:

> "If a man have a power of re-entry under a lease upon non-payment of rent, and no payment of rent be made for [twenty] years, during which time he has not re-entered, he cannot re-enter afterwards and maintain an ejectment during the lease, although, as we have seen, his right to recover the possession at the end of the lease will not be affected by the mere non-payment of rent."

In a footnote he adds:

> "One learned judge thought this a startling state of things if such were the law: *Doe d. Mannion* v. *Bingham* (1). In this case, according to ALDERSON, B., the judges in fact controverted *Doe d. Davy* v. *Oxenham* (4), though they are reported to have stated otherwise."

Other English text writers have ignored or rejected the authority of that case. I see even in LORD ST. LEONARD'S citation of the case some indication of doubt. On the whole, for the reasons I have given, I think I ought to disregard the authority of *Mannion's Case* (1), by which in any event I am not bound. I decide in this case that the plaintiff is entitled to recover in ejectment notwithstanding that the first breach of the covenant to pay rent was more than twelve years before the writ. His pleadings leave him open to elect to rely on any such breach, that is, the last non-payment before writ or any previous non-payment up to twelve years before writ.

This conclusion is still subject to the second point taken by counsel for the defendant Mrs. Cresswell, namely, that she, having tendered before the action and paid into court in the action six years' arrears of rent, has paid all arrears of rent legally due, and hence, by reason of s. 212 of the Common Law Procedure Act, 1852, the claim to possession must fail. If that contention is erroneous because the tender and payment is insufficient, it must follow that the claim in ejectment succeeds, but she will be entitled after judgment to relief if minded so to apply under s. 46 of the Supreme Court of Judicature Act, 1925, on certain terms, which will include payment of all arrears legally due as under s. 212 of the Act of 1852. The question is what all the arrears amount to. The plaintiff contends they must be the full arrears recoverable against the defendant Mr. Richardson instead of the six years tendered. Whether the plaintiff is limited to six years' arrears or the actual arrears, which are less than twenty years, depends on whether the defendant is justified in her contention that the case is governed by s. 42 of the Real Property Limitation Act, 1833, and not by s. 3 of the Civil Procedure Act, 1833. The former Act fixes a period of six years, the latter of twenty years. The material words of the former are:

> "No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent . . . or any damages in respect of such arrears of rent or interest shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due."

The material words of the latter are:

> "all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty . . . shall be commenced and sued within twenty years after the cause of such actions or suits but not after."

It is well settled that these two Acts, which were passed within three weeks of each other, though the latter came into operation before the former, have to be read together to the extent and with the results stated by Lord Cottenham, L.C., in *Hunter* v. *Nackolds* (9) (1 Mac. & G. at p. 652):

> "In some of the cases which have arisen under these Acts, the courts have treated this provision of the second Act as an exception out of the enactment of the former: the conjoined enactments would in that case be, that no more than six years' arrears of rent or interest in respect of any sum charged upon or payable out of any land or rent shall be recovered by any distress, action, or suit, other than and except in actions upon covenant or debt upon specialty, in which cases the limitation shall be twenty years. This appears to me to be the only mode of reconciling the two enactments, and to have been the intention of the legislature."

The claim in that suit was for arrears of an annuity charged on lands, and it was held that not more than six years' arrears were recoverable, even though the annuity was also secured by a formal covenant, which, however, was not sued on. On the other hand, in *Darley* v. *Tennant* (10), in a personal action to recover arrears of rent or royalty under personal covenants, the case was held to come under the Civil Procedure Act, 1833, so that the period was twenty years. When, however, the claim is not on an indenture or specialty, the Civil Procedure Act, 1833, does not apply, but the Real Property Limitation Act, 1833, does, as in *Archbold* v. *Scully* (2), where equitable rights were in question. The Irish case of *Donegan* v. *Neill* (11) was a simple claim for rent under an indenture of demise, and it was held that the period of limitation was twenty years and not six.

Counsel for the defendant Mrs. Cresswell contends that the present case is not an action on the covenant to pay rent in the indenture of lease, and, hence, the period of six years under the Real Property Limitation Act, 1833, s. 42, must apply, because the proceeding is one to recover arrears of rent charged on or payable out of land, and is not an action of debt for rent on an indenture of demise. In my judgment, the true position here is not exhausted by either formula. So far as the defendant Mr. Richardson is concerned, the action is an action of debt on his covenant to pay the rent under the indenture of demise, and he, if he had been served, would not have relied on any period of limitation except twenty years under the Civil Procedure Act, 1833, s. 3, and that would not have helped him because the arrears fall within the period of twenty years. So far as the defendant Mrs. Cresswell is personally liable for rent, her personal liability is for less than six years' arrears—that is, from 1924. But her position depends on other considerations, and I do not see how she either need, or can, be entitled to invoke the six years' period of limitation. Her claim is that she has tendered, and as a condition of relief paid in all arrears of rent under s. 212 of the Common Law Procedure Act, 1852, but that condition does not mean, I think, arrears due from her personally, nor is she sued for such arrears, but it means all arrears due from the covenantor under the lease—that is, the defendant Mr. Richardson—who is liable for a personal action on his covenant. Counsel claims that here there is no question of the personal covenant to pay rent, but the rent in question is that payable out of the land and as a charge on the land, under the redendum in the lease, so as to fall within the distinction pointed out in the words I have quoted by LORD COTTENHAM. I think this is a fallacy. The defendant Mrs. Cresswell is only concerned in the ascertainment of the arrears of rent legally claimable in order that she may obtain relief against the forfeiture by paying the amount of all arrears legally claimable, and that can only be tested by ascertaining what could be recovered in a personal action for rent against the covenantor, the defendant Mr. Richardson. In such an action the limitation under the Real Property Limitation Act, 1833, s. 42, would not be material. One analogy may be found in the judgment of BYRNE, J., in *Dingle* v. *Coppen* (12), where it was held in a redemption action that the party redeeming must pay all arrears of rent and could not avail himself of the six years' limitation.

In my judgment, the defendant Mrs. Cresswell fails on this point also, and has not tendered and paid into court all arrears of rent so as to avoid the forfeiture, but if she hereafter is desirous to be relieved against the order in ejectment she must (inter alia) satisfy all arrears of rent recoverable under the covenant against the original covenantor.

Judgment for the plaintiff.

Solicitors: *Billinghurst, Wood & Pope*; *Corsellis & Berney.*

[*Reported by* R. A. YULE, ESQ., *Barrister-at-Law.*]

WILLIAM LEITCH & CO., LTD. *v.* LEYDON

[HOUSE OF LORDS (Lord Hailsham, Lord Dunedin, Lord Buckmaster, Lord Blanesburgh and Lord Warrington), October 20, 21, November 24, 1930]

[Reported [1931] A.C. 90; 100 L.J.P.C. 10; 144 L.T. 218; 47 T.L.R. 81; 74 Sol. Jo. 836]

Sale of Goods—Goods placed by seller in buyer's receptacle—Receptacle belonging to another trader—Ownership thereof retained by him—Liability of seller respecting use of receptacle.

The appellants were manufacturers of aerated waters; the respondent was a grocer who supplied customers with aerated water which he drew from a soda fountain and placed in a receptacle brought by the customer. The appellants notified their wholesale customers that bottles containing their aerated water remained their property, and when empty must be returned to them. It was assumed for the purposes of the case that the consumers were in lawful possession of the bottles. Certain consumers brought to the respondent bottles of the appellants and requested that he fill them with aerated water from the soda fountain. The respondent made no inquiry of his customers as to their ownership of the bottles provided, but filled bottles which were produced to him without examining them. It was conceded that there was no contractual relationship between the appellants and the respondent. By their note of suspension and interdict the appellants sought to interdict the respondent (i) from receiving from his customers bottles belonging to the appellants and embossed with their name for the purpose of filling the same with soda water, lemonade, &c., drawn from a Vantas or other soda water fountain containing soda water, lemonade, &c., not of the appellants' manufacture; and (ii) from filling with soda water, lemonade, &c., drawn from a Vantas or other soda water fountain bottles belonging to the appellants and embossed with their names for the purpose of selling the contents thereof when sold from his shop or other premises. The respondent pleaded that, assuming that the property in the bottles remained in the appellants, the respondent before filling the bottles owed no duty to the appellants to examine them or inquire into their history.

Held: inasmuch as there was no contractual relationship between the appellants and the respondent, there was no duty cast upon the respondent to examine the bottles tendered to him in the course of his trade in order to be sure that they were not bottles belonging to the appellants and being used for purposes to which the appellants objected; the respondent was not asserting a right of property in, or damaging, any bottle; and, therefore, the appellants' claim failed.

Per LORD DUNEDIN: It is a novelty to me to say that A can be compelled by law to do or refrain from doing something lawful in itself, and that to his own prejudice, in order to help B to enforce his contract with C.

Notes. Cases referred to:

(1) *Manders* v. *Williams* (1849), 4 Exch. 339; 18 L.J.Ex. 437; 13 L.T.O.S. 325; 154 E.R. 1242; 39 Digest 508, *1258*.

(2) *Barlow & Co.* v. *Hanslip*, [1926] N.I. 113.

(3) *Fowler* v. *Hollins* (1872), L.R. 7 Q.B. 616; 41 L.J.Q.B. 277; 27 L.T. 168, Ex. Ch.; affirmed sub nom. *Hollins* v. *Fowler* (1875), L.R. 7 H.L. 757; 44 L.J.Q.B. 169; 33 L.T. 73, H.L.; 43 Digest 471, *102*.

(4) *Stephens* v. *Elwall* (1815), 4 M. & S. 259; 105 E.R. 830; 43 Digest 469, *94*.

(5) *Garland* v. *Carlisle* (1837), 4 Cl. & Fin. 693; 4 Bing.N.C. 7; 11 Bli.N.S. 421; 3 M. & W. 152; 4 Scott, 587; 7 E.R. 263, H.L.; 43 Digest 476, *142*.

Appeals from interlocutors of the First Division of the Court of Session in actions of suspension and interdict which were heard together. The facts which are sufficiently summarised in the headnote are fully set out in the opinion of LORD HAILSHAM. The Lord Ordinary (LORD PITMAN) in each case sustained the plea in law for the respondent and assoilzied him from the prayer of the note of suspension and interdict and the First Division of the Court of Session (the Lord President, LORD SANDS and LORD MORISON, LORD BLACKBURN dissenting) adhered to his interlocutor. They held that the use made by the grocer of the bottles was an independent use made for the purposes of his own trade, and not a use derivative from that made of them by his customers. The appellants in each action appealed.

James Keith, K.C., and *J. L. Clyde* (both of the Scottish Bar) for the appellants in both cases.

Coudee Sanderman, K.C. (D.F.), *Sir Leslie Scott, K.C.*, and *J. G. McIntyre* (of the Scottish Bar) for the respondent in both cases.

The House took time for consideration.

Nov. 24. The following opinions were read.

LORD HAILSHAM (read by LORD THANKERTON).—The appellants are manufacturers of aerated waters and members of an association called the Edinburgh and District Aerated Water Manufacturers and Beer Bottlers' Defence Association. The respondent is a grocer carrying on business in Edinburgh. By their note of suspension and interdict dated Jan. 6, 1928, the appellants seek to interdict the respondent: (i) from receiving or accepting from his customers bottles belonging to the appellants and embossed, moulded, engraved or otherwise impressed or marked with the appellants' name for the purpose of filling the same with soda water, lemonade, kola, raspberry or other aerated water or beverage sold to his said customers and drawn from or made by means of or with the aid of a Vantas soda fountain or other soda water fountain or similar device containing or producing or aiding in the production of soda water, lemonade, kola, raspberry or other aerated water or beverage not of the appellants' manufacture; (ii) from filling with soda water, lemonade, kola, raspberry or other aerated water or beverage drawn from or made by means of or with the aid of a Vantas soda fountain or other soda water fountain or similar device as aforesaid bottles belonging to the appellants and embossed, moulded, engraved or otherwise impressed or marked with the appellants' name for the purpose of selling the contents thereof when sold from his said shop or other premises. On April 12, 1929, the Lord Ordinary pronounced an interlocutor in these terms:

> "The Lord Ordinary, having considered the case, sustains the fifth plea in law for the respondent and assoilzies him from the power of the note of suspension and interdict by the complainers and decerns."

On Nov. 15, 1929, the First Division of the Court of Session adhered to the said interlocutor and refused the reclaiming note of the appellants. The fifth plea in law referred to in the interlocutor was in the following terms:

> "Assuming that the property in the said bottles remained in the complainers the respondent before filling said bottles owed no duty to the complainers to examine them or inquire into their history and should be assoilzied."

The facts which give rise to the present appeal are as follows. The appellants carry on a considerable business in Edinburgh as manufacturers of aerated waters. In the manufacture of aerated waters the cost of the bottles or other containers in which the aerated waters are supplied substantially exceeds the value of the aerated waters themselves; and the appellants and other manufacturers are anxious, therefore, to secure that, as far as possible, their bottles should return to them after the contents have been consumed. The bottles used by the appellants contain their name embossed or moulded into the glass and are closed by stoppers which are covered by a strip label bearing the appellants' name and also in some cases statements that "this bottle is not sold with its contents. It remains our exclusive property"; in others the words "Replace stopper," and in others various combinations of these or similar statements. In or about the year 1907 the appellants and those associated with them in the Edinburgh and District Aerated Water Manufacturers and Beer Bottlers' Defence Association adopted a scheme under which their customers were required to make a deposit of ½d. (later increased to 1d.) on each bottle and of 6d. on each syphon; and at the same time they set up a bottle exchange to which any bottle which any member of the association received belonging to any other member was returned and which acted as a clearing house between the different members of the association for bottles.

After this scheme had been adopted the course of business between the appellants and their customers was as follows. In the case of credit customers when goods were delivered invoices were sent out which contained the following notice:

> "All syphons, bottles, stoppers and boxes bearing our name remain our exclusive property. They are provided for the purposes of our own trade only and must not otherwise be used, unduly detained, damaged or destroyed. To ensure their return a deposit of 6s. per doz. will be made on all syphons and 1s. per dozen on all bottles sent out. Our syphons and bottles are not sold with their contents and must be returned when empty whereupon the deposit will be refunded."

A notice in the same terms appeared on the monthly accounts rendered to customers and in these accounts the customer was debited with the prescribed deposit on all goods supplied and was credited with the 6s. per dozen on syphons and 1s. per dozen on bottles returned empty whether the syphons and bottles were the property of the appellants or of any other manufacturer. In the case of sales for cash, the business was mainly done through vanmen who called on the customers and delivered the goods for cash. In the case of these cash transactions the vanmen were instructed to inform the customers that the bottles remained the property of the vendors; he was to collect a deposit on syphons and bottles and was to give credit for any empty syphons or bottles returned to him. Three such vanmen were called who stated that it was their practice to give notice to the customers in accordance with these instructions. The appellants did not deal directly with the public. When the appellants' customers re-sold to the public it appears to have been their practice in some cases not to exact a deposit but to trust to the customers to return the bottles or syphons and in other cases to ask a deposit of 1d. on bottles and 6d. on syphons which was returned to the customer if and when the empty bottles and syphons were handed back. In practice the great bulk of the appellants' bottles did return to them sooner or later directly from customers or indirectly through the bottle exchange; the appellants proved that on an average about 1·62 per cent. of their bottles failed to return, representing about 22,000 bottles a year.

The appellants' association seemed to have been at considerable pains to make their method of business with regard to bottles and syphons widely known to the public; notices were supplied to their customers with a request that they should be displayed in their shops; advertisements were inserted in the newspapers and exhibited in tramcars and elsewhere. The amount of the deposit was not nearly sufficient to cover the value of the bottle or syphon, but in practice it does not appear that any steps were taken by the appellants to compel delivery of any bottles or syphons not returned or to assert any claim for the value of such bottles or syphons beyond the amount of the deposit.

The respondent dealt in aerated waters which he obtained from the firm of Dunbar & Co. who were members of the Edinburgh and District Aerated Water Manufacturers and Beer Bottlers' Defence Association. In addition to these bottled waters the respondent installed in his shop a Vantas soda fountain about five years ago. The Vantas soda fountain was obtained from a company known as Sodastream, Ltd. The object of the installation of the Vantas soda fountain was to supply aerated waters in small quantities to customers bringing their own receptacles. The method of business was for the customer to come with a bottle or jug or any other receptacle and to ask for whatever kind of aerated water he desired. The shopkeeper then put into the receptacle the proper quantity of flavouring matter and added the proper quantity of aerated water from the fountain and returned the receptacle full to the customer; in some cases the contents were consumed on the premises and in others they were taken away in the customer's bottle or jug. In the respondent's case about half the receptacles brought by customers were jugs or similar open vessels and about half were bottles which could be closed up. The respondent made no inquiry of his customers as to their ownership of the receptacle provided and made no examination of the receptacle beyond seeing that it was sufficiently clean to receive the drink. On July 29, 1927, the Edinburgh and District Aerated Water Manufacturers and Beer Bottlers Defence Association addressed to the respondent a letter in the following terms:

> "Dear Sir,—It has been reported to me that you have recently been filling aerated water bottles belonging to members of this association with beverages from the soda fountain installed in your shop. This is an infringement of the right of property of the members in their bottles. Members do not part with the property in their bottles and no one other than the member whose name is on the bottle has a right to use it. I enclose a list of members' names and enclose hereto a form of undertaking which you might write out on your own paper and return to me. Otherwise the association will have to take further steps to ensure the adequate protection of their members' property."

With this letter was enclosed a list of the names and addresses of the members of the association, including the appellants. The respondent made no reply to the letter. For some little time after its receipt he seems to have examined the bottles produced to him by his customers and to have refused to fill those bearing the names of members of the association. Later on, however, he received from Sodastream, Ltd., a letter which stated inter alia:

> "There is no law to prevent your drawing Vantas drinks into any bottles handed to you for this purpose and our advice to you is to take no notice of threatening letters. If, as a result of following this advice, you are put to the expense of defending an action at law, we will bear the cost."

After receipt of this letter the respondent seems to have filled bottles which were produced to him without examining them or taking any steps to ascertain the names upon them; and evidence was adduced at the trial that persons sent by the bottle exchange of the appellants' association with bottles belonging either to the appellants or to Dunbar & Co. were able to get those bottles filled on five or six occasions by the respondent. It was not suggested that these emissaries ever called the attention of the respondent to the names on the bottles. There was some evidence that on one occasion in September, 1928, the person serving the drink noticed the appellants' name on the bottle, but this statement was not admitted by the respondent. It was admitted by the respondent, in evidence, that if the bottle was clean it was possible by examination to ascertain whether it bore the name of the appellants or of some other manufacturers. The evidence on this point is in these terms:

> Q.: It was quite easy for your assistants to see if the bottles belonged to Leitch. A.: Oh yes, we were not very particular.—Q.: Or to any other aerated water manufacturer. A.: Yes.—Q.: It would be seen at once when you took it up in your hand. A.: Well, you never paid any attention to it as long as the bottle was clean.—Q.: It was easily seen that it was Leitch's bottle. A.: No, not unless you looked.—Q.: One glance would tell you. A.: Yes, if you paid attention to it, it would.—Q.: And if you were handling it, would not you see it when you were filling it with soda? A.: No, the bottle is below.—Q.: When you took it from the counter? A.: Yes, you may notice it.—Q.: In filling them have you noticed the names on the bottles which you were filling? A.: Well, I have answered that already. Yes, occasionally, if you will look for it you will see the name on the bottle surely.

In this state of facts the appellants contend that there was a duty upon the respondent to refrain from using or assisting his customers to use any bottles that belonged to the appellants after receipt of the letter of July 29, 1927. Counsel for the appellants conceded that unless they could prove that all bottles having the appellants' name embossed upon them were the property of the appellants their action must fail, but they claimed that they had established this fact, and they contended that, if that fact were established, they had a right to insist that the respondent should examine the bottles tendered to him for filling and should refrain from filling them if they bore the appellants' name. In my judgment, there is no foundation in law for this contention. It is conceded that there is no contractual relationship between the appellants and the respondent, and the duty must arise, if at all, from the fact that the bottles are the property of the appellants. I cannot see that the fact that these bottles belonged to the appellants gives them any right to insist on persons with whom they are in no contractual relationship examining the bottles tendered to them in the course of their trade in order to be sure that they are not bottles belonging to the appellants and being used for purposes to which the appellants object. Counsel for the appellants conceded that unless he could establish that all bottles bearing their name were the property of the appellants his claim must fail, and that he could not impose upon the respondent the duty of investigation to find out whether any particular bottle belonged to the appellants or not; but he contended that there was a duty to examine the bottles and he sought to justify that claim by saying that it was very easy to make the examination. I do not understand on what legal foundation this distinction rests. Unless the appellants can establish that there is a duty on the respondent to ascertain which bottles are the appellants' property it seems to me that their claim for an injunction must fail: if there is such a duty, then I do not see that it could make any difference in law whether the ascertainment is easy or difficult. In my judgment, no such duty can be shown to exist, and, therefore, the action must fail. This is the ground on which the dismissal of the action is based in the court of first instance; and it is sufficient to dispose of the case.

The Lord Ordinary and some at least of the judges in the First Division seem to have thought that the evidence did not establish that all bottles bearing the appellants' name must remain their property. The Lord Ordinary took the view that the evidence of the vanmen was not inconsistent with some, at least, of the appellants' customers having purchased the bottles with their contents from the vanmen who had ostensible authority to effect such a sale. During the course of the argument before your Lordships' House other possible means by which the property might have passed from the appellants in certain cases were suggested. I am not disposed to dissent from the courts below on their view of the evidence, but it seems to me unnecessary for the purposes of the decision of this case. Interesting and difficult questions are also raised in the argument whether what the respondent did amounted to any user of the bottles by himself, or whether he was merely assisting customers to use them; and whether in the latter case he could be restrained from assisting his customers to make use of bottles which were in their lawful possession, for a purpose which was not wrongful or unlawful on the part of the customers unless they had notice that the appellants objected to it. These questions again did not seem to me necessary for the determination of the case on the view which I have formed; and I think it better, therefore, to refrain from any discussion of them, especially in view of the fact that your Lordships do not think it necessary to hear counsel for the respondent. For the reason which I have given I think that the interlocutors pronounced were correct, and that this appeal should be dismissed with costs, and move your Lordships accordingly.

LORD DUNEDIN.—I concur. What is that which is demanded from the respondent if the interdict sought was granted? He would be obliged when a customer called and, proffering a bottle, requested it to be filled from the Vantas soda fountain to inspect the bottle; if he found an embossed name on it, to certiorate himself whether the name was not the name of one of the numerous members of the Association of Aerated Water Manufacturers; and, if he found it was, then to refuse to supply the Vantas water demanded, a refusal which would probably lose him his customer. Such a demand can only be granted if there is a clear case of infringement of a right of the appellants by the respondent. Now, the person who presents the bottle to be filled is in lawful possession of the bottle; that possession is not transferred to the respondent. The person in lawful possession requests the bottle to be filled and it is filled; the filling is all that the respondent does. It is quite true that the person presenting the bottle may be, and that to the respondent's knowledge, under contractual obligation to the appellants either as to its return or its use, but to that contract the respondent is no party and it is a novelty to me to say that A can be compelled by law to do or refrain from doing something lawful in itself, and that to his own prejudice, in order to help B to enforce his contract with C. No case of that sort was produced. It would be a perfectly different matter if the respondent in any way asserted property in the bottle or acted in such a way that it could be said that he was passing off his Vantas aerated water as the aerated water of the appellants. He is doing nothing of the sort, nor is he damaging an article which he knows to be not his own. He is only complying with the request of the person who is in lawful possession of the movable to give something which that person uses in a way connected with that movable. The appellants can sue his customer for breach of contract and either get such damages as he can qualify or get an interdict against his breaking his contract, but he has no contractual relation with the respondent on which he can sue, and he can, in my opinion, qualify no culpa on his part. I think the Court of Session was right in refusing the interdict.

I have perused the opinion of my noble and learned friend LORD BLANESBURGH which will shortly be read to your Lordships, and I find it necessary to say this. Although I think it is quite true that the general considerations upon which this case falls to be determined are the same in Scottish and English law, it is quite a different thing to say that Scottish and English law are so much the same that one can quote cases, as quoted by my noble and learned friend, the older authorities on trover and conversion, and make them Scottish authorities. The law of England as to trover and conversion is, in many cases, a very technical law, and it is largely put aside now in modern times, but those older authorities go very technically upon English distinctions. Trespass as to chattels in a Scottish lawyer's mouth is a perfectly unmeaning phrase, and, accordingly, I cannot think that the authorities quoted by my noble and learned friend have anything to do in a Scottish case with the question of sustaining the fifth plea in law.

LORD BUCKMASTER.—The appellants are manufacturers of aerated waters, which they sell to traders and others in bottles and syphons, the terms of the sale being that the property in the bottles and syphons remains with the appellants, to whom their immediate customers are bound to restore them. In respect of the bottles with which alone we are concerned, a penny, part of the purchase price, is returned upon their receipt. As between the appellants and their immediate customers, therefore, the position is quite plain. But the customers are, and must be, to the knowledge of the appellants, in the habit of re-selling the soda water in bottles to anyone who seeks to buy, and the bottles may in such cases be taken away. It is, undoubtedly, the fact that, if any purchaser takes away a bottle, he has to pay the trader 1d., which is returned if the bottle is sent back, but the evidence is clear, and in accordance with common experience, that such ultimate purchaser becomes apparently the absolute owner of the bottle, and can put it to any of the uses mentioned by LORD SANDS, or to any others which ingenuity may suggest. As between the appellants and such a purchaser, the appellants say that they still remain the owners of the bottle. This I will assume without deciding it. Letting that matter pass, and coming to the facts of this case, we find that in certain cases the purchasers of these bottles, having emptied them of their original contents, seek to have them re-filled, which they can do by a simple process at the shop of anyone who possesses a machine similar to that possessed by the respondent. The appellants seek to restrain the respondent from using his machine for any such purpose. They assert that in the hands of the ultimate purchaser there is no right whatever to use the bottle for any purpose at all. He may have taken it away on a journey, not knowing to whom it should be returned, and be unaware of the elaborate clearing house in the vortex of which nearly all the empty bottles ultimately find their way, but still the bottle is not his, and even while in his lawful custody cannot, when once empty, ever be re-filled. Assuming, however, that the appellants can claim from any purchaser of the bottle the restoration of the bottle, and forbid him using it for any purpose at all, it still does not follow that they are entitled to obtain the injunction they seek against the respondent.

The respondent does no more than fill whatever receptacle is offered to him. He is wholly unaffected by any contract made between the appellants and their customers. Even if the purchaser is doing an unlawful act in bringing the bottle to be filled, the appellants cannot cast upon the respondent the duty of investigating every vessel for the purpose of seeing whether it is one of the appellants' bottles. It is true that the names are embossed upon the bottles, and the ownership stated on some but not all of the labels, but the labels may be destroyed, as they probably would be, so that if the appellants are right, the respondent is bound to inspect and to compel every one of his assistants to inspect each bottle brought, before he fills it, for the purpose of seeing, in the words of the interdict the appellants seek, whether it is "embossed moulded engraved or otherwise impressed or marked" with the appellants' name. No authority has been quoted to show that any such duty can be cast upon a stranger to the original contract, and, indeed, an injunc-

A tion, in order to be effective, would, in the result, be an injunction compelling the respondent to examine the bottle because there are other bottles in numbers which do not belong to the appellants, though they may belong to other people similarly circumstanced, and unless such a duty were established by precedent, or reasonably to be inferred from well-known and accepted obligations, I should be unwilling to create it anew. For this reason, therefore, I think that the appeal must fail, but B I should like to add that had I reached a different conclusion upon the facts as stated there would still remain to my mind the difficult question whether, when the appellants parted with the possession of these bottles on terms which they must be assumed to know would not be made binding on the ultimate purchaser, and clothed their customer with the full apparent power of making a good title to the bottle, they could afterwards seek assistance by injunction for an alleged wrong C for the responsibility of which their own conduct was not entirely free.

LORD BLANESBURGH (read by LORD TOMLIN).—I concur in the view that this appeal may properly be dismissed without asking any assistance from the respondent's counsel. But that concurrence I give for a special reason which I will explain later. If it had seemed to me to involve the acceptance on my part D of the respondent's fifth plea in law, as interpreted by the Lord Ordinary, I should, I fear, have felt myself bound in hoc statu to withhold it.

It is, I think, unfortunate that in no court has reference been made to a judgment of PARKE, B., which, delivered eighty-five years ago, illuminates to-day many dark places in this case. I have come upon it in the course of some examination of the authorities made since the close of the argument and I take leave to refer E to it—English authority though it be—because I have not noted in the proceedings in the Court of Session that any distinction is taken there between the principles of Scottish and of English law applicable to this case. Authorities in both countries are quoted indifferently. But I do not put PARKE, B.'s judgment forward as an authority which even provisionally could be said to be decisive of this appeal in any of its aspects. The facts in many respects are different. The wrongful act F of the defendant there, for instance, amounted to a conversion, while the alleged wrongful acts of the respondents here probably at the highest amounted to no more than a trespass to goods. The decision is relevant now because each tort is based upon the proposition that a man touches the property of others at his peril, and it is for that reason that the decision, and, even more, the grounds of it are so G instructive in the present case. They must, as it seems to me, be most seriously weighed before any approval of the fifth plea in law can be expressed.

PARKE, B.'s case is *Manders* v. *Williams* (1). It has found its way into the textbooks and into subsequent judicial decisions. It was an action for trover for certain casks containing porter which had been consigned by the plaintiffs, brewers in Dublin, to one John David, of Laugharne, in Wales, under an invoice which H contained the following clause:

> "The empty casks to be returned to Dublin at his (David's) expense and risk within six months from date hereof, or paid for at invoice price, at the option of the shippers."

The invoice then stated the price of the porter and there was this note at the foot. I "Value of the barrels 7s. 6d. each." The defendant, who was the sheriff of Carmarthenshire, had seized and sold under a fi. fa. against David, 300 of the casks lying empty in his cellar. The question was whether the plaintiffs had sufficient possession to maintain trover against the sheriff. It will be noticed that the terms of the invoice there were much less express than are those of the invoices with which we are here concerned. But the learned judges took a view of the document there in question which in essentials brings it into correspondence with the express provisions of the appellants' invoices. The court's interpretation of the invoice is to be found in the following observations of ALDERSON, B., and

PLATT, B., in the course of the argument and in the judgment of PARKE, B., at its close. ALDERSON, B., said:

> "There is no event in which David could say to the plaintiffs 'I will have the casks.' The meaning of the contract is, that the moment the casks are empty they belong to the shippers of the porter, but if David did not return them within six months, they were to have the option of treating him as a purchaser."

"The true construction of the contract," said PLATT, B., "is, that the brewers sell the porter and lend the casks until it is consumed." But the position is most clearly exposed in the judgment of the court in the course of which PARKE, B., says (4 Exch. at p. 343):

> "The contract must be construed with reference to the course of trading between the parties. . . . The object was, to put the vendee in possession of the porter, and he was to have the casks for keeping the porter, until he had an opportunity of disposing of it. Then what was his situation as soon as the porter was emptied from the casks? Was he more than a mere bailee during pleasure, the plaintiffs having a right to say, 'You have no longer any claim to the possession of the casks; that was determined when they were emptied, and we insist upon their being delivered to us'? That being so, the plaintiffs are entitled to maintain trover against a stranger who seizes the casks, and the sheriff is in that position. The true construction of the contract is to give David an interest only until the casks were empty. . . . The interest of the vendee was never meant to extend beyond the right to keep the casks until the porter was consumed. Possibly, he might within the six months have transferred the porter in the casks to a sub-vendee, but, as soon as the casks were emptied, the right to them reverted to the vendors. According to the true construction of this contract, I am satisfied that it was never intended that David should have the casks for any other purpose than keeping the porter. Indeed, I do not see what advantage there could be in his right of possession continuing after the casks were empty; for, during the residue of the six months, he could neither let them to anyone else nor make any further use of them himself, without being a wrongdoer, and at the end of the six months he was bound to return them. So soon as the casks were empty, the right of property and the right of possession reverted to the plaintiffs, and David was in the situation of a mere bailee during pleasure."

The fifth plea in law assumes the property in the appellants' invoiced bottles to remain in them. This judgment, I venture to think, shows that to be a very necessary assumption. It shows that in such cases as the present the manufacturers' customers may be no more than mere bailees of the invoiced bottles entitled to retain them until they are empty, but precluded, save as wrongdoers, from making any further use of them while in their custody. It shows also how the customer may be relegated to that position by an invoice much less express than the appellants' invoices here. It shows further that those described as sub-vendees of the customer—the ultimate consumers of the appellants' aerated waters here—hold the chattels under the same restricted title as did the customer whatever may have been their arrangement with him. But this statement, I think, must be subject to this exception—that the "consumer" having made no contract with the manufacturers cannot be placed, as was their original customer, under a positive obligation to return the manufacturers' bottles to them when empty.* No one, I take it, is bound save by contract, to take a chattel to the owner of it. His obligation, in that behalf, is not to prevent the owner getting it when he comes for it. There was, it will be noted, no deposit in that case. But the appellants contend that *Barlow & Co.* v. *Hanslip* (2) rightly shows that the situation in law is not thereby affected in principle, although tender of 1d. may have to accompany each demand.

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* But see *Donoghue* (*or McAlister*) v. *Stevenson*, [1932] All E.R.Rep. 1.

The argument of the appellants, fortified by *Manders* v. *Williams* (1), may, I think, be summarised as follows. I state it only as an argument without indicating upon it any opinion of my own. The respondent here in relation to bottles in respect of which the appellants' ownership is assumed has been guilty of a trespass. The wrong to the appellants in relation to that trespass is constituted whether or not actual damage has resulted therefrom either to the chattel or to themselves: see Pollock on Torts (13th Edn.), p. 364. But a trespass committed by the respondent, "not acting," in the words of the Lord President, "on behalf of his customers but for the purposes of his own trade," and instigated by rival manufacturers who have assumed the burden of his defence will be strictly regarded by the court, and while not, if isolated, casual, or unpremeditated, a fit subject of interdict, readily becomes one if it is committed by the wrongdoer under an alleged claim of right, whether the bottles are or whether he knows them to be the property of the appellants or not. The gist of the case against the respondent is, it is contended, in the words of Cleasby, B. (*Fowler* v. *Hollins* (3), L.R. 7 Q.B. at p. 639): "That persons deal with the property in chattels or exercise acts of ownership over them at their peril"; and such acts are as wrongful if exercised on request or by direction of someone other than the owner, as if exercised on the respondents' own behalf: see per Brett, J. (L.R. 7 H.L. at p. 784). The trespasser is not excused by inquiry into the complainant's title except to the extent that ignorance, after inquiry, may be evidence that the act was inadvertent. But knowledge of the pursuer's title, while it may be an aggravation of the trespass, is no constituent part of it. In *Stephens* v. *Elwall* (4) Lord Ellenborough, C.J., says (4 M. & S. at p. 261):

> "The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but nevertheless his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it."

Of that case, which was finally approved of by this House in *Hollins* v. *Fowler* (3), Blackburn, J., says (L.R. 7 H.L. at p. 769):

> "No case harder than that of the defendant can well be imagined, unless, perhaps, that of a sheriff who seized the goods which, in consequence of a secret act of bankruptcy, had become the goods of the assignees. He was liable to them in trover (see *Garland* v. *Carlisle* (5)). . . . Those who agree with the opinion expressed by the Lord Chief Baron that it is unreasonable and unjust that [persons in the position of the defendants] should be bound, at their peril, to inquire into the title of the sellers with whom they deal, would support an alteration of the law to that effect. Many, having regard to the interest of the true owners of goods, would object to it.'

The law, such is the appellants' contention, is the same in all these respects where a defender has wrongfully trespassed upon goods as where he has wrongfully converted them; while, with reference to Blackburn, J.'s last observation, there might well be serious objection on the part of the public as a whole to any alteration in the law above stated which, as it stands, and so far as it is effective, enables the supply of soda water to be broadcast throughout the country at minima of expense in respect of overhead charges to the manufacturer and of corresponding cost to the consumer. I do not accept these contentions, because your Lordships have not heard the respondent. They may have less force in Scotland than in England. They may finally be found, in some other case, perhaps, to have no force at all. But while I do not accept them, neither do I reject them. They call for an answer and until that is forthcoming my mind remains open. Therefore, I cannot for myself accept, as established in hoc statu, the respondent's fifth plea in law. But, nevertheless, I am of opinion with the rest of your Lordships that this appeal should be dismissed, and for the reason that the appellants have not, in my judgment, established as against the respondent any actionable wrong whatever. A There has been no case of trespass upon their goods proved against him. It is true that the property in the empty bottles presented to and filled by the respondent was indubitably in the appellants, but it is equally true that the requests to fill them made to the respondent were made on the authority and instructions of the appellants and with the desire that they should be acceded to. Of what trespass then it may be asked was the respondent guilty when he acceded so readily to all B the proved requests? In my judgment, he was, as it happened, guilty of no trespass whatever. Volenti non fit injuria. It may be that in view of the nature of the wrong complained of in cases like this, it can never be possible to prove that it has been committed by means of anything in the nature of a trap order. It suffices, however, to say that the appellants in this case have not, as I think, supplied the necessary proof. For that reason only I concur in the motion made C by the noble Viscount on the Woolsack.

LORD WARRINGTON.—This is an appeal by the pursuers in the action from an interlocutor dated Nov. 15, 1929, of the First Division of the Court of Session whereby their Lordships (LORD BLACKBURN dissenting) dismissed an appeal from an interlocutor dated April 17, 1929, pronounced by the Lord Ordinary, LORD D PITMAN, whereby an interdict claimed by the pursuers was in effect refused.

The pursuers are manufacturers of aerated waters, having a factory in Edinburgh. Their waters are sold in bottles marked and embossed with their name and address and closed with a screw stopper also marked with their name, and in some cases bearing a paper label stating in effect that the bottle is their property. The appellants deal only with retailers who sell the waters to the public. They do not deal E direct with members of the public. The appellants carry on business with their own customers, the retail dealers, upon the terms that the property in the bottles themselves is not included in the sale, and they contend that when the bottles are empty they are entitled to recover them, not only from their own customers, but from any person into whose hands they may fall, and, further, to prevent them from being used for any purpose of which they do not approve. I say at once, F without going into detail on this part of the case, that, in my opinion, the appellants have established that in general at all events, though not universally as between themselves and their own customers, the bottles are not included in the sale so as to pass to the purchaser the property therein as distinct from the right of possession. That this latter right so long as the bottles contain the appellants' water at all events passes to the original purchasers is implicit in the nature of the G transaction. Further that these purchasers as retail dealers should be entitled to transfer their possession to members of the public is equally obvious, nor are these ultimate purchasers in any way bound by way of contract by obligations restrictive of the right of user undertaken by the immediate customers of the appellants.*

With these preliminary remarks I turn to the facts of this case. The respondent is a retail grocer carrying on business in Edinburgh. He deals in aerated waters, H but he is not a customer of the appellants. Besides selling to the public aerated waters of other makers in bottles he possesses a machine called a Vantas soda fountain, whereby he is enabled to make and supply to the public aerated waters drawn off from the machine into a jug, bottle, or other container produced by the member of the public asking to be so supplied. These persons sometimes tender bottles originally supplied by and bearing the names of the appellants. The respondent I insists on his right to fill such bottles at his customers' request. Whether the pursuers are entitled to an interdict preventing him from so doing is the question in this appeal. There is no question of passing off, or assisting others to pass off, aerated waters not manufactured by the appellants as their waters. The claim of the appellants rests on their alleged right, by virtue of the property which they say remains vested in them, to prevent any use by any one of the bottles if such use is not authorised by them.

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* But see *Donoghue (or McAlister)* v. *Stevenson,* [1932] All E.R.Rep. 1.

In the first place one has to consider the position of the member of the public who produces the bottle for filling by the respondent. He is in lawful possession of the bottle, and, in my opinion, he remains in such possession notwithstanding that for the purpose of filling he temporarily transfers the manual custody to the respondent. In this respect I agree with the view of LORD MORISON, founded on the statement of the law by LORD STAIR cited by the learned judge. But not only is he in lawful possession of the bottle. There must be many members of the public who know nothing of the terms on which the appellants do business with their own customers and who are entitled to believe that the possession of the bottle carries with it the ordinary incidents of property in a chattel. The mere fact that the appellants' name is on the bottle may well convey to the ordinary purchaser nothing more than the fact that the waters it originally contained were manufactured by the appellants. It would be impossible for the respondent to discriminate between such of his customers, if any, as may be affected by knowledge and such as are not, and, even if he were informed that the apparent property in a particular bottle conveys no right in the possessor of it to use the bottle for the particular purpose, I can see nothing in the circumstances to require him to enforce any such restriction by refusing to fill the bottle. The interdict asked for assumes that the bottles produced for filling belong to the appellants because they are embossed with their name. This assumption is, in my opinion, unfounded in law. If, on the other hand, it is insisted that all the circumstances which might affect the apparent ownership resulting from possession are to be inquired into, the proposed interdict would impose an intolerable hardship on the respondent. As to this it must be borne in mind that no attempt was made to prove any circumstance known to the respondent except the fact of the name being upon the bottles. It is true that he received the warning letter of July 29, 1927, but this was founded on the broad claim that members of the association by whose secretary the letter was issued, including the appellants, do not part with the property in their bottles, and that no one other than a member whose name is on the bottles has a right to use it. This claim ignores, what I think is the fact, that in very many cases the possession of the bottle would primâ facie confer on its actual possessor the right to use it for any purpose for which it is fitted. For these reasons I agree with the conclusion of the majority of the Lords of the First Division and in particular with the opinion of LORD MORISON. The result is that in my judgment this appeal fails and ought to be dismissed with costs.

Appeals dismissed.

Solicitors: *William Webb & Sons*, for *J. Miller Thomson & Co.*, W.S., Edinburgh; *Bailey*, *Shaw & Gillett*, for *Maclay*, *Murray & Spens*, writers, Glasgow, and *J. and J. Ross*, W.S., Edinburgh.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

GIMSON *v.* INLAND REVENUE COMMISSIONERS

[King's Bench Division (Rowlatt, J.), May 8, 9, 1930]

[Reported [1930] 2 K.B. 246; 99 L.J.K.B. 532; 143 L.T. 704;
15 Tax Cas. 595]

Surtax—Assessment—Dividend—Dividend paid out of income of company not chargeable to tax.

The taxpayer was a shareholder in a company which, for the year ended Oct. 31, 1926, paid him a dividend on his shares partly out of income of the company which by reason of the rules relating to the computation of taxable income under Sched. D to the Income Tax Act, 1918, had not been brought into assessment. The Commissioners of Inland Revenue contended that so far as the dividend was paid out of this income it attracted supertax in the taxpayer's hands.

Held: as the dividend was paid out of profits or gains not chargeable to tax on the company it was not income chargeable to supertax in the hands of the taxpayer as shareholder.

Notes. Supertax is now called surtax. Schedule D, Case III, of the Income Tax Act, 1918, has been replaced by s. 123 (1), s. 131 (1), (2), and s. 430 (1), (2), (3), (4) of the Income Tax Act, 1952; Case V by s. 132 (1), (2) (a) (b) (c), (3) (b), s. 429 (1), and Sched. 18, Part III, 2 (2) (a) (b); Case VI by s. 135; and r. 21 of the All Schedules (General) Rules under the Act of 1918 by s. 170 and s. 426 (3) of the Act of 1952. As to deduction of tax from dividends generally, see now s. 184 of the Act of 1952.

Distinguished: *Hamilton* v. *I.R. Comrs.*, [1931] 2 K.B. 495; *Neumann* v. *I.R. Comrs.*, [1934] All E.R.Rep. 398; *Benn* v. *I.R. Comrs.*, [1937] 3 All E.R. 852. Considered: *I.R. Comrs.* v. *Cull*, [1938] 1 All E.R. 467.

As to the taxation of dividends, see 20 Halsbury's Laws (3rd Edn.) 411 et seq. For Income Tax Act, 1952, see 31 Halsbury's Statutes (2nd Edn.).

Cases referred to:

(1) *Brown* v. *National Provident Institution, Ogston* v. *Provident Mutual Life Association*, [1921] 2 A.C. 222; 90 L.J.K.B. 1009; 125 L.T. 417; 37 T.L.R. 804; sub nom. *National Provident Institution* v. *Brown*, *Brown* v. *National Provident Institution*, *Provident Mutual Life Assurance Association* v. *Ogston*, *Ogston* v. *Provident Mutual Life Assurance Association*, 8 Tax Cas. 57, H.L.; 28 Digest 62, *316*.

(2) *Whelan* v. *Henning*, [1926] A.C. 293; 134 L.T. 513; 42 T.L.R. 259, H.L.; 28 Digest 81, *450*.

(3) *I.R. Comrs.* v. *Blott*, *I.R. Comrs.* v. *Greenwood*, [1921] 2 A.C. 171; 90 L.J.K.B. 1028; 125 L.T. 497; 37 T.L.R. 762; 65 Sol. Jo. 642; 8 Tax Cas. 101, H.L.; 28 Digest 107, *663*.

Case Stated by Special Commissioners of Income Tax.

At a meeting of the commissioners held on June 11, 1929, the appellant, David M. Gimson, appealed against an additional assessment to supertax in the sum of £44 made upon him under the provisions of the Income Tax Acts for the year ending April 5, 1928. This assessment was made in respect of a dividend received from Alfred Herbert, Ltd., hereinafter called "the company." The appellant was the holder of 300 ordinary shares of £5 each in the company. The company made up its accounts to Oct. 31 in every year, and its dividends were declared in respect of, and expressed in its balance-sheets to be in respect of, years ending on such date. At a general meeting of the company held on July 22, 1926, a resolution was passed confirming "the payment on April 23, 1926, of a final dividend of 5 per cent. (actual) on the ordinary shares, paid out of a fund consisting of realised capital profits and out of other profits not liable to income tax absorbing £40,375."

This dividend appeared in the balance-sheet for the year ending Oct. 31, 1926, as payable in respect of the year 1924–5, and as diminishing the balance at credit of the profit and loss account as at Nov. 1, 1925. The fund referred to in the said resolution amounting to £63,051 11s. 9d., out of which this dividend was paid, was made up of the following items:

	£	s.	d.	£	s.	d.
(1) Profit on realisation of investments ...	16,596	1	0			
Less loss on realisation of investments ...	10,673	9	3			
				5,922	11	9
(2) Profits on sale of machines ex plant ...				20,724	0	0
(3) War loan interest, Treasury bill discount, etc.				21,146	0	0
(4) Foreign and colonial dividends				8,684	0	0
(5) Profit on exchange				4,050	0	0
(6) Premiums on issue of shares				2,525	0	0
				£63,051	11	9

It was conceded by the Crown for the purposes of this case that so much of the dividend as was paid out of items (1), (2), (5), and (6), which were treated for the purposes of this case as being of a capital nature and not assessable to income tax in the company's hands, was not liable to supertax, but it was claimed that so much of the dividend as was paid out of items (3) and (4) was liable to supertax. The liability was, accordingly, computed on $\frac{21{,}146+8{,}684}{63{,}051}$ of the dividend of £75, namely, £35, received by the appellant. The assessment under appeal was arrived at as follows:

Actual amount of dividend liable to supertax	£35
Approximate addition for income tax	£9
Assessment	£44

Item (3) of the fund consisted of:

Treasury bill discounts	£8,726
Interest on munition levy paid in advance	£5,718
Interest on 5 per cent. war loan	£6,702
	£21,146

The Treasury bill discounts and interest on munition levy were each received in one year only, many years before the year when the dividend in question was declared. These amounts had not been brought into computation for assessment in the respective years of receipt, because, under the rules of Case III of Sched. D, which were in force at that time, the basis of assessment was the amount of the preceding year's income, which was nil. Neither had these particular amounts been brought into computation for assessment in the following years because the company had no income from these sources in those years, and under the decision in *Brown* v. *National Provident Institution* (1) no assessment could be made for those years. The war loan interest of £6,702 was the amount received without deduction of tax in the year 1921–2. As no income from this source had been received in the following year, 1922–3, this amount of £6,702 of war loan interest had not been included in any computation for assessment to income tax for 1922–3 or any other year, but there had been an assessment under Case III for 1921–2 in respect of the war loan interest based on the amount received in the previous year.

Item (4) consisted of portions of dividends on certain foreign and colonial shares received by the company in the years 1921–2, 1922–3 and 1923–4. Dividends of this description were assessable under the rules of Case V of Sched. D then in force on the average of the three preceding years, and a dividend arising in any year was accordingly brought into the computation of the income for assessment in each of the three succeeding years to the extent of one-third in each year if any assessment was competent in such succeeding years. The company had no income from those sources in the two years 1924–5 and 1925–6, and consequently under the decision in *Whelan* v. *Henning* (2) no assessments were or could be made for those years in respect of profits from those sources. The portions of the dividends which arose in the years 1921–2, 1922–3 and 1923–4 which formed any part of the basis of the computation for assessment under Case V in succeeding years appear from the following statement:

	Brought into computation		Not brought into computation		Brought into computation
	1922–3	1923–4	1924–5	1925–6	1926–7
Dividends for 1921–2 £5,184	£1,728	£1,728	£1,728	—	—
Dividends for 1922–3 £5,130	—	£1,710	£1,710	£1,710	—
Dividends for 1923–4 £5,305	—	—	£1,768	£1,768	£1,769
			£5,206	£3,478	
			£8,684		

There had been assessments under Case V for 1921–2, 1922–3 and 1923–4 in respect of dividends from foreign and colonial shares based on the average of the three preceding years.

It was contended by the appellant that, as the items of income (3) and (4) were not liable to be assessed to income tax, any dividend paid thereout was not liable to assessment to supertax, and that the assessment should accordingly be discharged. It was contended on behalf of the Commissioners of Inland Revenue (inter alia): (a) That the amounts in items (3) and (4) above mentioned had been taxable and taxed in the hands of the company in the years in which they were respectively received on the statutory basis as laid down in the Income Tax Acts; (b) that the use of the figures in items (3) and (4) as the measure or basis of computation for subsequent years was irrelevant; (c) that in so far as the dividend of April 23, 1926, was paid out of items (3) and (4) it attracted supertax in the hands of the appellant; and (d) that the assessment as made should be confirmed. The commissioners held that a dividend paid out of income assessable to income tax was liable to supertax, notwithstanding that income tax may not have been paid on the actual amount of the income by reason of the assessment to income tax being based on some other measure than that of the actual income, and, accordingly, they confirmed the assessment. The appellant required the commissioners to state a Case for the opinion of the High Court, pursuant to the Income Tax Act, 1918, s. 7 (6) and s. 149.

Raymond Needham, K.C., and *Scrimgeour* for the appellant.

The Attorney-General (*Sir William Jowitt, K.C.*) and *R. P. Hills* for the Crown.

ROWLATT, J.—This is an important point which may not often emerge in practice, but is of a very fundamental character. The appellant is a shareholder in a company and received a dividend. The company in that year made no taxable profits, and the dividend was paid, to put it shortly, partly out of capital and partly out of income, which, by reason of the rules as regards measurement of income, it is sufficient to say was for tax purposes nil, although there were the sovereigns there. In those circumstances he was paid a dividend of £75. Nothing was sought to be deducted for income tax, nor was it said to be free of income tax. In fact, that £75 was his aliquot proportion of what the directors were disposing of, including income tax, which, of course, was nil. For supertax purposes the dividend has been split up, and it is said that £40 of it represents capital, and we leave that out, and that £35 of it is income which is liable to supertax.

The Attorney-General says that he does not accept the propriety of splitting up the dividend and seeing what it comes from, and he reserved that point. But as this case is presented to me I have got to deal with a sum which is income in the hands of the company, but has, owing to the principles of measurement, escaped income tax. What has been done in the way of assessing to supertax is this. The £35 received by the appellant in respect of this part of his dividend, which was all that the company had earned from the source or had to divide from this source, is treated as increased by a sum of £9, which they call the appropriate addition to income tax, that is to say, the £35 really represents £44 of profits divided, on which £9 has been deducted for income tax. That is simply stating what is not the fact. There is no evidence to support that. It is a simple statement which is a disputable fact, and the Attorney-General did not contend to the contrary, but what he did contend was that, although the assessment of £44 cannot be maintained, if the figure was £35 it could be maintained, and he said that although income tax had not been charged upon £35, he would maintain his right to say either that it ought to have been charged in the hands of the recipient by direct assessment or that it ought to have been treated as tax-bearing income paid by the company out of funds not themselves taxed so that the company ought to have deducted the tax and paid it over, and they, not having done so, are really liable to a penalty under s. 33 of the Finance Act.

That brings us to the point that the dividend received from a company is itself a tax-bearing subject-matter and not a subject-matter which represents merely the division to the individual of a fund which has suffered tax so that the tax attaches in the hands of the company and the dividend receiver has nothing whatever to say to the income tax as regards that. The matter became of extreme importance in the first instance in cases where a subject having a small income was entitled to get back tax. It is exactly the same rule which governs the supertax, and if the commissioners are right in this case in the assessment of £44, we should get the extraordinary result that if the appellant's income was small, he could get back tax which the revenue never had, representing sums which did not exist. So that is quite wrong.

I am bound to say I have always regarded it as fundamental that, just as in the case of an individual whose income comes to him direct and who gets back the tax which he has suffered, and no other, and pays supertax in respect of a fund which suffers tax, and no other, so if the appellant had received this money direct from the company by holding this source of income himself and had been liable to income tax in nil because of the regulations affecting measurement, his income would not be subject-matter on which he could get back tax in case his income was small or pay supertax in case it was big. So although the case of a company is different, although the Attorney-General very properly referred to what I said in *Blott's Case* (3), in essence it is the same. The taxpayer can only get back tax which the money he received has suffered, and he can only be liable to supertax in respect of a dividend which is taxable. The Attorney-General says that, although that may be so, still when you get a dividend which does somehow or other come to the taxpayer from a fund which is not taxed, then it becomes, under r. 21 of the All Schedules Rules, an annual payment charged with tax under Sched. D by reference to Case VI, which is a sweeping-in case. All I can say is that that is a theory which, I think, must be established by some superior court to this court. It is absolutely contrary to the idea one has ever held, and it is in my experience entirely novel. I think the appellant is entitled to succeed in this case, and the appeal must be allowed with costs.

Solicitors: *Field, Roscoe & Co.*, for *Pinsent & Co.*, Birmingham; *Solicitor of Inland Revenue.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

COLVILLE ESTATE, LTD. *v.* INLAND REVENUE COMMISSIONERS

[KING'S BENCH DIVISION (Rowlatt, J.), May 30, 1930]

[Reported [1930] 2 K.B. 393; 100 L.J.K.B. 101; 144 L.T. 28; 15 Tax Cas. 485]

Surtax—Company—Undistributed profits—Distribution of reasonable part of income—Mortgages—Articles of association providing for application of income to payment of interest and repayment of principal—Finance Act, 1922 (12 & 13 *Geo.* 5, *c.* 17), *s.* 21 (1).

A private limited company was incorporated in 1915 with the principal object of acquiring freehold and leasehold property known as the C. Estate from H.B.B. subject to heavy mortgages. Almost all the shares in the company were held by H.B.B. The original articles of association of the company provided by art. 95 that so long as the mortgages mentioned in the agreement for the purchase of the C. Estate were outstanding, the net profits of the company should be applied in the discharge of the mortgages, subject to a contrary direction by special resolution of the company. In 1924 art. 95 was extended to apply to any mortgage affecting the property of the company and not only to those mentioned in the purchase agreement. Some of the mortgage debts were vested in H.B.B., but he agreed to forego payment of interest until the whole of the principal money in respect of other mortgage debts had been discharged. The company paid no dividend, but by 1926 the mortgages had been considerably reduced. Since 1921 all outstanding mortgages had been taken over by H.B.B. No special resolution affecting the payment of interest or repayment of the principal of the mortgages under art. 95 was passed. The Special Commissioners gave a direction under the Finance Act, 1922, s. 21 (1), that for the purposes of assessment to supertax the actual income from all sources of the company should for the periods ended June 24, 1924, June 24, 1925, and June 24, 1926, be deemed to be the income of the members of the company. On appeal by the company,

Held: the commissioners were not precluded by art. 95, the fact that no special resolution under that article was passed, or by any other circumstance, from reaching the conclusion that the company was not distributing a reasonable part of its income; and, therefore, it was open to the commissioners so to conclude, and to give a direction under s. 21 (1).

Per **Curiam:** there was no duty on the commissioners to decide what in the circumstances would constitute the distribution of a reasonable part of its income by the company.

Notes. The Finance Act, 1922, s. 21, was replaced by the Income Tax Act, 1952, s. 245.

Referred to: *A. J. Mucklow, Ltd.* v. *I.R. Comrs.*, [1954] 2 All E.R. 508; *Morelle, Ltd.* v. *Wakeling*, [1955] 1 All E.R. 708.

As to Special Commissioners' powers to make directions for the purposes of surtax, see 20 HALSBURY'S LAWS (3rd Edn.) 551 et seq.; and for cases on the subject, see 28 DIGEST 104, 643 et seq. For the Income Tax Act, 1952, s. 245, see 31 HALSBURY'S STATUTES (2nd Edn.) 232.

Cases referred to:

(1) *Salomon* v. *Salomon & Co., Ltd., Salomon & Co., Ltd.* v. *Salomon*, [1897] A.C. 22; 66 L.J.Ch. 35; 75 L.T. 426; 45 W.R. 193; 13 T.L.R. 46; 41 Sol. Jo. 63; 4 Mans. 89, H.L.; 9 Digest (Repl.) 30, *11*.

(2) *Borland's Trustee* v. *Steel Bros. & Co., Ltd.*, [1901] 1 Ch. 279; 70 L.J.Ch. 51; 47 W.R. 120; 17 T.L.R. 45; 9 Digest (Repl.) 231, *1501*.

A (3) *I.R. Comrs.* v. *Sansom*, [1921] 2 K.B. 492; 90 L.J.K.B. 627; 125 L.T. 37; 8 Tax Cas. 20, C.A.; 28 Digest 101, *612*.

(4) *David Carlaw & Sons, Ltd.* v. *I.R. Comrs.*, 1926 S.C. 870; 11 Tax Cas. 96; Digest Supp.

(5) *Glazed Kid, Ltd.* v. *I.R. Comrs.* (1930), 15 Tax Cas. 445; Digest Supp.

B **Case Stated** by the Board of Referees pursuant to the Finance Act, 1922, s. 21, Sched. I, and the Income Tax Act, 1918, s. 149, for the opinion of the High Court of **Justice:**

At a meeting of the Board of Referees held at the Royal Courts of Justice on May 15, 1929, for the purpose of re-hearing appeals under para. 2 of Sched. I to the Finance Act, 1922, the members of the said board present at the said meeting C re-heard an appeal by the Colville Estate, Ltd., whose registered office is at 49, Russell Square, in the county of London (hereinafter called the company), against directions made by the commissioners for the special purposes of the income tax Acts on April 27, 1928, under s. 21 of the Finance Act, 1922, whereby they directed that for the purposes of assessment to supertax the actual income from all sources of the company should for the periods ending June 24, 1924, D June 24, 1925, and June 24, 1926, respectively, be deemed to be the income of the members of the company, and the amount thereof should be apportioned among the members. The company being aggrieved by the said directions appealed against the same to the said Special Commissioners, who, upon the hearing of the said appeal on Oct. 12, 1928, reserved their decision, and on Nov. 6, 1928, determined that the said directions should be confirmed. The company being dis- E satisfied with the said determination required the said appeal to be re-heard by the Board of Referees, and they re-heard the same accordingly.

On the re-hearing before the Board of Referees of the said appeal the following facts were admitted or proved:

The company was incorporated as a private limited company, under the Companies Acts, 1908 and 1913, on March 17, 1915, with the principal object of entering F into an agreement with Sir Hickman Beckett Bacon, Baronet (hereinafter called "Sir Hickman Bacon"), for the acquisition, under the agreement referred to in art. 4 of the articles of association of the company, of hereditaments and premises in various parts of London, Weybridge, Norwood, and Brighton, known as the Colville Estate. The capital of the company was £35,000 in 35,000 shares of £1 each. A private unincorporated syndicate was formed in 1879 to take over the G Colville Estate, and Sir Hickman Bacon with others took over the liability for the first mortgages on the estate in order to avoid losing the same. A limited company would have been formed in 1905, when Sir Hickman Bacon took over the interests of certain of the other proprietors, but the interested parties were afraid that the mortgagees would then foreclose. In order to carry the transaction out it became necessary for Sir Hickman Bacon with others to enter into direct H personal covenants with the mortgagees for payment of over £500,000. No profit or interest was ever drawn by Sir Hickman Bacon.

The estate consists principally of freehold and leasehold houses of from sixty to eighty years old, many of which have in the past been converted into flats. As regards the leasehold properties of the company, out of 183 properties leases of seven expire between 1940 and 1950, of eighty-eight between 1950 and 1960, of I eighty-four between 1960 and 1970, and four between 1970 and 1980.

By art. 95 of the original articles of association of the company it was provided as follows:

> "So long as any of the mortgages or charges specified in the said Agreement mentioned in cl. 4 hereof shall remain outstanding and unsatisfied the net profits of the company shall be applied in the discharge and satisfaction, so far as the same shall be available of the principal moneys and interest, and the moneys secured by the said mortgages or charges for the time being out-

> standing and unsatisfied, unless the company shall by special resolution direct to the contrary."

By special resolution of the company, duly confirmed on Nov. 10, 1924, the following article was substituted for the said art. 95, namely:

> "So long as any mortgage or charge affecting any property of the company shall remain outstanding and unsatisfied the net profits of the company shall be applied in the discharge and satisfaction, so far as the same shall be available, of the principal moneys, and the moneys secured by any mortgage or charge for the time being outstanding and unsatisfied, unless the company shall by special resolution direct to the contrary."

By art. 70 of the said articles of association it was provided as follows:

> "Until otherwise determined by a general meeting the number of directors shall not be less than two or more than three. The persons hereinafter named shall be the first directors, that is to say, Sir Hickman Beckett Bacon and the Hon. Edward Gerald Strutt."

At all material times the directors of the company were Sir Hickman Bacon and the said Hon. Edward Gerald Strutt, with the addition since Feb. 16, 1923, of Edward Jolliffe Strutt. Board meetings were held from time to time for the purposes of transacting the business of the company.

The shares of the company during the three years in question were held as follows:

	Shares of £1 each fully paid
To June 24, 1925	
Sir Hickman Bacon	4,943
Hon. Edward Gerald Strutt	1
Edward Jolliffe Strutt	1
	4,945
To June 24, 1926	
Sir Hickman Bacon	9,833
Hon. Edward Gerald Strutt	1
Edward Jolliffe Strutt	1
	9,835

By the sale agreement referred to above Sir Hickman Bacon agreed to sell to the company the freehold and leasehold properties scheduled to the said agreement, subject to mortgages owing thereon amounting to £238,057. The consideration for the sale was £4,943 in fully-paid shares of the company, the company undertaking the liability for the mortgage moneys and interest, and indemnifying the vendor in respect thereof.

By deed poll, dated Nov. 15, 1915, executed by Sir Hickman Bacon, it was recited that at the date of the said agreement and the said deed poll Sir Hickman Bacon was beneficially entitled to the several mortgage debts and moneys owing upon the security of the premises described in the first and second schedules to the said agreement, save and except such of the mortgage debts and moneys as were specified in the schedule to the said deed poll, and also that it was intended that the said agreement should have contained a provision that he was not to be entitled to claim or have paid to him any interest on the several mortgage debts and sums of money to which he was beneficially entitled as aforesaid, or on any moneys he might pay or provide in discharge or part discharge of any of the mortgage debts mentioned in the schedule to the said deed poll, until the whole of the principal money in respect of the mortgage debts mentioned in the said schedule was discharged; the intent being that as far as possible the net profits of the company, without any deduction for interest on mortgage debts to which he was entitled, should be applied in the discharge and satisfaction of the principal moneys and interest payable in respect of the mortgage debts mentioned in the said schedule; and Sir Hickman Bacon agreed that he would waive all claims to be paid any interest on the mortgage debts so as aforesaid vested in him beneficially, and also on any moneys he had paid or might pay or provide in discharge or part discharge of any of the mortgage debts mentioned in the schedule to the said deed poll, until the whole of the principal moneys in respect of the mortgage debts mentioned in the schedule to the said deed poll had been discharged, it being understood that the company would, as was intended, apply as far as possible the net profits of the company in the discharge and satisfaction of the principal moneys and interest payable in respect of the mortgage debts mentioned in the schedule to the said deed poll.

An account was taken from the books of the company showing the reductions from time to time made by the company of the said mortgages, amounting to £238,057 at the date of the said agreement. It appeared from the said account that the said mortgages were by June 24, 1926, reduced by payments off to £186,000. The company was not formed to deal in property, nor had it in fact done so. It had devoted itself to the management of the Colville Estate; but the company had from time to time sold certain of its freehold and leasehold properties, and had where possible purchased the freehold of premises which it already held on lease. The company had only purchased one freehold property which it did not already hold on lease.

The material items in the abstract of the balance sheet annexed to the case are summarised as shown on p. 774.

No dividend has ever been paid by the company. The surplus shown in the above-mentioned revenue accounts was in each year credited to the reserve shown in the above-mentioned balance sheets, and the deficit shown in the above-mentioned revenue accounts in 1919 and 1920 was debited to the said reserve. The investments shown in the above-mentioned balance sheets consisted at all material dates of either 5 per cent. National War Bonds, 4 per cent. Victory Bonds, 5 per cent. War Loan, 5½ per cent. Treasury Bonds, 3½ per cent. Conversion Loan Bearer Bonds, or 3½ per cent. Conversion Loan Registered Stock.

The reason for the cessation of mortgage interest is that all the outstanding mortgages have since 1921 been taken over by Sir Hickman Bacon. About the end of 1924 the properties upon which the outstanding mortgages were secured were conveyed to the company in accordance with the resolutions recorded in the minutes of the general meeting of Nov. 10, 1924. The deed of conveyance was registered at the Land Registry, and certificates of absolute title in respect of the freehold property, and certificates of good leasehold title in respect of the leasehold property, which had been mortgaged, were issued to the company by the Land Registry. The said certificates were deposited with Sir Hickman Bacon as security for the payment of the amount outstanding in respect of the said mortgages at the date of the said deed of conveyance, and the charge thereby created has been duly registered in favour of Sir Hickman Bacon. This transaction was completed before the general meeting of Feb. 16, 1925, at which the balance sheet for the year ending June 24, 1924, was presented. Repayments have from time to time been made to Sir Hickman Bacon on account of the outstanding mortgages or the debt secured by such charge. The repayments to Sir Hickman Bacon during the material periods, particulars of which are shown in the account of mortgages, were as follows:

Year ending June 24, 1924	£2,500	0	0
Year ending June 24, 1925	£5,000	0	0
Year ending June 24, 1926	£10,406	17	2
	£17,906	17	2

At the time of stating the Case the rents receivable from the company's properties were:

Rack-rents of leaseholds let on full repairing leases	£7,993
Rack-rents of leaseholds not let on full repairing leases	£13,145
Rack-rent of freeholds let on full repairing leases	£7,143
Rack-rent of freeholds not let on full repairing leases	£15,100
Total rack-rents excluding forty-four ground rent lets	£43,381

Balance Sheet

Year	Liabilities				Assets			
	Creditors	Mortgages	Reserve	Capital	Cash	Debtors	Investments	Estate (net)
	£	£	£	£	£		£	£
1915	11,035	226,262	3,464	4,945	1,207	8,502	—	235,972
1916	11,232	220,297	6,636	4,945	4,014	7,129	—	231,944
1917	10,813	215,307	8,947	4,945	4,526	7,214	—	228,249
1918	9,450	213,707	12,757	4,945	5,036	6,588	5,000	224,212
1919	12,339	212,107	8,180	4,945	3,345	4,028	10,000	220,175
1920	11,565	208,407	6,907	4,945	4,297	4,116	29,594	193,794
1921	11,834	208,407	7,333	4,945	1,648	10,164	36,966	183,718
1922	10,788	208,407	17,275	4,945	15,051	6,236	42,005	178,100
1923	12,345	200,907	22,010	4,945	8,932	5,715	51,899	173,638
1924	10,025	198,407	31,368	4,945	7,983	6,028	61,963	168,751
1925	7,778	196,407	45,777	4,945	6,500	9,072	75,451	163,864
1926	8,495	186,000	62,820	9,835	13,170	9,539	81,718	162,722
1927	4,088	167,000	80,460	9,835	8,153	8,575	87,719	156,935

Revenue Account

Year	Revenue			Expenditure		Balance	
	Net Rentals	Interest	Mortgage Interest	Repairs	Depreciation	Deficit	Surplus
	£	£	£	£	£	£	£
1915	29,749	—	5,426	5,965	4,028	—	3,464
1916	27,527	37	5,116	5,389	4,030	—	3,172
1917	27,357	124	2,599	7,484	4,037	—	2,311
1918	28,228	174	879	7,571	4,037	—	3,810
1919	29,083	427	—	16,678	4,037	4,577	—
1920	31,609	727	812	16,078	4,037	1,273	—
1921	31,622	1,227	471	17,868	4,037	—	426
1922	37,206	1,893	—	14,438	4,037	—	9,943
1923	36,801	1,434	—	17,118	4,037	—	4,734
1924	37,678	2,253	—	15,080	4,037	—	9,358
1925	38,712	2,753	—	12,030	4,037	—	14,409
1926	38,795	3,436	—	11,213	4,037	—	17,043
1927	39,089	3,717	—	11,284	4,037	—	17,639

At the re-hearing of the appeal evidence was given by Mr. Edward Jolliffe Strutt, one of the managing directors of the company, and Mr. Charles Gerald Eve, partner in the firm of Thurgood, Martin, and Eve, chartered surveyors, whose firm had acted for the estate since 1909, and who had personally known it for the last ten years, and who, at times during February, 1929, had refreshed his acquaintance with the properties on the estate. The evidence of these witnesses consisted of written statements submitted to the Board of Referees, which were taken as being evidence given at the hearing, and of their oral evidence recorded by the shorthand writer.

It was contended before the Board of Referees on behalf of the company that the directions appealed against should be discharged on some or all of the following grounds: (a) that art. 95 of the articles of association of the company precluded the company from paying a dividend, and that it was an implied term of the contract for sale of the properties by Sir Hickman Bacon to the company that such article should form one of the articles of association of the purchasing company; (b) that so long as art. 95 remained an article of the company, and Sir Hickman Bacon as the largest shareholder insisted on his right not to vote for a special resolution, the final words of art. 95 had no practical effect; (c) that the introduction of s. 31 (1) into the Finance Act, 1927, was relevant, and ought to be interpreted as showing that prior to that section coming into operation it was not intended by the legislature that money applied in payment for an undertaking or in redemption or repayment of any loan, capital, or debt in such circumstances as the present case, was available for distribution to the members within the meaning of s. 21 of the Finance Act, 1922; (d) that the special fact of the identity of the mortgagee with the controlling shareholder was in the circumstances immaterial in considering whether the money applied in repayment of the mortgages was available for distribution by the company; (e) that the current requirements of the company's business, and the maintenance and development of the company's business, made it necessary or advisable that dividends should not be paid for the periods in question; (f) that on the construction of s. 21 (1) of the Finance Act, 1922, the "said income," which is to be the subject-matter of the direction referred to, means the "reasonable part of its actual income from all sources" previously therein referred to, and not the whole income for the year or other period in question as therein referred to, and that the Board of Referees, if satisfied that liability attached in respect of any of the three years in question, should have proceeded to inquire to what reasonable part of the actual income for the year in question liability would attach.

The following cases were referred to: *Salomon* v. *Salomon & Co, Ltd.* (1), *Borland's Trustee* v. *Steel Bros. & Co., Ltd.* (2), *I.R. Comrs.* v. *Sansom* (3), and *David Carlaw & Sons, Ltd.* v. *I.R. Comrs.* (4).

The Board of Referees did not call upon the representative of the Crown to reply, but dismissed the said appeal and confirmed the directions made by the Special Commissioners on April 27, 1928, as aforesaid. Immediately upon the Board of Referees so determining the appeal the company expressed its dissatisfaction with their determination as being erroneous in point of law, and in due course required them under the Finance Act, 1922, s. 21, and Sched. I of the Income Tax Act, 1918, s. 149, to state a Case for the opinion of the High Court, which case they stated and signed accordingly.

As a matter of construction of the Finance Act, 1922, they held: (i) that neither the fact that the articles of a company required a special resolution as a condition precedent to the declaration of a dividend, nor the fact that there was not a sufficient majority of shareholders willing to vote for such a resolution, precluded them from holding that the company had not distributed a reasonable part of its income within the meaning of s. 21; (ii) that the existence of a contract between a company and some other party restricting the liberty of the company to distribute profits by way of dividend did not preclude them from holding that the company had not distributed a reasonable part of its income within the meaning of s. 21; (iii) that if they held that the company had failed to distribute a reasonable part of its income within the meaning of s. 21 they were not required to decide what amount would have been a reasonable part.

They found the following facts: (i) the circumstances were not at any time such as to make it reasonable for the company to agree not to declare a dividend until the debts scheduled to the deed poll had been discharged; (ii) the actual value of the properties at the end of each of the financial years 1924, 1925, and 1926 was very largely in excess of the value as shown in the respective balance sheets for those years, and, as regards each year, the company could have declared a substantial dividend without endangering the ability of the company to meet any expenditure likely to be required for reconstruction; (iii) as regards each of the years 1924, 1925, and 1926, even if the amounts applied in repayment of debt were regarded as not available for distribution, the company did not within a reasonable time distribute to its members, in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of supertax, a reasonable part of its actual income from all sources for such year.

The questions of law for the opinion of the court were: (i) whether the Board of Referees were precluded from holding that the company had failed to distribute a reasonable part of its income, within the meaning of s. 21 of the Finance Act, 1922, by reason of art. 95, and the fact that no special resolution had been passed, or by reason of the existence of an implied contract as set forth in the contentions on behalf of the company; (ii) whether the introduction of s. 31 (1) of the Finance Act, 1927, had the effect contended for on behalf of the company and, if so, whether, having regard to their findings of fact, that section was material; (iii) whether the construction of s. 21 (1) of the Finance Act, 1922, contended for on behalf of the company was correct in law, and, if so, whether the case should be remitted to them to determine what was a reasonable amount for the company to distribute; (iv) whether there was evidence upon which they could hold that the company had failed to distribute a reasonable part of its income within the meaning of s. 21 of the Finance Act, 1922.

E. G. Palmer for the company.

R. P. Hills (*the Solicitor-General, Sir J. B. Melville*, with him) for the Crown.

ROWLATT, J.—In this case the real, and practically the only, point is whether art. 95 of the articles, and the absence of a special resolution under it, prevents the direction of the Special Commissioners being maintained.

There was no contract that the profits of the company should be paid in liquidating the principal of the mortgages. There was nothing but the article. The mortgagees were not in possession; they had not appointed a receiver. The position was, so far as mortgagor and mortgagee were concerned, that the mortgages stood as continuing incumbrances, interest being paid year by year until such time as the mortgagees wanted the capital paid off. The mortgagor was liable to the principal, he was liable to the interest, on his covenants, and his property was liable to them, but the mortgages were outstanding, no possession being taken, and no receiver appointed. All that was happening was that the interest fell to be paid. But art. 95 provided:

> "So long as any of the mortgages or charges specified in the said agreement mentioned in cl. 4 hereof shall remain outstanding and unsatisfied the net profits of the company shall be applied in the discharge and satisfaction so far as the same shall be available of the principal moneys and interest and the moneys secured . . . unless the company shall by special resolution direct to the contrary."

That article must be read as a whole and it gives power by special resolution to remove its veto. Under those circumstances, what is the position? I was referred to *Salomon's Case* (*Salomon* v. *Salomon & Co., Ltd.* (1)) and to other cases which emphasise very clearly the difference in personality between the corporation and the corporators, and also affirm very clearly that a shareholder cannot derive any benefit from his holding contrary to the articles. In s. 21 of the Act of 1922 the legislature propounds the question whether a company has distributed a reasonable part of its actual income. There may be formalities in the way of a company not doing it; the directors may have to recommend the dividend; certain people might have to concur, for all we know, inside the company. The question is whether the company, looking at it as a whole, has distributed a reasonable part of its income. What does a "reasonable part" of its income mean? It means a reasonable part of its income, looking at its requirements, its current position, and all that sort of thing. When one inquires if it is distributing a reasonable part, one has to examine what reasons there are for not distributing; some reasons may be good, and some bad. There may be a very great deal of profit, but if there is a contract—as there was in the *Glazed Kid Case* (5), under which the company is bound to pay all the profits into a particular banking account, and if it did not it would be restrained by injunction, that is a very excellent reason indeed for not distributing. It could not be said that a company was not distributing a reasonable part merely because it did not distribute that which it could not distribute. But there may be some reasons which are not good, such as that the shareholders do not want income distributed and insist on an article which puts it in their hands. It is as broad as it is long. The company is not distributing it; that is how I look at it, and there is nothing more in it. The company simply has not distributed.

On the question whether there should have been distribution, having regard to the reserves required, and the provision for reconstruction, and considerations of that kind, those are considerations which have been dealt with by the tribunals of fact. The only question for me is whether this article and the documents precluded the decision to which the tribunals have come.

An argument was raised by counsel for the company based upon s. 31 of the Act of 1927, which enacts that for the purpose of the subsection with which I am here concerned,

> "any such sum as is hereinafter described shall be regarded as income available for distribution among the members of the company and not as having been applied or being applicable to the current requirements of the company's business . . ."

It then gives descriptions of sums which include the sort of sum in question in this case. "Now," says counsel, "that being the Act of 1927, it shows that that was not the law before." What exactly does that come to? Supposing it was not the law before as regards this particular sum. Counsel says that the law was that this particular sum should not be regarded as available and should be regarded as having been applied, but that is not the result. It can be no more than this, that there is no enactment on the subject; it is not the contrary enactment. Apart from that this subsection merely carries a certain injunction or prohibition as to the way certain things shall be dealt with, very far beyond the limits necessary to include this case. It does not in the least follow that this case was not included. When I say included, I mean did not fall to be considered, or might not have to be considered, in the same way before the statute passed. The statute covers this case a fortiori. It does not follow apart from the statute altogether this case was not covered before on general principles—on the previous Act. So much for the main part of this case.

Another interesting point raised is whether the proper construction of the section was not that the commissioners ought to have concluded what was a reasonable part of the income to be divided. This is not quite a new point because it arose in the Scottish case, *Carlaw's Case*—*Carlaw* v. *I.R. Comrs.* (4)—and it arose before me in the *Glazed Kid Case* (5). The Scottish courts, and I also, proceeded on the footing that when there had not been a distribution of a reasonable part, the whole of the income—not the part that might reasonably have been distributed—was to be treated as directed by the section. In Scotland the subject never argued to the contrary, but just the reverse. He came and propounded that result of the section and emphasised its penal character. From that he argued that the section ought not to apply unless there was some mens rea on the part of the subject. It was never argued to the contrary and it was not argued before me, so perhaps I am not bound as a matter of authority. But I am quite clear myself, if it is open to me to express an opinion now, that the construction of the Crown is right. It says "the said income of the company shall . . . be deemed to be the income of the members." What is the "said income"? The earlier part of the section is:

> "Where it appears to the Special Commissioners that any company . . . has not, within a reasonable time . . . distributed to its members . . . a reasonable part of its actual income."

"Said income" refers, I think, to "actual income" and not to "reasonable part," because it is to be observed that the commissioners are never asked or required to say what is a "reasonable part," and "said income" has nothing to refer to it, because it is an entirely different thing to say that so much is not a reasonable part from saying what is a reasonable part; one does not involve the other.

It is very difficult to say what is a heap, but it is very easy to say what is not a heap and what is more than a heap. The commissioners are not asked to say what a reasonable part is. They are asked whether what has been distributed is not a reasonable part, and it is an entirely different question. It has been said that this section is very penal. Perhaps, it is said, that is not the construction which ought to be adopted. There are two sides to that question. The scheme of this subsection is that companies are divided into two, those who distribute reasonably and those who do not. If they do not, then the company falls to be dealt with much as if it were a partnership, the income of the individual. That is a very clear way of doing it. If it had been that in every case the commissioners were to find out what was a reasonable dividend to declare, and insist on supertax being paid on that footing, I can very well conceive that their activities might have been very much more largely employed; but in practice, it would come to this, that the dividends of private companies would be taxed up in almost all cases, or would be liable to be taxed up, and the subject would have very great ground for complaint. It is only fair to say that it is not at all improbable that this is, in the long run, a more beneficial way of dealing with it from the point of view of the subject, especially for a subject who does not want to take an unfair advantage of the revenue. I think the appeal fails on both points, and, therefore, must be dismissed with costs.

Order accordingly.

Solicitors: *Oldman, Cornwall & Wood Roberts*; *Solicitor of Inland Revenue.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* DALGETY & CO., LTD.

[HOUSE OF LORDS (Lord Buckmaster, Lord Dunedin, Lord Warrington, Lord Thankerton and Lord Macmillan), February 20, March 13, April 4, 1930]

[Reported [1930] A.C. 527; 99 L.J.K.B. 342; 143 L.T. 191; 46 T.L.R. 349; 15 Tax Cas. 216]

Income Tax—Double taxation—Relief—Dominion tax—Allowances and deductions—Tax on debenture interest deductible from payments to debenture holders—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 17, *All Schedules Rules*, *r.* 19—*Finance Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 18), *s.* 27 (1), *Sched. III.*

A company incorporated in England derived most of its income from trading in Australia and New Zealand. It was charged to income tax on its income arising in Australia and New Zealand both in those Dominions and in the United Kingdom, and it claimed relief in the United Kingdom against the Dominion tax under the Finance Act, 1920, s. 27 (1). The Crown resisted the company's claim to relief in respect of the whole of the profits arising in the Dominions because the company, in paying interest on debentures issued in the United Kingdom, deducted United Kingdom tax under the Income Tax Act, 1918, All Schedules Rules, r. 19. The Crown contended that the relief should be limited to the amount of the Dominion profits reduced by the debenture interest, so far as the interest was paid out of these profits.

Held: the company was entitled to relief in respect of the whole of its Dominion profits since it had paid Dominion income tax on the whole of such profits and had also paid income tax in the United Kingdom on the whole of its profits, it being irrelevant that a part of the United Kingdom tax was not ultimately borne by the company; and, furthermore, s. 17 of the Act of 1918 (as amended by the Finance Act, 1920, Sched. III) did not exclude or restrict the relief afforded by s. 27 (1) of the Act of 1920.

Notes. The Income Tax Act, 1918, s. 17 (as amended), was replaced by the Income Tax Act, 1952, s. 221. The Finance Act, 1920, s. 27, was repealed by the Income Tax Act, 1952. The Dominion income tax relief on doubly taxed income was applicable after the coming into force of the Income Tax Act, 1952, only in relation to the Republic of Ireland.

Considered: *I.R. Comrs.* v. *National Mortgage and Agency Co. of New Zealand, Ltd.*, [1938] 2 All E.R. 88. Referred to: *Hamilton* v. *I.R. Comrs.*, [1931] 2 K.B. 495; *Neumann* v. *I.R. Comrs.* (1933), 49 T.L.R. 212; *Assam Railways and Trading Co.* v. *I.R. Comrs.*, [1933] 2 K.B. 576; *Cadbury Bros., Ltd.* v. *Sinclair*, [1933] All E.R.Rep. 218.

As to double taxation relief, see 20 HALSBURY'S LAWS (3rd Edn.) 452 et seq.; and for cases on the subject, see 28 DIGEST 93, *552–556*.

Cases referred to:

(1) *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co., Ltd.*, [1921] 1 A.C. 172; 89 L.J.P.C. 220; 124 L.T. 225; 36 T.L.R. 830; 65 Sol. Jo. 24, H.L.; 28 Digest 93, *553*.

(2) *Colquhoun* v. *Brooks* (1889), 14 App. Cas. 493; 59 L.J.Q.B. 53; 61 L.T. 518; 54 J.P. 277; 38 W.R. 289; 5 T.L.R. 728; 2 Tax Cas. 490, H.L.; 28 Digest 79, *433*.

Appeal from a decision of the Court of Appeal (LORD HANWORTH, M.R., LAWRENCE and SANKEY, L.JJ.), reported [1930], 1 K.B. 1, on a Case stated under s. 28 of the Finance Act, 1921, and s. 149 of the Income Tax Act, 1918, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

The Case Stated was as follows:

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on Feb. 7, 1927, Dalgety & Co., Ltd., hereinafter called the company, claimed relief in respect of colonial or Dominion income tax under the Finance Act, 1916, s. 43, and the Income Tax Act, 1918, s. 55, for the years ending respectively April 5, 1917, April 5, 1918, April 5, 1919, and April 5, 1920, and under the Finance Act, 1920, s. 27, for the years ending April 5, 1921, April 5, 1922, April 5, 1923, and April 5, 1924.

2. The company is a company incorporated in England under the Companies Acts with an authorised capital which during the years in question consisted of 200,000 ordinary shares of £20 each, on all of which £5 per share has been paid up, and 100,000 preference shares of £10 each, of which 50,000 have been issued and fully paid up. The company has also issued debentures and debenture stocks (both of which are hereinafter included in the expression "debentures") which during the years in question amounted to approximately £2,500,000. Under these debentures the principal and interest were secured on the whole undertaking and assets of the company.

3. The business of the company is that of general merchants, shipping and insurance agents, and bankers. Apart from dividends which are taxed by deduction and income from property which is charged to income tax under Sched. A, practically the whole of its income arises from trading profits earned by trading operations in Australia and New Zealand, but as the control of the company is exercised in England such trading profits are all assessed to British income tax under Case I of Sched. D. Dominion income tax has also been paid on such trading profits arising in Australia and New Zealand.

4. For each of the years under review a claim for relief in respect of colonial or Dominion income tax has been made by the company, and has been admitted in part by the Inland Revenue Commissioners. No question now remains in dispute in regard to the rate at which relief should be granted for any year, the sole point at issue being whether the amount on which the relief due to the company is to be calculated is the whole amount of the profits earned by it in Australia and New Zealand or only the balance of such profits remaining after deducting therefrom the excess of the interest paid by it on its debentures over the amount of income arising in the United Kingdom. It is agreed that the debenture interest should be regarded as paid out of income arising in the United Kingdom so far as there was such income available for the purpose and consequently to that extent would not affect the amount of relief to which the company might be entitled. The balance of the debenture interest was paid out of the said trading profits.

5. The following figures for two typical years, of which the first is governed by the Finance Act, 1916, s. 43, and the second by the Finance Act, 1920, s. 27, illustrate (i) the method which the company claims and (ii) the method which the Crown claims should be followed in calculating the amount of relief due:

Relief, 1918–19

(a) Total profits		£468,089
(b) Taxed dividends and Sched. A		£48,820
(c) Profits (excluding line (b)), i.e., trading profits taxed under Case I, Sched. D, and also to Dominion income tax ...		£419,269
(d) Debenture interest	£104,065	
(e) Less (b) above	£48,820	
		£55,245
(f) Net profits		£364,024
(i) Claimed by the company:		
Relief due on line (c), i.e., on whole of profits made in the Dominions (not deducting any debenture interest), amounting at agreed rates to		£49,713

(ii) Allowed by the Revenue: Relief due on line (c) as above, less balance of debenture interest amounting to £55,245 as above (i.e., relief on line (f)), amounting at agreed rates to ...		£43,820
Difference between the two methods		£5,893

Relief, 1923–4

(a) Total profits		£578,051
(b) Taxed dividends and Sched. A		£79,506
(c) Profits (excluding line (b)), i.e., trading profits taxed under Case I, Sched. D, and also to Dominion income tax ...		£498,545
(d) Debenture interest	£114,228	
(e) Less (b) above	£79,506	
		£34,722
(f) Net profits		£463,823
(i) Claimed by the company: Relief due on line (c), i.e., on whole of profits made in the Dominions (not deducting any debenture interest), amounting at agreed rates to		£50,838
(ii) Allowed by the Revenue: Relief due on line (c) as above, less balance of debenture interest amounting to £34,722 as above (i.e., relief on line (f)), amounting at agreed rates to ...		£47,567
Difference between the two methods		£3,271

6. In computing the profits for assessment under Case I, Sched. D, no deduction was allowed in respect of debenture interest. In paying such debenture interest the company deducted the full rate of United Kingdom income tax.

7. It was contended on behalf of the company: (a) that the company had paid United Kingdom income tax on the whole of its income which included the part thereof earned in Australia and New Zealand; (b) that the company had also paid colonial or Dominion income tax on the part of its income earned in Australia and New Zealand; (c) that the company was therefore entitled to relief from United Kingdom income tax on all that part of the income; (d) that the company's right to relief was not affected by the fact that it was entitled to deduct and had deducted United Kingdom income tax on payment of interest to its debenture holders.

8. It was contended on behalf of the Crown, inter alia: (a) that the company was not entitled to relief in respect of any income the tax on which it was entitled to deduct out of any payment made by it to any other person; (b) that so far as the profits were applied in payment of debenture interest they were not income of the company within the relief provisions in question; (c) that as the company had not ultimately borne United Kingdom income tax on the amount paid by way of debenture interest it had not paid such tax within the meaning of the sections providing for the allowance of relief; (d) that the method of computing the relief contended for by the Crown was correct.

The Case then set out in full the reasoning of the commissioners in reaching their decision that the company was entitled to the relief which it claimed. The Court of Appeal held, reversing the decision of Rowlatt, J., that the whole amount on which income tax had been paid was the amount on which relief could be claimed, and no deduction from it ought to be made in respect of the debenture interest, as the effect of r. 19, r. 20 and r. 21 of the All Schedules Rules to the Income Tax Act, 1918, was that the person making a payment subject to deduction of tax was to hand over the deductions to the Crown only when the interest paid was provided out of moneys not charged or wholly charged to tax. Section 17 of the Income Tax Act, 1918, must be read as referring to allowance or deduction.

The Crown appealed.

The Attorney-General (*Sir William Jowitt, K.C.*) and *R. P. Hills* for the Crown. *A. M. Latter, K.C.*, and *A. M. Bremner* for the company were not called upon.

The House took time for consideration.

April 4. The following opinions were read.

LORD BUCKMASTER.—By the Finance Act, 1920, s. 27, it is enacted that

> "If any person who has paid, by deduction or otherwise, or is liable to pay, United Kingdom income tax for any year of assessment on any part of his income proves to the satisfaction of the Special Commissioners that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled to relief from United Kingdom income tax paid or payable by him on that part of his income at a rate thereon to be determined as follows: (a) If the Dominion rate of tax does not exceed one-half of the appropriate rate of United Kingdom tax, the rate at which relief is to be given shall be the Dominion rate of tax; (b) In any other case the rate at which relief is to be given shall be one-half of the appropriate rate of United Kingdom tax."

The meaning of that section is the chief issue on this appeal. It reproduced with some alterations, immaterial for the present purpose, the Income Tax Act, 1918, s. 55, which in turn was the re-enactment of the Finance Act, 1916, s. 43. In the Act of 1918 the expression "United Kingdom income tax" is defined for purposes of the section as "income tax charged in accordance with the provisions of this Act" and this is only altered in the later statutes by substituting the words "the Income Tax Acts" for the last three words of the former definition. These are all the statutory provisions that need immediate attention; the dispute as to their meaning arises in the following way.

The respondent is a company incorporated in England under the Companies Acts and carrying on a business of merchants, insurance agents and bankers, both in the United Kingdom and in New Zealand and Australia. Its income chiefly arises from operations carried on in the latter countries, and in respect of such income it is liable to income tax in the United Kingdom and in these Dominions. For the years in question the company paid the full United Kingdom income tax on all its profits and gains and also the Dominion taxes on so much as was earned within their jurisdiction. In these circumstances it claimed relief from the double tax for the years beginning April, 1916, and ending April, 1924. The claim necessarily depended as to the portion up to April, 1920, on the earlier and after that period on the later statute, but, as already pointed out, the difference between the two is immaterial for the present purpose.

The claim was disallowed by the Inland Revenue Commissioners on the ground that the company had issued debentures and in paying interest thereon had deducted the full amount of the United Kingdom income tax. If, therefore, the claim were allowed in full the company would receive back a sum which would cause the amount of profits distributed by way of dividend to the shareholders to escape the full burden of tax measured in terms of the rate imposed in the United Kingdom.

The actual figures are not material. The question in dispute can be stated in general terms and it is this. If a company registered and carrying on business in the United Kingdom has issued debentures charging its total assets with repayment of capital and interest, can it obtain relief in respect of income tax paid in the Dominions on the amount of all the profits and gains that have paid double tax, or only on the residue after deduction of the debenture interest properly payable out of the profits that are doubly taxed? The Special Commissioners held the company entitled to the relief which it claimed. Rowlatt, J., took a different view, but the opinion of the Special Commissioners was restored by the Court of Appeal.

I have intentionally stated the proposition in the limited terms applicable to the respondent company and have omitted the consideration of the case where the debentures create no security—a case less favourable to the Crown.

It is plain that the right conclusion to be drawn must depend on the meaning of the words "income" and "paid" in the relevant sections. According to the contention of the Crown the former means income after deducting all payments charged on it, and the latter means paid without recourse for its recoupment. This may well be a reasonable view of what ought to be done in the circumstances, but it cannot be too often repeated that our duty is not to see what, in our judgment, the legislature might reasonably do, but that which their acts declare that they have done, whether by way of imposed burden or of provided relief.

In case of evenly balanced uncertainty the probability of a wise purpose must be considered and may turn the scales and so also must it be borne in mind where, without some such concession, the words would have no rational meaning, but in all Acts the words used, interpreted as part of the whole statute, constitute the proper guide.

Taking the words in order there can be no doubt the company did pay "United Kingdom income tax" on the full amount. "The income tax charged in accordance with the provisions of the Income Tax Acts" was charged on the whole of its profits and gains. Nothing less would have been accepted and no other person was liable to make the payment. But it is urged that even if this be accepted, to the extent of the debenture interest, the payment was made on behalf of the debenture holders: To this extent that is true, namely, that, having paid, the company was entitled to deduct the tax from the debenture interest, and, to the extent of that deduction, it was the debenture holders' tax that was thus discharged. But it was not the debenture holders who made the payment but the company. By s. 209 of the Act of 1918 which remains unrepealed it is expressly provided that in arriving at the amount of profits or gains for the purpose of income tax

> "no deduction shall be made on account of any annual interest, annuity or other annual payment to be paid out of such profits or gains in regard that a proportionate part of the tax is allowed to be deducted on making any such payment"

and by r. 19 of the All Schedules Rules of the Act of 1918, it is expressly provided that the whole of the profits and gains shall be assessed and charged with tax on the person liable to the interest or annual payment without distinguishing the same. In accordance with this the company and it alone could be assessed, from it alone was the amount of the assessment claimed, by it alone was it paid, and it was prohibited from making any deduction from such assessment in respect of annual sums charged on their profits.

The definition in s. 55 expressly invests the words United Kingdom income tax with the meaning that it is the tax chargeable in accordance with the provisions of the Act, and that tax is chargeable on all the profits and gains and the amount paid is the amount which the company are bound to pay and for which they are alone responsible. If there had been no debentures the claim for relief could not have been resisted, and the existence of the debentures cannot in my opinion limit the company's rights and give greater rights to the Crown. It is only the application of the income that has caused the difficulty and with this the taxing authority has no direct concern.

Scottish Union and National Insurance Co. v. *New Zealand and Australian Land Co., Ltd.* (1) has no direct bearing on the present case, for in that case the division of profits was as between different classes of shareholders who together constituted the company; thus a similar result ensued, for the dividends on the preference shares were paid after the deduction of the full United Kingdom income tax with the result that there, as here, the ordinary shareholders received the full benefit of a relief based on a sum not measured by their share of the profits but on the total amount. The fact, however, that the distribution was amongst members of the company and that the company as a whole was in no way advantaged really robs the case of all value, and I think even prevents its use for the purpose for which it was employed by LAWRENCE, L.J.

A further argument was, however, based on the words of s. 17 of the Act of 1918, which is in these words:

> "A claimant shall not be entitled to exemption, abatement or relief, in respect of any income, the tax on which he is entitled to charge against any other person or to deduct, retain, or satisfy out of any payment he is liable to make to any other person."

The words are apt to cover the present case: the question is do they apply? They are to be found in Part 3 of the Act of 1918, which is headed "Exemption, abatement and relief."

This part of the Act is confined to specified claims for relief; it begins with s. 9 and proceeds down to and including s. 15 in stating the cases in which relief may be claimed. Section 16 shows how the allowance may be made and s. 17 then follows; the remaining sections of this part of the Act deal with the machinery for making and regulating the claims arising under the earlier section. In this same Act, by s. 55, the provisions with regard to the double tax are first introduced —neither by express words nor by reference are the provisions of s. 17 made applicable. Dealing with this Act alone it is my opinion that s. 17 can only be construed as referring to the special reliefs provided in the separate portion of the Acts in which it stands; were it intended to have had general application it would be found in the general clauses of the Act, as, for example, in those which are grouped in Part 10 under the head "Miscellaneous," which though chiefly dealing with matters of administration yet in s. 209, as an illustration, specially makes general provision with regard to the method of arriving at the amount of profits and gains. So far, therefore, as the Act of 1918 is concerned, in my opinion s. 17 does not apply to s. 55.

The matter, however, does not rest there. The Finance Act, 1920, provides by s. 64 that Part 2 of the Act, which includes s. 27, shall be construed together with the Income Tax Acts. This by itself carries the matter no further, for s. 27 only replaces s. 55 of the Act of 1918 and thus leaves the construction of s. 17 of that Act unaltered, but Sched. III to the Act of 1920 provides that the words of s. 17 shall be altered by substituting the words "allowance or deduction" for the words "exemption, abatement," and by Sched. IV repeals s. 9 to s. 13, sub-s. (1) and sub-s. (2) of s. 14, and s. 15 of the Act of 1918. The sections thus repealed cover the cases mentioned in Part 3 of the Act of 1918 as cases entitled to relief, and the argument is that in consequence s. 17, having no longer its proper foundation on which to rest, must, as it is expressly preserved and amended, find a new foundation in s. 27 of the Act of 1920. The simple answer to that proposition is that no new meaning has been conferred on the words of the section except so far, if at all, as the words "allowance or deduction" confer it, but these clearly relate to the new sections in the Act of 1920 which take the place of those repealed in Part 3, and in these new sections the words "allowance and deductions" are found throughout.

The argument of the Crown amounts to this. Be it granted that s. 17 of the Act of 1918 did not apply to the provisions of s. 55 of that statute (LAWRENCE, L.J., says this was expressly admitted by the Attorney-General), yet none the less it does apply to s. 27 of the Act of 1920, although the sections to which it did have application before are replaced by corresponding sections to which it can still refer. In other words, a privilege possessed by the subject in relation to taxation is to be taken away by some repealing and amending words in a schedule and a general clause as to construing Acts together. I do not believe that any such argument has ever prevailed in construing a taxing statute and it certainly cannot prevail in the present case.

LORD WARRINGTON.—The respondent is a company incorporated in England under the Companies Acts with a share capital consisting of preference and ordinary shares and with a debenture debt of £2,500,000, of which both principal and interest are secured on the entire undertaking and assets of the company. Apart from dividends taxed by deduction and income charged to income tax under Sched. A, practically the whole of its income arises from trading operations in Australia and New Zealand. Dominion income tax has been paid in Australia and New Zealand in respect of such last-mentioned income. The control of the company is exercised in England and the same income has also been assessed to British income tax under Case I of Sched. D.

In paying interest to its debenture holders the company has, as it was bound and entitled to do, deducted from such interest the amount of United Kingdom income tax at the full rate. The present case is not concerned with any claims by debenture holders, if any such there be, who have also paid Dominion income tax in respect of such interest. In the year ending April 5, 1917, and in each successive tax year down to and including that ending April 5, 1924, the company has made a claim for relief in respect of the Dominion income tax so paid as above mentioned under the statutory provisions from time to time in force, all of which were in practically the same form so far as this case is concerned. It will be enough to refer to the last enactment on the subject, viz., the Finance Act, 1920, s. 27 (1), which is as follows:

> "If any person who has paid by deduction or otherwise, or is liable to pay, United Kingdom income tax for any year of assessment on any part of his income proves to the satisfaction of the Special Commissioners that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled to relief from United Kingdom income tax paid or payable by him on that part of his income at a rate thereon to be determined"

as in the Act provided. No question arises as to the rate and the only point at issue is whether the amount of relief is to be calculated on (a) the whole of the profits earned by them in the Dominions or only on (b) the balance of such profits remaining after deducting therefrom the excess of the interest paid by it on its debentures over the amount of income arising in the United Kingdom. It is agreed that the debenture interest should be regarded as paid out of income arising in the United Kingdom so far as that will go.

The company insists on the principle referred to as (a), the Crown on (b). The commissioners adopted the view of the company. They were required to state a Case which came before ROWLATT, J. He set aside the assessment of the commissioners, adopting the view of the Crown. The Court of Appeal (LORD HANWORTH, M.R., and LAWRENCE and SANKEY, L.JJ.) unanimously allowed the appeal and restored the assessment of the commissioners. The Crown appeals to this House.

The company's contention is a simple one. The company is a person who has paid or is liable to pay United Kingdom income tax on part of his income, viz., in this case the trading profits earned in the Dominions, and has also paid Dominion income tax on the same part of his income, and is therefore entitled to relief from United Kingdom income tax payable on that part of his income. Reading the words of the statute in their ordinary and natural meaning there is no answer to this contention. But the Crown says the words are not so to be read. The company has deducted from the interest payable to the debenture holders the United Kingdom tax in respect of that interest and it is said it has thus recovered a corresponding portion of the United Kingdom income tax paid or payable by them in respect of the profits from their Dominion trade and therefore ought not to be treated as having paid United Kingdom tax on the whole of such profits. This A view obviously requires that the words of the section be read in a sense other than their ordinary and natural meaning, as for example "paid" must be read "paid and ultimately borne." I can find nothing in the other provisions of the Act to indicate that the ordinary construction would bring a result not contemplated by the legislature, and I therefore see no ground for the application of the principle of construction adopted in the well-known case of *Colquhoun* v. *Brooks* (2), in which B the absence of machinery to give effect to the Act, if wide words were used in their ordinary and natural meaning, was held to be sufficient to justify a more limited construction.

I agree, therefore, with the learned judges of the Court of Appeal that the words of the statute ought to be construed in the ordinary and natural sense and that the company has made out a claim to relief calculated on the whole of the profits C brought into charge in respect of which Dominion income tax has been paid. With all respect to ROWLATT, J., I cannot adopt his view that income in this section means only so much as exceeds the amount of the interest paid out of it. The company pays tax on the whole of that part of its income which is also subject to Dominion income tax and none the less that on making a payment of interest payable out of its profits and gains it deducts as it is entitled to do the tax payable D by the recipient. The company is not accountable to the revenue for this tax nor does its right to deduct it depend upon its having paid its own tax on its profits and gains (see r. 19 of All Schedules Rules).

As to the minor point under s. 17 I agree with the views expressed by the commissioners and the Court of Appeal and have nothing to add. I think the appeal ought to be dismissed with costs. E

LORD THANKERTON.—The respondent company is a company incorporated in England, but the main part of its income arises from trading profits earned in Australia and New Zealand; as the company is controlled from England, these trading profits are all assessed to United Kingdom income tax under Case I of Sched. D. Dominion income tax has also been paid on such profits arising in F Australia and New Zealand. The respondent company claims relief from United Kingdom income tax in respect of Dominion income tax for the eight financial years ending on April 5, in each year from 1917 to 1924 inclusive.

The company has a large debenture issue, and in paying the debenture interest the company has deducted, as it was entitled to do, the full rate of United Kingdom income tax. Parties are agreed as to the rate at which relief should be granted G for the respective years, and that payment of the debenture interest should be treated as having been primarily met out of the company's income arising in the United Kingdom, only the balance of such interest being treated as having been paid out of the overseas income. The only question is whether the company, in claiming relief, is entitled to include that portion of the overseas profits, which is to be thus regarded as having been applied in payment of debenture interest. H

As regards the first three years in question, the matter depends on construction of the Finance Act, 1916, s. 43, as regards the fourth year on the Income Tax Act, 1918, s. 55, and as regards the remaining four years on the Finance Act, 1920, s. 27. As regards the last four years a subsidiary point is raised by the Crown, which is based on the Income Tax Act, 1918, s. 17, as amended by the Finance Act, 1920. I The earlier statutory provisions are not materially different and the main question may be conveniently considered in relation to the terms of the Finance Act, 1920, s. 27 (1), the material portion of which is as follows:

> "If any person who has paid, by deduction or otherwise, or is liable to pay United Kingdom income tax for any year of assessment on any part of his income proves to the satisfaction of the Special Commissioners that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled to relief from United Kingdom income tax paid or

> payable by him on that part of his income at a rate thereon to be determined as follows: . . ."

Subsection 8 (b) defines "United Kingdom income tax" as meaning income tax chargeable in accordance with the provisions of the Income Tax Acts.

The company paid the Dominion income tax on the whole of the overseas trading profits, including that part which was applied in payment of debenture interest, and has not recovered any part of that tax by deduction or otherwise from the debenture holders. Further the company has paid United Kingdom income tax, for which it alone was liable, on the whole of its profits. The Crown maintains that the deduction by the company of the appropriate amount of United Kingdom tax on payment of the debenture interest disables the company from thereafter claiming that they have "paid" that amount of United Kingdom tax within the meaning of s. 27 (1) of the Act of 1920, or that the profits so far as applied in payment of debenture interest are part of their "income" within the meaning of that section.

The Special Commissioners decided in favour of the company, ROWLATT, J., in favour of the Crown, and the Court of Appeal in favour of the company. I agree with the decision of the Court of Appeal. In my opinion the natural meaning of the language used is in favour of the company's contention. In accordance with the provisions of the Income Tax Acts, the whole of the company's profits, whether applied in whole or in part in payment of debenture interest, or not so applied at all, forms its income for the purpose of assessment and charge under Sched. D, and, in my opinion, the fact that it is entitled, though not bound, to recover the appropriate proportion by deduction on payment of the interest, cannot be held to alter the position. The company is entitled to make that deduction, whether it has paid its income tax or not, and is under no liability to account to the Crown for it. The contention of the Crown involves construing "paid" to mean "paid and ultimately borne," a construction for which I see neither necessity nor warrant.

On the subsidiary point raised by the Crown under the Income Tax Act, 1918, s. 17, I agree with the reasons of the Court of Appeal for its rejection. I concur in the motion proposed.

LORD MACMILLAN.—The respondent company has in fact in each of the eight years in question paid United Kingdom income tax on the whole of its profits wherever arising at the full rate chargeable in each of these years. On the part of these profits which arose in Australia and New Zealand the company has also in each year paid the Dominion income tax chargeable. As regards this part of its total profits the company has thus paid both United Kingdom income tax and Dominion income tax. On this statement the case would appear to fit precisely the language of the Finance Act, 1916, s. 43, the Income Tax Act, 1918, s. 55, and the Finance Act, 1920, s. 27, so as to entitle the company to the relief thereby provided. I observe that when s. 43 of the Act of 1916 was under consideration in this House in *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co., Ltd.* (1), LORD FINLAY, after quoting the statutory prerequisites of relief, said ([1921] 1 A.C. at p. 181):

> "It is the company and the company alone who fulfil this requirement . . . it has paid the colonial taxes and the United Kingdom income tax, and it is the only person entitled to claim and to receive from the commissioners the repayment provided for by s. 43."

In that case, however, the right of the company to relief was not in issue and the only question was whether the company, having had the benefit of relief under s. 43 of the Act of 1916, ought, when paying dividends to its preference shareholders, to deduct tax at the full United Kingdom rate or at a rate diminished to the extent of the relief received. The decision was that tax was deductible at the full United Kingdom rate.

In the present case no question would have arisen as to the company's right to relief but for the circumstance that it happens to have issued debentures and debenture stock. In paying interest to the debenture holders the company has properly deducted income tax at the full rate current in the United Kingdom and not at the rate at which its profits would actually bear United Kingdom income tax if the statutory relief were accorded and taken into account. So far as the debenture interest has been or is deemed to have been paid out of profits arising in the United Kingdom which have borne full United Kingdom income tax and in respect of which there is of course no claim for relief, no question arises. But in so far as the debenture interest has been paid out of profits arising in the Dominions it has been paid out of a fund which if the relief claimed is accorded will have borne less than the full United Kingdom income tax. The company having deducted tax at the full United Kingdom rate when paying its debenture interest will consequently benefit to the extent of the difference which it retains.

The Crown contends that this is not right, and that before any relief from United Kingdom income tax is accorded in respect of the profits arising in the Dominions there should be deducted the amount of the debenture interest paid out of these profits. This contention was supported by an argument to the effect that in all cases of relief under the income tax code income is reckoned net after deduction of all charges. The Crown further maintained that the company had not in fact borne the United Kingdom income tax on its Dominion profits applied in paying the debenture interest because it has recouped itself by deducting tax at the full United Kingdom rate when paying that interest and that the company was consequently not entitled to relief in respect of that part of its income, the persons who had really paid the United Kingdom income tax being the recipients of the debenture interest who had paid it by deduction.

To sustain the company's claim may be to produce a result which can be represented as anomalous, but in my opinion the justification of its claim follows inevitably from the combined effect of the statutory scheme of relief and the system of deduction at the source under r. 19 of the General Rules applicable to all schedules.

There can be no question that the company has paid full United Kingdom income tax on the whole of its income, including the portion derived from the Dominions and applied in paying its debenture interest. No deduction from assessment has been made in respect of its debenture interest and none could properly be made. The amount of the debenture interest is not deductible for the purpose of ascertaining the net assessable income of the company. It is true that the company will not have borne full United Kingdom income tax on the portion of its income derived from the Dominions and applied in paying its debenture interest if the relief claimed is accorded. But the right to deduct income tax at the full United Kingdom rate when paying its debenture interest is plainly conferred on the company by r. 19, for the condition is that the interest shall be "payable wholly out of profits or gains brought into charge to tax," and the whole profits of the company have been brought into charge to tax. Actual payment, not ultimate incidence, is the criterion both of the right of relief and of the right to deduct.

Since the decision in *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co., Ltd.* (1) the legislature has attempted a reconciliation of the right of relief and the right to deduct by enacting in the Finance Act, 1920, s. 27 (5), as regards the payment of dividends that

> "where under r. 20 of the General Rules applicable to Scheds. A, B, C, D, and E a body of persons is entitled to deduct income tax from any dividends tax shall not in any case be deducted at a rate exceeding the rate of the United Kingdom income tax as reduced by any relief from that tax given under this section in respect of any payment of Dominion income tax."

I am not sure that the effect of this enactment could not be shown to be as anomalous as the present claim is said to be, but at any rate no similar provision is made for the case of payment of interest on debentures and the right to deduct

A the full United Kingdom income tax remains where debenture interest is paid out of profits or gains brought into charge to tax. But does the company's present claim, if upheld, really result in an anomaly? It is true that, if it is granted, the company will have paid its debenture interest out of a fund which will have contributed to the United Kingdom revenue less than the full rate of United Kingdom tax, but it will have paid it out of a fund which has borne in the shape of combined B United Kingdom and Dominion income tax at least the equivalent of the full United Kingdom tax. I rather think that this practical result is just the necessary consequence of the scheme of relief, and it does not seem inherently unjust. No part of the company's income will in the end have escaped without paying and bearing tax at least on the scale of the full United Kingdom income tax, although the United Kingdom revenue will only receive a share of that total tax.

C On the other hand, the contention of the Crown involves a discrimination in the matter of relief between companies which have and companies which have not made a debenture issue. I do not find any justification in the relevant legislation for such a discrimination. Further, the contention that the recipient of the debenture interest and not the company has paid the United Kingdom income tax within the statutory meaning would preclude the operation of any relief, for if the company D has not paid United Kingdom income tax it can have no claim to relief while the recipient of the debenture interest who in the ordinary case will have paid no Dominion income tax will equally have no claim to relief. The result would be that no relief would be accorded in respect of moneys which had in fact borne both United Kingdom and Dominion income tax, and the intention of the legislature would be defeated.

E As regards the separate but important point raised on the Income Tax Act, 1918, s. 17, in relation to the last four years in question, I am satisfied, as was the Court of Appeal, that it is adequately met by the reasoning of the commissioners.

I am, therefore, of opinion, on the grounds which I have indicated, that the appeal should be dismissed.

Appeal dismissed.

F Solicitors: *Solicitor of Inland Revenue*; *Bircham & Co.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

GUY-PELL *v.* FOSTER

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), April 30, May 1, 8, 1930]

[Reported [1930] 2 Ch. 169; 99 L.J.Ch. 520; 143 L.T. 247]

Contract—Repudiation—Breach of vital term—Party in breach not entitled to change mind and resume original position—Test whether stipulation goes to root of contract.

In 1922 the plaintiff agreed to take up debentures in a company in consideration of receiving from the defendant a letter of indemnity in the following terms: "Regarding the issue of £15,000 first lien debentures by the Standard Exploration Co., Ltd., at the price of £80 per £100, referred to in the annexed memorandum dated Dec. 19, 1921, I understand you are subscribing for £3,000 of the same, at a cost of £2,400. In consideration of your giving me one-fourth of any profit you may receive on such investment, I hereby indemnify you against any loss thereon. The expression 'any profit' only refers to the redemption price of £100 for £80 which, when received, will show a profit of £20 per bond, and the bonus out of the proceeds of any royalties on oil sales from the company's properties during the currency of the debentures, as set out in the annexed memorandum. The interest you will be entitled to receive from the company is excluded from the consideration of profits." The annexed memorandum referred to stated that the debentures were redeemable at par on July 1, 1925. The trust deed for securing the debentures gave power to a three-fourths majority of the debenture holders to sanction modification of their rights, and on April 3, 1925, a resolution was passed with the requisite majority extending the time for maturity of the debentures till July 1, 1930. On May 7, 1925, the plaintiff, who had protested against the resolution, wrote to the defendant stating that he intended to realise his holding, but understood that the securities of the company were valueless, and, therefore, asked for repayment under the letter of indemnity of £2,400. He offered to deal with the debentures as the defendant might direct. The defendant replied that no circumstances had arisen which entitled the plaintiff to call on him for repayment and that the plaintiff was not entitled to sell the debentures as by so doing before maturity he would imperil the consideration for which the defendant had given the indemnity. On July 16, 1925, the plaintiff sold the debentures for £25. On July 23, 1925, he issued a writ claiming from the defendant damages under the indemnity for the loss he had suffered on the sale of the debentures. The case went to the House of Lords which held in favour of the defendant that the due date at which the loss was to be ascertained had not arrived, and expressed the opinion that it was to be inferred from the terms of the indemnity that the profit and loss should be ascertained by reference to the same period. After that decision the plaintiff re-purchased the debentures. On July 18, 1928, a resolution to wind-up the company was passed, and on Feb. 5, 1929, the plaintiff began the present proceedings, claiming from the defendant the sum due under the indemnity on the ground that in consequence of the decision to wind-up the debentures had become due.

Held: there was to be implied in the contract of indemnity a duty on the part of the plaintiff to hold the debentures during the period of their currency, and in selling them he was in breach of a term which was vital to the contract; he was not entitled, by re-purchasing the debentures, to place himself in the position in which he had been before the sale; and, therefore, the defendant was entitled to treat the sale of the debentures as a repudiation of the contract by the plaintiff and was absolved from further performance of his part of the contract.

Per Lawrence, L.J.: The failure on the part of the plaintiff to perform his obligation would, if the debentures should, after they had been parted with, yield a profit, render the performance of the contract by the plaintiff a thing different in substance from what the defendant had stipulated for. That is the proper test to be applied when considering whether a particular stipulation goes to the root of the matter or whether it merely partially affects it and may be compensated for in damages.

Notes. As to repudiation of a contract, see 8 Halsbury's Laws (3rd Edn.) 203–205; and for cases see 12 Digest (Repl.) 377 et seq.

Cases referred to:

(1) *Pordage* v. *Cole* (1669), 1 Wms. Saund. 319; 1 Lev. 274; 2 Keb. 542; T.Raym. 183; 1 Sid. 423; 85 E.R. 449; 12 Digest (Repl.) 472, *3520*.

(2) *Hochster* v. *de la Tour* (1853), 2 E. & B. 678; 22 L.J.Q.B. 455; 22 L.T.O.S. 171; 17 Jur. 972; 1 W.R. 469; 1 C.L.R. 846; 118 E.R. 922; 12 Digest (Repl.) 377, *2960*.

(3) *Frost* v. *Knight* (1872), L.R. 7 Exch. 111; 41 L.J.Ex. 78; 26 L.T. 77; 20 W.R. 471, Ex. Ch.; 12 Digest (Repl.) 380, *2973*.

(4) *Mersey Steel and Iron Co., Ltd.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; 53 L.J.Q.B. 497; 51 L.T. 637; 32 W.R. 989, H.L.; 12 Digest (Repl.) 378, *2966*.

(5) *Johnstone* v. *Milling* (1886), 16 Q.B.D. 460; 55 L.J.Q.B. 162; 54 L.T. 629; 50 J.P. 694; 34 W.R. 238; 2 T.L.R. 249, C.A.; 12 Digest (Repl.) 377, *2961*.

(6) *Boone* v. *Eyre* (1779), 1 Hy. Bl. 273, n.; 1 Wms. Saund. 320c; 2 Wm. Bl. 1312; 126 E.R. 160; 12 Digest (Repl.) 472, *3526*.

(7) *Graves* v. *Legg* (1854), 9 Exch. 709; 23 L.J.Ex. 228; 23 L.T.O.S. 254; 2 C.L.R. 1266; 156 E.R. 304; 12 Digest (Repl.) 473, *3531*.

(8) *Bettini* v. *Gye* (1876), 1 Q.B.D. 183; 45 L.J.Q.B. 209; 34 L.T. 246; 40 J.P. 453; 24 W.R. 551; 12 Digest (Repl.) 482, *3590*.

Appeal by the plaintiff from an order of Clauson, J.

The facts are fully stated in the headnote and the judgment of the Master of the Rolls.

R. H. Hodge and *R. A. Willes* for the plaintiff.
Sir Leslie Scott, K.C., and *Holmes* for the defendant.

Cur. adv. vult.

May 8. The following judgments were read.

LORD HANWORTH, M.R.—The question that is raised in this action and this appeal is whether or not the plaintiff is entitled to a declaration under a contract of indemnity which was contained in a letter written by the defendant to the plaintiff dated Feb. 17, 1922, that he is entitled to be indemnified by the defendant on account of a loss which he claims he has sustained by reason of his investment in subscribing for 3,000 first lien debentures in the Standard Petroleum Exploration Co., Ltd. Clauson, J., by a judgment dated Jan. 24 of this year, decided that the plaintiff had not established his right to that indemnity, and from that judgment the plaintiff has appealed.

The question arises in somewhat curious and unusual circumstances. This company, the Standard Petroleum Exploration Co., Ltd., was one in which the defendant, Sir Harry Seymour Foster, was interested, and he brought the company to the notice of the plaintiff and sent him certain documents. The documents contain a statement of the position of the company in relation to the debentures. The documents are dated Dec. 19, 1921, and among the documents that were sent was an application form and a memorandum of the same date which told that the issue price of these debentures was £80 per £100, and that these debentures then to be issued were to rank pari passu with a similar amount of first lien debentures already created and redeemable at par on July 1, 1925. Mr. Guy-Pell bought, in 1922, six of these £500 first lien debentures, spending, therefore, on the purchase of them £2,400. The defendant gave a guarantee in respect of that purchase, which guarantee is dated Feb. 17, 1922, and is in the following terms:

> "Dear Mr. Guy-Pell,—Regarding the issue of £15,000 first lien debentures by the Standard Petroleum Exploration Co., Ltd., at the price of £80 per £100, referred to in the annexed memorandum, dated Dec. 19, 1921, which I have initialled for identification, I understand you are subscribing for £3,000 of the same, at a cost to you of £2,400. In consideration of your giving me one-fourth of any profit you may receive on such investment, I hereby indemnify you against any loss thereon. The expression 'any profit' only refers to the redemption price of £100 per £80, which, when received, will show a profit of £20 per bond, and the bonus out of the proceeds of any royalties on oil sales from the company's properties during the currency of the debentures, as set out in the annexed memorandum. The interest you will be entitled to receive from the company is excluded from the consideration of profits."

It will be necessary later in my judgment to consider the actual terms of that guarantee a little more closely.

The debentures were obtained and held by Mr. Guy-Pell, and his view was that the due date of the debentures was that which is stated in the application form and memorandum, namely, July 1, 1925. There was, however, a power under the trust deed to alter and to extend that date beyond July 1, 1925. On April 3, just before their apparent due date, proceedings were taken by the company under the trust deed whereby the maturity of the debentures was extended to a later date [July 1, 1930]. Just about this time, on May 7, Mr. Guy-Pell was anxious to bring the matter to a close, and he wrote a letter of that date to Sir Harry Seymour Foster, saying:

> "I have determined to realise my holding in the Standard Petroleum Exploration Co. and enclose a copy of a letter I have received from my brokers, from which it appears that the shares and securities of the company are now valueless. Under those circumstances I must ask you for repayment of the sum of £2,400 under your contract of indemnity against payment. I shall, of course, be ready to deal with the shares and debentures as you may direct."

Sir Harry Seymour Foster replied on May 20, 1925, and disputed the allegation made that the shares and securities of the company were valueless, and he closed his letter by saying this:

> "Your brokers' statement, as a result of market inquiries, that no market exists in the securities, is merely a repetition of what existed when you invested—hence, presumably, my indemnity. No circumstances have arisen which entitle you to call upon me for repayment."

The plaintiff replied to that letter on May 27, 1925:

> "As you appear to be unwilling to take over my holding in the above company, I am placing the same in the hands of Messrs. Foster and Cranfield for sale by public auction, at an early date, and I must hold you responsible for any loss which I may incur in respect of the investment. I cannot agree that your indemnity was given because no market existed in the securities."

On June 2, 1925, Sir Harry replied:

> "In my view, you are not entitled to sell the securities, as you thereby imperil the consideration for which I gave you the indemnity, namely, the one-fourth of any profit you may receive on the redemption price of £100 per bond, and one-fourth of any royalties received as bonus during the currency of the debentures. I hope, on re-consideration, you will not disturb the present arrangement in our mutual interest."

On June 10 Sir Harry Seymour Foster again wrote and said:

> "I have been compelled to consult my legal advisers and have put the whole correspondence before them. They advise me that, unless you undertake to

> A abandon the proposed sale, I am entitled to proceed for an injunction to restrain you, a course I am most reluctant to take, after our friendly relations."

On June 16 the plaintiff replied that the sale would be proceeded with; and on June 22 Sir Harry Seymour Foster said:

> "As to your renewed threat, I am advised you have entirely misconceived B your position, and are not entitled to act as you propose, and, whilst I do not intend to resort to litigation, for the reason stated in my last letter, you will understand that I again enter my protest, and you will be acting at your own risk."

The attitude of both parties, therefore, to the indemnity had been made plain by that date. In spite of the protest raised by the defendant, Mr. Guy-Pell, on C July 16, sold his debentures. They were put up for sale, but, apparently, there were no bidders, and, as a matter of fact, the son of the plaintiff bought them for a sum of £25 and no more, and they were transferred to Mr. Guy-Pell, jun.

A writ was issued on July 23 in which Mr. Guy-Pell claimed from Sir Harry Seymour Foster the payment of the loss which he had sustained in respect of these debentures, and inter alia, other matters with which this action is not concerned— D that loss being a sum of £2,400 less the £25 received upon the sale on July 16. In answer to the claim which was made in that action a defence was put in by Sir Harry Seymour Foster, in which defence he said this:

> "The defendant denies that there has been any breach on his part of the said contracts of indemnity or upon either of them. The defendant will contend that by reason of the sale of the said debentures by the plaintiff the defendant E is discharged from all his obligations under the said contracts and each of them, and that the plaintiff has no cause of action against the defendant."

The action was tried before ROMER, J., who dismissed the action. It came before the Court of Appeal, when the Court of Appeal took the view that the due date of the debentures as indicated by the documents between the parties was July 1, 1925, F even though there had been an extension of that date which was of crucial importance as between the parties. The Court of Appeal, therefore, altered the judgment, and in respect of those debentures held that Mr. Guy-Pell was entitled to have his indemnity implemented by Sir Harry Foster. From that an appeal was taken to the House of Lords. In the case which was presented to the House of Lords the point that was taken by Sir Harry Foster in his defence was made G abundantly plain, because in the reasons which were put before the House of Lords by him, he said that he was not liable because it was an implied term of the contracts of indemnity that the respondent should retain the debentures either until they were redeemed by the company pursuant to the terms therein or until they were enforced against the company and the respondent received his share of the proceeds of realisation of the securities, and by selling the debentures the H respondent committed a breach of the contract and was not entitled to sue the appellant for breach of contract. It is plain, therefore, that by his defence and in his appeal to the House of Lords Sir Henry Seymour Foster had relied upon the terms of the indemnity, those terms being that there should be correlative rights between him and the plaintiff—correlative rights under which he was entitled to require the plaintiff to hold the debentures in order that he, Sir Harry, might have I the opportunity of obtaining from the plaintiff one-fourth of any profit.

Looking back to the indemnity, the term which I read is plain: "In consideration of your giving me one-fourth of any profit you may receive on such investment, I hereby indemnify you against any loss thereon." The defendant in the action may well have been unwilling to rely upon the possibility of his receiving any profit from an assignee, and the mere statement of that term of the guarantee would appear to show that both parties were relying the one upon the other—Mr. Guy-Pell relying upon the indemnity given by Sir Harry, and Sir Harry giving the indemnity and relying upon receiving from Mr. Guy-Pell any profit which he, Mr. Guy-Pell, might receive upon such investment. The interpretation of the term "any profit" A shows that the profit is to include any sums or bonus received during the currency of the debentures.

On those issues the matter was before the House of Lords. When the noble and learned Lords gave their reasons in their speeches, LORD CAVE, L.C., in considering the terms of the indemnity, said this:

> "My Lords, it is plain that (as the courts below have recognised) the plaintiff's B rights must depend on the construction placed on the two contracts of indemnity and in particular upon the question when, according to the true construction of those contracts, the 'loss' against which the plaintiff was to be indemnified ought to be ascertained. . . . The contract stipulated for two things, namely, (i) a payment to be made by the plaintiff to the defendant of one-fourth of any profit which the plaintiff might receive on the investment, C and (ii) an indemnity to be given by the defendant to the plaintiff against his loss thereon; and it is a natural inference that the parties intended that the profit and loss should be ascertained by reference to the same period."

The second contract of indemnity referred to is immaterial. LORD WARRINGTON, in giving his judgment, said this: D

> "On the construction of this letter I am of opinion that it was a condition of the appellant's liability that the debentures should be retained by the respondent during their currency inasmuch as, unless this was done, the appellant would not be entitled to receive his share of such special profits, if any, as might be earned between the sale of the debentures and the expiration of the period of currency. . . . I prefer the view I have expressed to the view that E there was in the contract an implied obligation on the part of the respondent to retain the debentures, if it is meant, as I think it is, that such an obligation was one the breach of which would render him liable to an action for damages."

The majority of the members of the House of Lords, therefore, gave judgment upon the view that the due date at which the loss was to be ascertained had not arrived. But it is noticeable that in the judgment acquiesced in by the other members of F the House of Lords it is plainly stated by the Lord Chancellor that upon the construction of the indemnity it ought to be held that there was an inference that the parties intended that the profit and loss should be ascertained by reference to the same period. The observation to which I have referred in the speech of LORD WARRINGTON cannot be overlooked in this or in any other court. He held, although it was unnecessary for his adhesion to the decision of the majority, that the term G which I have read in the indemnity was an actual condition of any liability on the part of the defendant, a condition which imposed upon Mr. Guy-Pell the duty of holding and retaining the debentures during their currency in order that the defendant might have the right to receive from him, Mr. Guy-Pell, and from no one else, his share of such special profits as might be earned during the currency of the debentures. H

After that decision had been given by the House of Lords, Mr. Guy-Pell, sen., bought back from Mr. Guy-Pell, jun., the debentures; he, therefore, put himself in the position of being once more the holder of the debentures; and at a later date, namely, on July 18, 1928, a resolution to wind-up the company was duly passed, and on Nov. 5 a claim was made by the plaintiff under the terms of the letter of indemnity, the plaintiff saying that, in consequence of the decision to wind-up, I the debentures had now become due, and that in accordance with the decision of the majority in the House of Lords he was, therefore, entitled to ask the defendant to respond to the terms of his indemnity. The respondent declined on the ground that the whole contract had been put an end to by the proceedings in the early action which had gone up to the House of Lords; and a writ was issued in the present action on Feb. 5, 1929, the defence being raised that the indemnity was no longer available to the plaintiff for the plaintiff had renounced ~~his~~ contract under the indemnity—namely, to hold the debentures—and that it, therefore, was open to the defendant to elect whether he would treat the contract as at an end, and that he had so elected, as illustrated by his defence and his statement of his case to the House of Lords, and that thus in the litigation between the parties a final conclusion had been reached, and no further action was open to the plaintiff upon this indemnity. Clauson, J., has, in accordance with that reasoning, refused relief to the plaintiff, and the plaintiff now appeals to this court. We, therefore, have to consider as a matter of law what is the proper interpretation to be put upon the indemnity and what is the effect of the previous proceedings between the parties.

It appears to us to be quite clear, more especially in view of the terms which I have read from the speeches in the House of Lords, that the indemnity did involve a correlative duty on the part of Mr. Guy-Pell to hold the debentures. The words which I have emphasised make that plain, and I do not desire to repeat them. It appears, therefore, that the conduct of the plaintiff in refusing, in spite of Sir Harry Foster's protest, to hold the debentures and proceeding with the sale was an act in respect of a matter vital to the contract, and, as I have already pointed out, it does not appear that the guarantee would have been given unless the defendant had secured the correlative right from the plaintiff to receive one-fourth of the profits, and to receive those profits from the plaintiff himself. On the question, therefore, whether or not this term was a fundamental term of the contract, it appears plain to us that it was or that it could be taken in accordance with the judgment of Lord Warrington that it was a condition of any liability imposed upon the defendant that the plaintiff should continue to be the holder of the debentures.

What is the effect of renunciation on a vital point by a party to a contract? In the old case of *Pordage* v. *Cole* (1) it was stated, in the simple but explicit terms relative to the older pleadings (1 Wms. Saund. on p. 556): "Where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and a performance must be averred."

I turn, then, to the two or three well-known cases which establish that, upon renunciation by one party of a contract, the promisee may elect whether to treat that as a renunciation and to proceed accordingly, or whether he will leave the matter open for the time. In *Hochster* v. *de la Tour* (2) (2 E. & B. at p. 683), in the course of the argument of Mr. Hannen, he puts it in this way: "If one party to an executory contract gave the other notice that he refused to go on with the bargain, in order that the other side might act upon that refusal in such a manner as to incapacitate himself from fulfilling it, and he did so act, the refusal could never be retracted." In the course of the argument, Crompton, J., says, at p. 685:

> "When a party announces his intention not to fulfil the contract, the other side may take him at his word and rescind the contract That word 'rescind' implies that both parties have agreed that the contract shall be at an end as if it had never been. But I am inclined to think that the party may also say: 'Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time.' "

I have already and purposely dwelt upon the terms of the letters between the parties, and the terms of the pleadings between the parties, in order to make it quite plain that Mr. Guy-Pell acted against the protest of Sir Harry Seymour Foster, and that Sir Harry Seymour Foster elected to treat that conduct on the part of Mr. Guy-Pell as a renunciation of the term which enured to the benefit of Sir Harry Seymour Foster.

In giving judgment in *Hochster* v. *de la Tour* (2), Lord Campbell said that, at p. 690:

> "But it is surely much more rational and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. It seems strange that the defendant, after renouncing the contract, and

> absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind." A

In the present case, although Mr. Guy-Pell was cautioned, yet he elected to act as he did, and he cannot complain that Sir Harry Seymour Foster took him at his word and raised the point that the contract was concluded as between them.

In *Frost* v. *Knight* (3) in his well-known judgment SIR ALEXANDER COCKBURN puts the matter plain beyond words. He says (L.R. 7 Exch. at p. 114): B

> "The promisee [that in this case would be on this term of the contract Sir Harry Seymour Foster] has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantages the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must, of course, deprive him." C

As in this case, the sale of the debentures did deprive Sir Harry of his rights to one-fourth of the profits. SIR ALEXANDER COCKBURN proceeds: D

> "It is, therefore, quite right to hold that such an announcement amounts to a violation of the contract in omnibus, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract"

—and in the circumstances of that case bring his action. E

Then, in *Mersey Steel and Iron Co., Ltd.* v. *Naylor, Benzon & Co.* (4) (9 App. Cas. at p. 443), there is a short passage from the judgment of LORD BLACKBURN which I desire to read:

> "The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something (it is so laid down in the note to *Pordage* v. *Cole* (1)), if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, 'I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct.'" F

Finally, in *Johnstone* v. *Milling* (5) LORD BOWEN says (16 Q.B.D. at p. 473): G

> "But such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such. Upon looking to the reason of the thing it seems obvious that in the latter case the rights of the parties under the contract must be regarded as culminating at the time of the wrongful renunciation of the contract, which must then be regarded as ceasing to exist except for the purpose of the promisee's maintaining his action upon it; it would be unjust and inconsistent with all fairness that the promisee should be entitled to bring his action as upon a wrongful renunciation of the contract, and yet to treat the contract as still open and existing with regard to the future." H

Those cases were cases in which the position of the parties was changed; but the rule of law is plain and applicable to the present time, to this contract of indemnity. Mr. Guy-Pell refused to maintain the position which was essential for the purpose of Sir Harry Seymour Foster receiving the consideration for which he gave the indemnity; Mr. Guy-Pell claimed that he had a right to implement the indemnity when he did; Sir Harry Seymour Foster elected to treat that as a renunciation of a vital term of the contract, and maintained that position before the House of Lords. The matter has been determined as upon the basis of a renouncement by the House of Lords, and the contract has, therefore, been brought to an end in omnibus, to use the phrase of SIR ALEXANDER COCKBURN. It cannot I now be maintained by Mr. Guy-Pell that he is entitled, without the consent of Sir Harry, to put himself once more into the position of a holder of the debentures and treat what has happened as if it were of no moment at all in calling upon Sir Harry Seymour Foster to fulfil an indemnity the condition of which Mr. Guy-Pell had broken upon a vital term. For these reasons it appears to us that this action fails, that the judgment of Clauson, J., was right, and the appeal must be dismissed with costs.

LAWRENCE, L.J.—Junior counsel for the plaintiff, in the course of his able argument, felt himself constrained to admit that it was an implied term of the contract of indemnity that the plaintiff should retain the debentures during the period of their currency. When the former action was before the House of Lords Lord Warrington expressed his opinion that this implied term was a condition of the defendant's liability under the contract, but that it did not impose a positive obligation on the plaintiff, the breach of which would render him liable to an action for damages. Mr. Willes admitted that, if that be the right construction of the contract, the plaintiff could not succeed on the present appeal. He, however, contended that on the true interpretation of the contract the term to be implied was a positive undertaking by the plaintiff not to part with the debentures during the period of their currency, but that this undertaking did not go to the root of the contract, and that the breach of it did not prevent the plaintiff from recovering. There is much force in the contention that, as the debenture never did yield any profit and, moreover, had been re-purchased before maturity, and as, therefore, the plaintiff's breach had not in fact in any way prejudiced the defendant, the plaintiff ought not to be precluded from enforcing his rights under the contract. Whatever might have been the position if nothing had taken place before this action was brought beyond the mere sale and re-purchase of the debentures, I am of opinion that in face of the actual facts the contention thus advanced cannot be supported. In the events which have happened I am of opinion that it is unnecessary to decide whether the implied term was merely a condition of the defendant's liability or a positive undertaking as in either case the plaintiff cannot sustain his present claim.

Assuming that the implied term did impose a positive obligation on the plaintiff not to part with the debentures during the period of their currency I agree with the opinion expressed by Romer, J., in the former case that it was a fundamental term which went to the root of the contract. By selling the debentures during the period of their currency the plaintiff parted with the right to receive any profits which might thereafter arise therefrom, one-fourth of which he had agreed to hand over to the defendant as the consideration for the indemnity. The defendant protested against the sale on the ground that it was inconsistent with the contract and would imperil the consideration thereby agreed to be given to him: see letter of June 2, 1925. Notwithstanding this protest the plaintiff stated that the sale must be proceeded with: see letter of June 6, 1925. He then sold the debentures and brought an action to enforce the indemnity. In the defence to that action the defendant pleaded, inter alia, that the sale of the debentures had discharged him from his obligations under the contract. That action was fought up to the House of Lords and was finally decided in favour of the defendant. Romer, J., held that at the date of the sale the debentures were still current; that the implied term that the plaintiff should retain the debentures during the period of their currency imposed a positive obligation on the plaintiff not to part with them during that period; that this obligation went to the root of the contract; and that, as it had been broken, the plaintiff could not recover under the contract. The Lord Chancellor (agreeing with Romer, J., that the debentures were still current at the date of sale) held that as the plaintiff had agreed to pay to the defendant one-fourth of any profits which might be received by him from the debentures during the whole period of their currency, the time for ascertaining the plaintiff's loss was when the debentures ultimately matured for payment and as that time had not arrived the plaintiff's claim could not be sustained. LORD DUNEDIN, LORD SHAW and LORD CARSON concurred in this judgment. LORD WARRINGTON, while concurring in the opinion that the debentures were still current at the date of the sale, expressed the opinion, as I have already stated, that the implied term to retain the debentures was a condition of the defendant's liability under the contract and that as the plaintiff had parted with the debentures he could not sustain his claim for indemnity.

In these circumstances the question now arises whether, assuming the true view of the construction of the contract to be as expressed by ROMER, J., and apparently acquiesced in by the majority of the members of the House of Lords, and not as expressed by LORD WARRINGTON, the defendant was right in treating the implied undertaking not to part with the debentures during their currency as a stipulation going to the root of the contract the breach of which absolved him from any further liability thereunder. Junior counsel for the plaintiff, while relying upon the repurchase of the debentures as having placed the plaintiff in a position to hand them over to the defendant on the latter paying the loss on the original investment, frankly admitted that he could not contend that in the circumstances the repurchase would enable the plaintiff to sustain his present action if the court were to hold that the sale amounted to a breach of the fundamental term of the contract.

In *Mersey Steel and Iron Co., Ltd.* v. *Naylor, Benzon & Co.* (4), LORD BLACKBURN states (9 App. Cas at p. 443):

> "The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something (it is so laid down in the note to *Pordage* v. *Cole* (1)), if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, 'I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct.' "

The question, therefore, resolves itself into whether the obligation undertaken by the defendant under the contract is dependent upon or independent of the implied obligation on the part of the plaintiff not to part with the debentures before maturity. If these two obligations are independent of each other the plaintiff is entitled to sustain an action for breach by the defendant of his obligation notwithstanding that the plaintiff may himself have committed a breach of the implied obligation on his part. If, on the other hand, the obligations undertaken by the parties are mutual and go to the whole consideration on both sides they are mutual conditions and the plaintiff having committed a breach of his obligation cannot maintain an action for a breach on the part of the defendant: *Boone* v. *Eyre* (6).

In the present case I do not think that it is reasonably open to doubt that the plaintiff's obligation to retain the debentures during the period of their currency formed the basis of the consideration for the defendant's obligation to indemnify the plaintiff against loss and went to the root of the bargain between the parties. Without such retention the plaintiff could not give to the defendant the one-fourth share of the profits, which, according to the terms of the contract, constitute the only consideration for his agreement to indemnify the plaintiff. It follows, therefore, that the performance by the plaintiff of his obligation to retain the debentures is a condition precedent to his right to enforce the performance of the defendant's obligation to indemnify. The failure on the part of the plaintiff to perform his obligation would, if the debentures should, after they had been parted with, yield a profit, render the performance of the contract by the plaintiff a thing different in substance from what the defendant had stipulated for. That this is the proper test to be applied when considering whether a particular stipulation goes to the root of the matter or whether it merely partially affects it and may be compensated for in damages is shown by the judgment of PARKE, B., in *Graves* v. *Legg* (7) (9 Exch. 709 at p. 716) and by the judgment of the court delivered by BLACKBURN, J., in *Bettini* v. *Gye* (8) (1 Q.B.D. 183): see also notes to *Pordage* v. *Cole* (1) (1 Wms. Saund. at p. 319).

The case may also be put somewhat differently. The sale of the debentures before maturity may be said to have amounted in effect to a declaration by the plaintiff of his intention no longer to carry out his express obligation to pay one-fourth of any profits which he might receive therefrom during the period of that currency. Such a declaration of intention, though not in itself, unless acted upon by the defendant, a breach of that express obligation, gave the defendant a right of electing either to ignore the declaration and, holding to his contract, to wait until the time for its performance had arrived, or else to act upon the declaration and treat it as a final assertion by the plaintiff that he intended no longer to be bound by the contract, in which latter case the contract would cease to exist except for the purpose of the defendant enforcing any claim he might have for damages by reason of the wrongful repudiation: see judgment of Bowen, L.J., in *Johnstone* v. *Milling* (5). Looked at from this point of view it is plain from the facts which I have stated that the defendant unequivocally elected to treat the sale as a final assertion by the plaintiff that he intended no longer to be bound by the contract, and that, therefore, the contract ceased to exist, with the result that the plaintiff cannot now sustain an action upon it. In my judgment, for the reasons stated, this appeal fails and should be dismissed with costs.

ROMER, L.J.—When the earlier action between these parties came before me in October, 1926, I came to the conclusion, for the reasons that I then gave, that it was a necessarily implied term of the contract of indemnity entered into between the parties in February, 1922, that Mr. Guy-Pell should retain the debentures during their currency, and that, inasmuch as Mr. Guy-Pell had sold the debentures during their currency, he had committed a breach of the implied agreement on his part which went to the very root of the contract of indemnity, and thereby disentitled him to sue Sir Harry Foster in respect thereof. Neither further argument nor further reflection has caused me to alter or modify the opinion I then formed. This being so, it follows that, in my opinion, Mr. Guy-Pell is not entitled to maintain the present action. I only desire to add this. When the appeal in the first action came before the House of Lords, Lord Warrington expressed the opinion that the retention of the debentures by Mr. Guy-Pell during their currency was a mere condition of Sir Harry Foster's liability under the contract of indemnity, and said that he preferred that view to the view that I had taken that there was, in the contract, an implied obligation on the part of Mr. Guy-Pell to retain them. Clauson, J., took the same view, but, with the greatest deference to Lord Warrington and the learned judge, it appears to me that merely to imply such a condition does not secure to Sir Harry Foster his full rights under the agreement. The consideration given by him for the one-quarter share of the profit mentioned in the letter of Feb. 17, 1922, was not a payment by him under the contract of indemnity, but the incurring of a liability to indemnify Mr. Guy-Pell. If Mr. Guy-Pell had sold the debentures for £2,400 in the month of July, 1925, Sir Harry Foster would indeed have been relieved from his liability to make any payment under the contract of indemnity. But he would, if the view of Lord Warrington were to prevail, be deprived of the consideration that was to come to him for submitting himself to the liability to indemnify—a liability that he had remained subject to between the date of the contract and the date of the sale of the debentures. Subject to these observations, I find myself in complete accordance with the views expressed by Clauson, J.'s judgment in the present action, and I agree that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Peacock & Goddard*; *Sparks, Russell, Isard & Co.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

FRY *v.* BURMA CORPORATION

[HOUSE OF LORDS (Viscount Dunedin, Lord Warrington and Lord Atkin), February 24, 25, 1930]

[Reported [1930] A.C. 321; 99 L.J.K.B. 305; 142 L.T. 609; 15 Tax Cas. 113]

Income Tax—Assessment—Method—Company—Company resident abroad—Business control transferred to England—Assessment under Sched. D, Case I—Assessment on three years' average—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sched. D, Case I, Rule applicable to Case I, Rules applicable to Cases I and II, r.* 1 (2).

A company, incorporated in India, had its registered office in Rangoon. It had a London office and almost all its share capital was held in the United Kingdom. Until 1925, the company's business was controlled by a board of six directors in Burma and directors' meetings and the company's annual general meetings were held in Rangoon. The company decided to transfer the seat and control of its business to London, and special resolutions of the company gave effect to that decision. New directors were appointed, providing a majority who were resident in England, and, in accordance with the articles, it was determined by the directors that meetings of the board should be held in London. It was conceded that the effect of these changes was to make the company assessable to income tax as from July 1, 1925, under the Income Tax Act, 1918, Sched. D, para. 1 (a) (ii), in respect of annual profits accruing to it as a company residing in the United Kingdom, and that the tax was chargeable under Case I. On a question as to the method of assessment,

Held: the assessment ought to be made, in accordance with the Rule applicable to Case I of Sched. D, on the full amount of the balance of the profits or gains on a fair and just average of the three years ending June 30, 1924, being the date in the year immediately preceding the year of assessment on which the accounts were usually made up, and the assessment ought not to be made in accordance with r. 1 (2) of the Rules applicable to Cases I and II because the removal to London was not the setting up and commencing of trade within that rule.

Colquhoun v. *Brooks* (1) (1889), 14 App. Cas. 493, considered.

Decision of the Court of Appeal ([1930] 1 K.B. 249) affirmed.

Notes. The Income Tax Act, 1918, Sched. D, Rule applicable to Case I, was replaced by the Income Tax Act, 1952, s. 127; and r. 1 of the Rules applicable to Cases I and II was replaced by s. 128 of the Act of 1952.

Applied: *Back* v. *Whitlock*, [1932] All E.R.Rep. 241. Considered: *Carter* v. *Sharon*, [1936] 1 All E.R. 720. Referred to: *Elmhurst* v. *I.R.Comrs.*, [1937] 2 All E.R. 349; *Boarland* v. *Madras Electric Supply Corpn.*, [1953] 2 All E.R. 467.

For the Income Tax Act, 1952, s. 127 and s. 128, see 31 HALSBURY'S STATUTES (2nd Edn.) 122, 123.

Cases referred to:

(1) *Colquhoun* v. *Brooks* (1889), 14 App. Cas. 493; 59 L.J.Q.B. 53; 61 L.T. 518; 54 J.P. 277; 38 W.R. 289; 5 T.L.R. 728; 2 Tax Cas. 490, H.L.; 28 Digest 79, *433*.

(2) *Bradbury* v. *English Sewing Cotton Co.*, [1923] A.C. 744; 92 L.J.K.B. 736; 129 L.T. 546; 39 T.L.R. 590; 67 Sol. Jo. 678; 8 Tax Cas. 481, H.L.; 28 Digest 81, *445*.

(3) *Singer* v. *Williams*, [1921] 1 A.C. 41; 89 L.J.K.B. 1218; 123 L.T. 625; 36 T.L.R. 659; 64 Sol. Jo. 569; 7 Tax Cas. 419, H.L.; 28 Digest 78, *430*.

Appeal.

This was an appeal by the Crown from an order of the Court of Appeal (Lord Hanworth, M.R., Lawrence and Russell, L.JJ.), reported [1930] 1 K.B. 249, on a Case stated under s. 149 of the Income Tax Act, 1918, by the special commissioners of income tax, for the opinion of the King's Bench Division of the High Court of Justice.

The question for decision was whether the commissioners were entitled to hold that the respondents' trade which had been carried on since their incorporation in 1919 had not been set up and commenced in July, 1925, when the control of the respondent company was shifted from Burma to the United Kingdom.

The Case Stated was as follows:

At a meeting of the commissioners for the special purposes of the Income Tax Acts held on Feb. 10, 1926, for the purpose of hearing appeals the Burma Corpn., Ltd., appealed against an assessment to income tax under Case I of Sched. D in respect of the profits of the company's business in the sum of £1,500,000 for the year ending April 5, 1926, made upon the company under the provisions of the Income Tax Acts.

The company was incorporated under the Indian Companies Act, 1913, on Dec. 17, 1919. The registered office of the company is situate in Rangoon. The London office of the company is at 1, London Wall Buildings, London, E.C. 2. The issued share capital of the company consists of 135,416,890 rupees, divided into shares of 10 rupees each. Nearly all the issued capital is held in the United Kingdom. The principal object of the company was to acquire and carry on certain lead, silver and zinc mines situate in Burma, which had been carried on previously by an English company, the Burma Mines, Ltd.

From the incorporation of the company until July, 1925, the business of the company was controlled by a board of directors (six in number) in Burma. The directors' meetings and the annual general meetings of the company were held in Rangoon. The accounts of the company were prepared and audited in Burma. Of the six directors of the company five were resident in Burma. Having regard to the fact that the great majority of the shares in the company were held in the United Kingdom and to the difficulty of constituting a board of any permanence in Rangoon it was decided that the control of the company's business should be transferred to London. This decision was carried into effect by increasing the number of directors to a maximum of twelve, and by enabling the directors to hold their board meetings elsewhere than in India. The necessary alterations of the articles of association of the company were effected by resolutions passed and confirmed on Dec. 18, 1924, and Jan. 3, 1925, respectively. Six new directors, all of whom were resident in England, were appointed, making the total number of directors of the company eleven, seven of whom were resident in England.

By a memorandum in writing dated July 1, 1925, and signed by a majority of the directors of the company (as required by the amended article of association No. 106), it was determined that the meetings of the board should henceforth be held in London. The directors of the company resident in Rangoon (four in number) constituted a local committee of the board to deal with the company's affairs in Burma under the general direction of the London board.

It is agreed that since July 1, 1925, the company became resident in the United Kingdom and assessable to income tax under Case I of Sched. D of the Income Tax Act, 1918. The commissioners were satisfied upon the evidence called that the removal of the control of the company from Burma to London in 1925 did not cause and was not intended to cause any alteration in the carrying on or working of the company's undertaking. The company has continued to work and develop the same mine on similar lines as heretofore, winning therefrom similar products (lead, silver and zinc) and disposing of them in the same markets. The company is selling silver to the Indian banks under running contracts which were entered into by the company before July, 1925.

The following is an extract from a report of the directors to the shareholders on Dec. 30, 1925:

> 'The work of bringing the affairs of the corporation into their present state of prosperity has been most satisfactorily accomplished under the supervision of the board originally appointed in Rangoon and of the general manager, Mr. P. E. Marmion, and the new board desire to express their high appreciation of the great service those gentlemen have rendered. But having regard to the fact that the great majority of the shares are held in Great Britain, and to the difficulty of constituting a board of any permanence in Rangoon, it was decided that the time had come to transfer the supreme control of the corporation's affairs to London, and six new directors resident in England were accordingly appointed in accordance with the announcement already made. Those of the directors who are resident in Rangoon will constitute a local committee of the Board to deal with the corporation's affairs in Burma under the general direction of the London board. These changes took effect as from July 1 last. In connection therewith it was with great regret that the directors received the resignation of Sir T. R. Wynne, as chairman, which position he occupied for the long period of ten years. In consideration of the value of his services to the corporation an honorarium was voted to him of £3,000. In place of Sir T. R. Wynne, Mr. F. A. Govett was elected chairman. The directors regret to record the resignation from the board in June last of Mr. G. Lovell, to whom also a sum of £2,500 was voted for his special services during the period since the formation of the Indian company. The transfer of the board to London rendered the continuance of the advisory committee in London unnecessary and sums of £1,000 each were voted to three members of that committee who have not joined the new board, as an honorarium by way of compensation for their loss of office. Mr. W. W. Paine, who was also a member of the advisory committee, has been appointed financial adviser to the board.'

The assessment under appeal was made upon the company on an estimate of the company's profits for the period from July 1, 1925, to April 5, 1926, and purports to be made in accordance with r. 1 (2) of the Rules applicable to Cases I and II of Sched. D of the Income Tax Act, 1918. Previous to this assessment no assessment had been made on the company in respect of the profits of its business.

It was contended on behalf of the company that: (a) the trade of the company was not set up or commenced within the year of assessment; (b) the company during the year of assessment was carrying on the same trade or concern in the nature of a trade as it had carried on since its incorporation in 1919; (c) the company was assessable under Case I of Sched. D of the Income Tax Act, 1918, and the assessment should be computed in accordance with the Rule applicable to Case I of Sched. D on the full amount of the balance of the profits and gains upon a fair and just average of the three years ending June 30, 1924.

It was contended on behalf of the appellant (inter alia) that: (a) that the assessment under appeal fell to be made in accordance with r. 1 (2) of the Rules applicable to Cases I and II of Sched. D; (b) that the assessment, having been so made, was correct in principle and should be confirmed.

Having considered the evidence and arguments adduced before them, the commissioners decided as follows: '(i) In July, 1925, the control of the appellant company was shifted from Burma to the United Kingdom, and consequently the company became assessable to income tax under Case I of Sched. D as a company residing in the United Kingdom in respect of the whole of the profits arising from the company's trade. (ii) Under these circumstances the Crown contend that the trade of the company, which became assessable under Case I of Sched. D, is "a trade which has been set up and commenced within the year of assessment" (r. 1 (2) of Cases I and II). (iii) Upon the evidence before us we hold that the trade was not set up and commenced within the year of assessment. The company carry on the same trade or ‘‘concern in the nature of a trade’’ as they have carried on since incorporation in 1919. (iv) We hold that the assessment on the company for the year ending April 5, 1926, must be made in accordance with the Rule applicable to Case I of Sched. D on the full amount of the balance of the profits and gains upon a fair and just average of the three years ending June 30, 1924. (v) If, however, a part of the profits of the appellant company for 1925–6 has been treated as income from foreign or colonial possessions or securities for the purpose of taxation in the hands of its shareholders or debenture holders, the assessment upon the company under Case I will require to be adjusted proportionately in order to avoid double taxation.

The Inspector of Taxes declared his dissatisfaction with the decision of the commissioners and a Case was duly stated.

The Court of Appeal held, reversing the decision of ROWLATT, J., that the removal to England did not constitute the setting up and commencing of a trade within the meaning of r. 1 (2) of the Rules applicable to Cases I and II of Sched. D, but the Rule applicable to Case I fitted the company's case exactly, and the tax must be computed on a three years' average of the company's profits.

The Attorney-General (*Sir W. A. Jowitt, K.C.*), *the Solicitor-General* (*Sir James Melville, K.C.*) and *R. P. Hills* for the Crown.

A. M. Latter, K.C., *Raymond Needham, K.C.*, and *Ian Baillieu* for the company.

VISCOUNT DUNEDIN.—This is an appeal on a question of income tax which has arisen between H.M. Inspector of Taxes and the Burma Corpn., Ltd., in these circumstances. The Burma Corpn., Ltd., is a corporation which existed and was created under the Indian Acts, and until 1925 it not only did the whole of its business, but managed the whole of its business, in Burma, although a very large proportion of its shareholders—the majority of them—were persons who lived in England. While it was in Burma the company, as a company, was not subject to income tax, though, naturally, the shareholders who received their dividends in this country would pay income tax on them. In 1925 the company came to the conclusion that it would be more convenient for it to manage its business in England, and, accordingly, a change was made in the directorate, which was largely increased by the addition of English directors, and a regular office was established in London. The effect of that, it is admitted, was to make the company resident in the United Kingdom, and as a person resident in the United Kingdom and carrying on a business elsewhere it became liable to income tax, and as to that there is no controversy between the parties. But the question that has arisen is what is to be done in the computation of the income tax for the first year of this changed management. The matter depends on those well-worn provisions of the Income Tax Act, 1918, which are as follows, under Sched. D:

> ‘‘1. Tax under this schedule shall be charged in respect of (a) the annual profits or gains arising or accruing . . . (ii) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere.’’

That is the provision that hits the company. Then Sched. D goes on to say:

> ‘‘2. Tax under this schedule shall be charged under the following cases respectively: that is to say—Case I—Tax in respect of any trade not contained in any other schedule.’’

I may mention, although it does not apply here, that Case V is: ‘‘Tax in respect of income arising from possessions out of the United Kingdom.’’ Then we come to the Rules applicable to Sched. D. The first is:

> ‘‘Rule applicable to Case I: The tax shall extend to every trade carried on in the United Kingdom or elsewhere, other than a trade relating to lands . . . and shall be computed on the full amount of the balance of profits or gains upon a fair and just average of three years ending on that day of the year immediately

> preceding the year of assessment on which the accounts of the said trade have been usually made up, or on April 5 preceding the year of assessment."

If that stood alone no question could arise, but then when we come to the Rules applicable to Cases I and II, r. 1 (2) provides:

> "Where the trade, profession, employment, or vocation has been set up and commenced within the said period of three years, the computation shall be made on the average of the profits or gains for one year from the period of the first setting up of the same, and where it has been set up and commenced within the year of assessment, the computation shall be made according to the Rules applicable to Case VI."

The controversy that arises is this. The commissioners took the view that the three years section applied; but the Crown said, "No; the three years section does not apply; what applies is r. 1 (2) of the Rules applicable to Cases I and II." That depends on whether, in the circumstances of this case, the trade has been set up within the said period of three years. It goes without saying that if sub-r. (2) applies, it necessarily overrules what is under the first Rule applicable to Case I. That is the question, and it is a very short question.

I am bound to say that I do not think I have ever been called on to decide a more useless appeal than this appeal. I can quite understand that the Crown should bring to this House anything that raises a general question that is likely to affect the taxpayer one way or the other. It does not matter one whit which way this case is decided, because there is no general principle involved in it. The case is a very peculiar one, and not particularly liable to happen again, but, if it does happen again, nobody can tell whether it is for the interest of the Crown or for the interest of the taxpayer that the decision should be one way or the other. It all depends on the particular figures. My remarks do not apply to the Attorney-General and Solicitor-General; they have far too much work to do to be able absolutely to advise as to all cases, but it really is high time—and I say this insistently—that those who advise the Crown in these matters should make up their minds that the Crown can be wrong, and not think it absolutely necessary to bring every case to this House, however trivial, simply because the Crown has been found wrong in that particular one.

Although I say that, it does not mean that this case is not arguable. It is arguable, and it has been remarkably well argued by the Attorney-General, because he has done what we in this House always like, that is, he has not troubled us with cases that do not apply. The books are full of such cases, and to a moderate extent one is accustomed to have them quoted, but here the Attorney-General at once went to the point, and said that this case depended simply on the construction of the words of the rule.

If one takes the rule as it stands, it would not be supposed that there could really be any question about it. From what I said in the narrative, it will be seen that, as far as the trade itself is concerned, there has not been the slightest alteration; it goes on now exactly as it went on before, and the commissioners have found, as a fact, that there is no alteration in the trade, and, therefore, primâ facie one would suppose that there could be no question that this trade had not been set up or commenced within the period of three years, because it has been going for a great deal longer. But, in spite of that, there is an argument, an ingenious argument not easily to be put aside, which the Attorney-General has developed, and that argument depends on the decision of this House in the well-known case of *Colquhoun* v. *Brooks* (1). Case I is: "Tax in respect of any trade not contained in any other schedule." *Colquhoun* v. *Brooks* (1) decided that, although the word "trade" is a word of ordinary significance and would include every trade, yet its meaning where it is mentioned in Case I is that it is a trade that, partly at least, is exercised within the United Kingdom, and therefore the Attorney-General says the effect of *Colquhoun* v. *Brooks* (1) is that when one comes to sub-r. (2) of r. 1 of the Rules applicable to Cases I and II, the trade that has to be set up there is a taxable trade, a trade that under the decision of *Colquhoun* v. *Brooks* (1) could be taxed under r. 1, and he says that taxable trade has only been set up for the first time when the company altered its direction and took it from Burma and brought it to England. There is a great deal in that contention, and I confess I was at first rather inclined to think the Attorney-General had made out his point, but, on further consideration and certainly influenced by the fact that I know your two Lordships who are to follow me are of this opinion, I have come to the conclusion that, after all, it is really safest in this case to go by the ordinary meaning of the words. There is no absolute necessity for saying that "trade" in this section (which has nothing to do with charging, but is only saying what is the method of computation that has to be taken) is to be pinned down to the exact meaning which it has under Case I, and it is safer to take the ordinary meaning of the word. If one takes the ordinary meaning of the word, there is an end of the matter. I am quite aware that the question as to the ordinary meaning of the words came up in *Colquhoun* v. *Brooks* (1), and, indeed, LORD HERSCHELL in his judgment begins by confessing that that is so. In that case there was a real practical question of very great moment to be decided. It did not mean that the business there was going to escape altogether—not at all, because it came under Case V; but at that time as the law then stood, it made this immense difference, that under Case V one did not pay income tax on anything except what was actually remitted to the United Kingdom; one did not pay on what was left out. That law has since been altered, and *Colquhoun* v. *Brooks* (1) is in one sense of no practical importance; it has really come out of its grave to found the ingenious argument in this case. I do not think, therefore, that there is the same necessity, as there was in *Colquhoun* v. *Brooks* (1), to distinguish very carefully as between the possible meanings of the words. I think that on the whole it is safest to take the words as they stand in their natural meaning, and, if that is so, then it follows that the judgments of the commissioners here and of the Court of Appeal are the right judgments.

I say that the Attorney-General very rightly disregarded the cases; there were only two that were mentioned. The one which seems to have had some force with ROWLATT, J., was *Bradbury* v. *English Sewing Cotton Co.* (2). I think that case does not apply, and the best way of showing that it does not apply is to read a short extract from the judgment of LORD SHAW in that case, in which he says ([1923] A.C. at p. 758):

> "It appears to me to be as contrary to law in principle to compel him to go through the confusing process of treating profits which have been already defined and taxed under one category as to be taken into account for the purpose of averaging under another category."

That shows, I think, without any more, the complete dissimilarity of that case from this. *Singer* v. *Williams* (3), which was also quoted, has no application, because there the whole matter was decided by the chapter and verse of the statute.

For these reasons I move that this appeal be dismissed with costs.

LORD WARRINGTON.—The question in this case is as to the mode in which income tax, admittedly payable by the respondent company on the profits arising from its trade, is to be computed. Is it to be on the average of three years as provided by the Rule applicable to Case I under Sched. D or is it subject to r. 1 (2) of the Rules applicable to Cases I and II, and therefore to be computed in accordance with the rules applicable to Case VI?

On July 1, 1925, the company, an Indian company, carrying on a large trade in Burma, for the first time became liable to British income tax under Case I of Sched. D. As from that date it became resident in England, and its trade was managed and controlled in this country. No break, however, occurred in the character of the trade itself, which continued to be carried on as before; this fact is found by the commissioners in the Case Stated.

The material provisions of the Income Tax Act, 1918, are the following. There is, first, Sched. D:

> "1. Tax under this schedule shall be charged in respect of: (a) The annual profits or gains arising or accruing . . . (ii) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere. 2. Tax under this schedule shall be charged under the following cases respectively, that is to say, Case I—Tax in respect of any trade not contained in any other schedule. . . . Case V—Tax in respect of income arising from possessions out of the United Kingdom."

The Rule applicable to Case I provides:

> "The tax shall extend to every trade carried on in the United Kingdom or elsewhere . . . and shall be computed on the full amount of the balance of the profits or gains upon a fair and just average of three years ending on that day of the year immediately preceding the year of assessment. . . ."

The Rules applicable to Cases I and II, r. 1 (2), provides:

> "Where the trade, profession, employment, or vocation has been set up and commenced within the said period of three years, the computation shall be made on the average of the profits or gains for one year from the period of the first setting up of the same, and where it has been set up and commenced within the year of assessment, the computation shall be made according to the Rules applicable to Case VI."

The Rule applicable to Case VI, which it is sought by the Crown to apply to the present case, is r. 2:

> "The computation shall be made, either on the full amount of the profits or gains arising in the year of assessment, or according to an average of such a period, being greater or less than one year, as the case may require, and as may be directed by the commissioners."

Under the decision of this House in *Colquhoun* v. *Brooks* (1), it is admitted that prior to July 1, 1925, the company itself was not subject to tax on the profits of its trade, that trade, on what was there held to be the true construction of the Act, not being a trade within Case I. The shareholders, however, were, in accordance with the same decision, liable to tax under Case V in respect of so much of the profits as might be remitted to them in this country, as being profits arising from a foreign possession. Now, however, the company is carrying on a trade which comes within Case I; it is resident in England, and is therefore itself liable to be assessed under Case I. Then arises the question: How is the tax to be computed? The general rule for the computation of the tax is the Rule applicable to Case I, which I have already read. That rule does not bring into tax any of the profits for the three years therein referred to, but merely provides a measure for the computation of the profits for the year of assessment. On this rule, taken by itself, no difficulty arises. The trade, the profits of which are to be ascertained, has been carried on for more than three years before the year of assessment, and the average of such profits could easily be struck. It is possible—I say no more, for this question is still open—that the commissioners would properly assess the company in three-fourths of that sum, seeing that they are taxing profits for nine months only of the company's trade year, but that question is one which remains to be decided, and as I say, so far as I am concerned I leave it quite open to the commissioners to decide it according to whatever view they may take. But it is said that the general rule is excluded by the Rules applicable to Cases I and II, r. 1 (2), that the trade, the profits of which are taxed, was set up and commenced within the year of assessment. I feel great difficulty in coming to the conclusion that "set up and commenced" means brought within the orbit of taxation, or in reading "trade" in this context as meaning the trade now for the first time brought under the operation of Case I or similar words. The trade has not altered its character; not a single business transaction has taken place since July 1, 1925, which might not have taken place before that date. The Attorney-General says the "trade" must mean the trade now controlled in this country, and he says one must read "trade" throughout as if it had been qualified by some such words as "home" or "controlled in this country." I cannot adopt this view. The legislature has employed a well-known business expression "trade set up and commenced," and I think these words must have their ordinary business meaning. If so, this trade was set up more than three years before the year of assessment, and there is no ground for excluding the general rule. The cases cited seem to me really to have no bearing on the present question.

For these reasons I think the appeal fails, and should be dismissed with costs. I may say that I agree with what has been said by my noble and learned friend on the Woolsack as to the uselessness of this appeal.

LORD ATKIN.—The respondent in this case is a company registered under the Indian Companies Act, 1913, incorporated in 1919, having its registered offices in Rangoon and owning mines in Burma, from which it wins lead, zinc, and silver and dispose of the products apparently abroad. Until 1925 it was resident abroad in Burma, and it carried on the business of mineowners in Burma. In 1925, in July, it determined to transfer the control of the company to this country, which it did by merely passing a resolution increasing the number of its directors, so as to include a larger number of London directors, and passing a resolution that the board should be able to meet in London, so that thereafter, by the carrying out of that resolution, the affairs of this company were, in fact, controlled by a board of directors meeting in London. The result of that was, according to the decisions in this House, that this company became resident in this country, and the further result followed that the business of the company thereafter was at any rate partly carried on in this country. There seems to me to be no doubt at all that it was partly, indeed, I should have said mainly, carried on in Burma, but it was also partly carried on in this country. There is on the Case Stated no evidence whether or not it may not have been carried on partly in this country before July, 1925, but I think for the purpose of this case it is safe to assume that the real facts were that for the first time the business of this company was partly carried on in London from July, 1925.

The question then arises: In what circumstances and to what extent is it to be assessed to income tax? Being a resident in this country, it obviously for the year 1925–6 for the first time became taxable, and it became taxable under the terms of Sched. D of the Act of 1918, which prescribes:

> "1. Tax under this schedule shall be charged in respect of the annual profits or gains arising or accruing . . . (ii) to any person residing in the United Kingdom from any trade, profession, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere."

The tax is to be charged under the following cases, namely: Case I: "Tax in respect of any trade not contained in any other schedule," and the Rule applicable to Case I is:

> "The tax shall extend to every trade carried on in the United Kingdom or elsewhere . . . and shall be computed on the full amount of the balance of the profits or gains upon a fair and just average of three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade have been usually made up, or on the fifth day of April preceding the year of assessment."

The company submits to be taxed on that footing, and it says that it is entitled to be taxed under the Rule applicable to Case I on an assessment which has to be computed on the full amount of the balance of the profits or gains on a fair and just average of three years ending on the day of the year on which the accounts of the trade have been made up. The Crown, on the other hand, say that is not the position and that the company ought to be taxed under r. 1 (2) of the Rules applicable to Cases I and II, which provides that:

> "Where the trade, profession, employment, or vocation has been set up and commenced within the said period of three years the computation shall be made on the average of the profits or gains for one year from the period of the first setting up of the same, and where it has been set up and commenced within the year of assessment, the computation shall be made according to the Rules applicable to Case VI."

I do not pause for the moment to discuss what those rules are. The Crown therefore say that the result of transferring the control of the trade to this country so that from that date the trade was partly carried on in this country, was to set up and commence the trade within the year of assessment. That involves partly, no doubt, a question of construction, but when the construction has been determined it seems to me to raise a question of fact. What is the meaning of the words "set up and commenced" the trade? It is said by the Attorney-General that the words must be construed in reference to the whole of this schedule and the cases and rules made thereunder, and I entirely agree with that view. Then it is said that one must give the same meaning throughout the schedules and the cases and the rules to the same words, and I agree that, unless the context makes it impossible to do so, one ought to give the same meaning to the words. Then if one looks to see what the rules and the cases are dealing with, the matter seems to be this. One is to tax only profits or gains, which is the first point. They must accrue to a person residing in the United Kingdom in respect of the matter on which they are charged; and they must accrue to a person residing in the United Kingdom from any trade carried on in the United Kingdom or elsewhere. The words "or elsewhere" have been limited by *Colquhoun* v. *Brooks* (1), and those words, though they seem to have a simple meaning, must be construed, in reference to the territorial limit of taxing jurisdiction and to the other provisions of the Act, as only applicable to trade carried on in the United Kingdom, or partly in the United Kingdom and elsewhere; and we must accept that view. But it seems to me that the word "trade" has still the same meaning throughout the Act. "Trade" refers to the various activities of commerce—the winning and using the products of the earth, or multiplying the products of the earth and selling them, or manufacturing them and selling them, the purchase and sale of commodities, or the offering of services for a reward, such as conveyance and the like. To my mind, throughout there is only one meaning to be attached to the word "trade." Trade may or may not become taxable in accordance with the provisions of the Act, and, in this particular case that we are dealing with, the trade of a person will not be taxed unless that person is resident in the United Kingdom.

In view of those circumstances, what is the position here? Is this company carrying on a trade in the United Kingdom, and is it entitled to have the tax computed on the full amount of the balance of the profits or gains for three years? It appears to me that it comes within every word of the Rule applicable to Case I; it is carrying on a trade and it would be entitled to computation on the three years' average. The only objection that can be made to that claim appears to me to be, as far as it turns on those words, the suggestion that you cannot use profits of a trade which existed at a time when the trade was not taxable in this country to arrive at an average for the purpose of computing the profits of a year when it is taxable. That appears to me to have no authority at all to support it; indeed it seems to me to be entirely contrary to the decision in *Singer* v. *Williams* (3), and the statement of the Lord Chancellor, and to have no support at all from the *Bradbury Case* (2). There is no reason why, if the trade still continues, the profits made at the time when it was not taxable should not be taken into account for the purpose of computing profits in a year when it is taxable.

The other view put forward by the Crown was this: It was said that whatever may be the construction of the Rule relating to Case I, there is an express Rule relating to Cases I and II, which deals with the tax on a trade being set up and commenced within the year of assessment. In respect of that I venture to think the conception of setting up and commencing a trade is a very simple one, and I should have thought that on the ordinary use of the language there could be no conceivable doubt about it. In that I rather concur with an expression used by RUSSELL, L.J., in the Court of Appeal. To set up and commence a trade seems to me to mean to bring into existence for the first time those activities, which I have just described, which constitute trade; they relate to acts done for the first time to enable a person to engage in manufacture, barter, or profitable services, such as I have dealt with. They do not appear to me to convey the idea, which is suggested by the Crown, that the trade becomes for the first time taxable in this country. That is an idea which I think is very easy to express, and certainly it is a very remarkable way of expressing it to use the words "set up and commence the trade." I have said that the question may become a question of fact, and I think it may. It may very well be that the activities which are being indulged in in the way of trade may be so altered in their nature, in their geographical disposition, or possibly in the way of their control, that the trade, which had been originated before the change, has been altered, so that a new trade is brought into existence, but that seems to be a question of fact, and in this case we have the finding of the commissioners, which appears to me to be conclusive, that the alteration which was made in the control of this business by altering the number of the directors and by arranging that the board henceforward should meet in London and not in Rangoon, and from London control the operations of the company, which otherwise continued unchanged in Burma, did not amount to a change in the trade.

In those circumstances it appears to me that the Crown do not bring the case within the Rules applicable to Cases I and II, but the case remains within the Rule applicable to Case I, and the profits fall to be computed on a fair average of the last three years. I pass no opinion at all on the question whether or not that involves that this company, which is now resident in this country, will have to pay on the full year's profits, or on an apportioned average; that will be a matter which will have to be the subject of further adjustment.

In his forcible reply made this morning, the Attorney-General referred to the consequences that might befall a taxpayer if this construction were adopted, i.e., if the taxpayer instead of beginning a trade in this sense, discontinued or ceased to carry on a trade. I am not myself at the present moment satisfied that the difficulties and inequalities which he suggested would really prove to be quite as serious. That is a matter that would no doubt require further discussion, and it is not before us. In any event, it would not appear to me to be effective to alter what in my view is the plain meaning of quite simple business words used in this connection, and I may perhaps conclude by saying that, if the inequalities and injustices are as great as the Attorney-General points out, the government have legal advisers who will be able to put them in a position to correct those obvious injustices and inequalities if they really follow from the words as construed by this House.

I agree with the words that have fallen from the noble Viscount on the Woolsack, and that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue*; *Birkbeck, Julius, Edwards & Co.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

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